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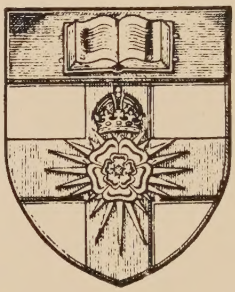

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THE ALL ENGLAND LAW REPORTS REPRINT

Being a selection from the
LAW TIMES REPORTS
1843–1935

REVISED AND ANNOTATED

1929

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LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.
1959

These Reports are cited thus:

[1929] All E.R. Rep.

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1959

Made and printed in Great Britain by
William Clowes and Sons, Limited, London and Beccles

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THE
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R. ADDIE & SONS (COLLIERIES), LTD. *v.* DUMBRECK

[House of Lords (Lord Hailsham, L.C., Viscount Dunedin, Lord Shaw, Lord Buckmaster and Lord Carson), November 16, 19, 1928; February 25, 1929]

[Reported [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 45 T.L.R. 267; 34 Com. Cas. 214]

Negligence—Child—Trespasser—Extent of duty of occupier—Duty of occupier to fence.

The occupier of land has no duty towards a trespasser to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is liable to a trespasser only where the injury suffered by the trespasser is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate malicious intention of doing harm to the trespasser, or at least some act done with such reckless disregard of the presence of the trespasser as to be tantamount to malicious acting. And this is so where a trespasser who is injured is a child, and so in such a case the special duty of care towards children of tender years who may come into contact with dangerous things does not exist.

Per Viscount Dunedin: There is no duty on the occupier of land to fence it against the world so that, if he does not take that or some other measure to stop trespass, a trespasser becomes a licensee [or now a "visitor" within the Occupiers' Liability Act, 1957 (infra)].

Notes. The distinction between an invitee and a licensee has been abolished by the Occupiers' Liability Act, 1957 (see 37 Halsbury's Statutes (2nd Edn.) 832). They are now both "visitors" within the Act, and the duty to them of an occupier is laid down in s. 2 and the following sections.

Explained: *Mourton* v. *Poulter*, [1930] All E.R.Rep. 6. Considered: *Ellis* v. *Fulham Corpn.*, [1937] 3 All E.R. 454; *Coates* v. *Rawtenstall Borough Council*, [1937] 3 All E.R. 602. Distinguished: *Pearson* v. *Coleman Bros.*, [1948] 2 All E.R. 274. Considered: *Pearson* v. *Lambeth Borough Council*, [1950] 1 All E.R. 682. Distinguished: *Gough* v. *National Coal Board*, [1953] 2 All E.R. 1283. Considered: *Perry* v. *Thomas Wrigley, Ltd.*, [1955] 3 All E.R. 243 n. Referred to: *Excelsior Wire Rope Co., Ltd.* v. *Callan*, [1930] All E.R.Rep. 1; *Donovan* v. *Union Cartage Co., Ltd.*, [1932] All E.R.Rep. 273; *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E.R.Rep. 222; *Purkis* v. *Walthamstow Borough Council*, [1934] All E.R.Rep. 64; *Weigall* v. *Westminster Hospital*, [1936]

1 All E.R. 232; *Morgan* v. *Incorporated Central Council of the Girls' Friendly Society*, [1936] 1 All E.R. 404; *Hawkins* v. *Thames Stevedore Co., Ltd. and Cold Storage Co., Ltd.*, [1936] 2 All E.R. 472; *Campbell* v. *Shelbourne Hotel, Ltd.*, [1939] 2 All E.R. 351; *Culkin* v. *McFie & Sons, Ltd.*, [1939] 3 All E.R. 613; *Gould* v. *McAuliffe*, [1941] 1 All E.R. 515; *Haseldine* v. *C. A. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; *Glasgow Corpn.* v. *Muir*, [1943] 2 All E.R. 44; *Walden* v. *Hammersmith Borough Council*, [1944] 1 All E.R. 490; *Adams* v. *Naylor*, [1944] 2 All E.R. 21; *Baker* v. *Bethnal Green Corpn.*, [1945] 1 All E.R. 135; *Bint* v. *Lewisham Borough Council* (1945), 174 L.T. 128; *Buckland* v. *Guildford Gas, Light and Coke Co.*, [1948] 2 All E.R. 1086; *Anderson* v. *Guiness Trust*, [1949] 1 All E.R. 530; *Horton* v. *London Graving Dock Co.*, [1950] 1 All E.R. 180; *Williams* v. *Cardiff Corpn.*, [1950] 1 All E.R. 250; *Edwards* v. *Railway Executive*, [1952] 2 All E.R. 430; *Davis* v. *St. Mary's Demolition and Excavation Co.*, [1954] 1 All E.R. 578; *Hawkins* v. *Coulsdon and Purley U.D.C.*, [1954] 1 All E.R. 97; *Phipps* v. *Rochester Corpn.*, [1955] 1 All E.R. 129; *Randall* v. *Tarrant*, [1955] 1 All E.R. 600; *Dyer* v. *Ilfracombe U.D.C.*, [1956] 1 All E.R. 581.

As to the duty of an occupier to children, see 23 HALSBURY'S LAWS (2nd Edn.) 584–586; and to trespassers, see ibid., 613, 614. For cases see 36 DIGEST (Repl.) 114 et seq., 70–72.

Cases referred to:

(1) *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(2) *Lowery* v. *Walker*, [1910] 1 K.B. 173; 79 L.J.K.B. 297; 101 L.T. 873; 26 T.L.R. 108; 54 Sol. Jo. 99, C.A.; reversed, [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674; 27 T.L.R. 83; 55 Sol. Jo. 62; 48 Sc.L.R. 726, H.L.; 36 Digest (Repl.) 55, *302*.

(3) *Latham* v. *R. Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

(4) *Hardy* v. *Central London Rail. Co.*, [1920] 3 K.B. 459; 89 L.J.K.B. 1187; 124 L.T. 136; 36 T.L.R. 843; 64 Sol. Jo. 683, C.A.; 36 Digest (Repl.) 120, *603*.

(5) *Coffee* v. *M'Evoy*, [1912] 2 D.R. 95; 36 Digest (Repl.) 72, **393*.

(6) *Haughton* v. *North British Rail. Co.* (1892), 20 R. (Ct. of Sess.) 113; 30 Sc.L.R. 111; 36 Digest (Repl.) 119, **868*.

(7) *Devlin* v. *Jeffray's Trustees* (1902), 40 Sc.L.R. 92; 5 F. (Ct. of Sess.) 130; 7 Digest 287, *157 v*.

(8) *Holland* v. *District Committee of Middle Ward of Lanarkshire*, 1909 S.C. 1142; 1909, 2 S.L.T. 7; 7 Digest 288, *k*.

(9) *Reilly* v. *Greenfield Coal and Brick Co., Ltd.*, 1909 S.C. 1328.

(10) *Mackenzie* v. *Fairfield Shipbuilding and Engineering Co., Ltd.*, 1913 S.C. 213; 7 Digest 288, *n*.

(11) *Boyd* v. *Glasgow Iron and Steel Co., Ltd.*, 1923 S.C. 758; 36 Digest (Repl.) 117, **858*.

(12) *Grand Trunk Rail. Co. of Canada* v. *Barnett*, [1911] A.C. 361; 80 L.J.P.C. 117; 104 L.T. 362; 27 T.L.R. 359, P.C.; 36 Digest (Repl.) 71, *359*.

(13) *Thompson* v. *North British Rail. Co.* (1882), 9 R. (Ct. of Sess.) 1101; 19 Sc.L.R. 817; 36 Digest (Repl.) 176, **1522*.

(14) *Cummings* v. *Darngavil Coal Co., Ltd.* (1903), 5 F. (Ct. of Sess.) 513; 10 S.L.T. 660; 7 Digest 287, *g*.

Appeal from an interlocutor of the First Division of the Court of Session (the Lord President and LORD SANDS, LORD BLACKBURN dissenting) affirming the decision of the sheriff-substitute of Lanarkshire at Glasgow, and finding the present appellants liable in damages to the respondent to the amount of £100 in respect of the death of the respondent's son, Andrew Douglas Dumbreck, who received fatal

injuries at a wheel, part of a haulage apparatus on the appellants' premises of View Park Colliery, Uddingston, on April 21, 1926.

The case was initiated in the Sheriff Court by the respondent, a foreman bricklayer, whose son, aged slightly over four years, was accidentally killed through being crushed in the terminal wheel of a haulage system belonging to and worked by the appellants. The haulage system was situated in a field belonging to the appellants, which was used partly for the deposit of ashes brought by the haulage system from the appellants' pithead. The haulage wheel was dangerous, being set in motion intermittently by a motor from the pithead without warning by the appellants from time to time. It was attractive to children and insufficiently protected. The field abutted on the public road, near which was a group of houses, in one of which the respondent lived with his family. Between the field and the public road was an old hedge full of wide gaps which allowed a practically unrestricted access from road to field. The respondent alleged that the child's death had been caused by the negligence of the appellants, who, accordingly, were liable to make reparation to the respondent as the child's father in name of solatium.

The main question of law which arose for decision on the appeal was whether in the circumstances in which the accident occurred, the appellants owed any duty of care towards the respondent's son to protect him from danger of contact with the haulage system or the wheel. The First Division of the Court of Session held, Lord Blackburn dissenting, (i) that the defenders had been guilty of negligence, in respect that, as the pursuer's son was one of a class of persons who, to their knowledge, habitually went near to their haulage system, they owed him a duty, which they had failed to fulfil, of taking care to prevent his being injured when the machinery was set in motion; and (ii) that neither the pursuer nor his son had been guilty of contributory negligence in respect (a) that the danger was not obvious, (b) that the child was too young to be capable of negligence, and (c) that it was the recognised custom of working-class parents to allow young children to wander near their homes unattended. The defenders appealed.

The facts are stated in the opinion of the Lord Chancellor.

Graham Robertson, K.C., James R. Marshall (both of the Scottish Bar), and *Harold Beveridge*, for the appellants.

George Morton, K.C., Albert Russell (both of the Scottish Bar) and *Weitzman*, for the respondent.

The House took time for consideration.

Feb. 25. The following opinions were read.

LORD HAILSHAM, L.C.—This is an appeal from an interlocutor of the First Division of the Court of Session, pronounced on appeal from a decision of the Sheriff-Substitute of Lanarkshire, whereby the appellants were ordered to pay to the respondent £100 damages in respect of the death of the infant son of the respondent, who received fatal injuries at the wheel pit of the haulage apparatus on the appellants' premises at View Park Colliery, Uddingston, on April 21, 1926. The facts as found by the Court of Session are as follows. The accident happened in a field at a spot about a hundred yards from a public road; the field forms part of View Park Colliery and is used as a dump for the deposit of ashes from the pithead; it is separated from the public road by a hedge in which there were at the time of the accident numerous large gaps, including a gap of 10 ft. opposite the point at which the accident happened; there are two gates to the field, at one of which there is a notice-board bearing the words "Trespassers will be prosecuted"; the haulage system consists of an endless wire cable operated from time to time, as may be necessary, for the purpose of removing ashes from the pithead by an eight-horsepower electric motor situated at the pithead, while at the other end of the system (which is not visible from the pithead) there is a heavy horizontal iron wheel round which the cable passes and returns at a speed of from two to two-and-a-half miles per hour; the wheel at the front, where the cable entered and left,

was in no way enclosed or protected, while on the top it was covered by four covering boards. In front of the wheel the cable had worn grooves or depressions in the adjacent surface of the ash-dump, so that there was a space 8 or 9 inches deep in the centre from ashes to covering-board, and rather more at the sides. The respondent had warned his son not to enter the colliery premises or to go near the wheel; the hedge was quite inadequate to keep the public, and, in particular, children, out of the ground, which was in fact, to the knowledge of the appellants, habitually traversed by members of the public as a short cut and frequented by youths and children of all ages. The appellants' employees at times warned children out of the field and reproved adults, but, as the appellants knew, the children disregarded warnings and the adults continued to frequent the field; the watch kept by the appellants' servants was casual and ineffective, except in so far as it was directed to guarding the wood piles and coal bings, and the ground in question was to the appellants' knowledge used as a playground by young children near the wheel and elsewhere; the wheel was dangerous and attractive to children and insufficiently protected at the time of the accident; the child who was killed was a little over four years of age, and the accident occurred owing to the child, when sitting on the cover of the wheel or in a position in front of and in close proximity to the pulley and rope, being caught and drawn into the mechanism when it was set in motion by the appellants' servants. Having regard to these facts, the Court of Session has held that the accident was due to the fault of the appellants in setting the haulage system in operation in the circumstances stated above without taking any precaution to avoid accident to persons frequenting the field in the near neighbourhood of the haulage system, and accordingly they awarded damages to the respondent.

The first, and, in my opinion, the only, question which arises for determination is the capacity in which the deceased child was in the field and at the wheel on the occasion of the accident. There are three categories into which persons visiting premises belonging to another person may fall: they may go (i) by the invitation, express or implied, of the occupier; (ii) with the leave and licence of the occupier; and (iii) as trespassers. It was suggested in argument that there was a fourth category of persons who were not on the premises with the leave or licence of the occupier, but who were not pure trespassers. I cannot find any foundation for this suggestion either in English or in Scottish law, and I do not think that the category exists. The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe. In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises which is not apparent to the visitor, but which is known—or ought to be known—to the occupier. Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.

It was suggested in argument for the respondent that *Cooke* v. *Midland Great Western Railway Co. of Ireland* (1) and of *Lowery* v. *Walker* (2) showed that even towards trespassers the duty was higher than that which I have stated. In my opinion, these two cases afford no ground for such a contention. In *Cooke* v. *Midland Great Western Railway Co. of Ireland* (1) the railway company kept a dangerous turn-table on their land close to a public road; the company knew that

A children were in the habit of playing on the turn-table, to which they obtained easy access through a well-worn gap in a fence which the respondents were bound by statute to maintain; a child between four and five years of age having been seriously injured on the turn-table, it was held that there was evidence for a jury of actionable negligence on the part of the railway company. LORD MACNAGHTEN ([1909] A.C. at p. 236), expressly treats the case as one in which the children B were resorting to the turn-table with the tacit permission of the railway company. LORD ATKINSON says ([1909] A.C. at p. 240):

> "If the plaintiff entered upon these premises and played on this turn-table with the leave and licence of the defendants, then these latter owed to the child a duty not to permit the machine to be in the movable and dangerous, C because movable, condition in which they permitted it in fact to be."

LORD COLLINS says ([1909] A.C. at p. 241):

> "I think all these facts in combination were evidence from which a jury might well infer not merely a licence but an invitation, which fixed the defendants with a high responsibility towards those people to whom such an invitation D would mainly appeal."

LORD LOREBURN agreed with the judgment of LORD MACNAGHTEN expressly on the ground that

> "this place . . . was to the defendants' knowledge an habitual resort of children . . . and that the defendants took no steps . . . to prevent the children's E presence,"

but he regarded the case as "near the line" and the evidence as very weak. In my opinion, the decision in *Cooke's Case* (1) rests upon the ground that there was evidence from which the jury were entitled to infer that the plaintiff was on the turn-table with the leave and licence of the railway company, and that the turn-table was in the nature of a trap; it therefore throws no light upon the question F as to any duty owed by the occupier of premises to a trespasser.

Lowery v. *Walker* (2) was an appeal from the decision of a County Court judge. The facts were that the respondent put a savage horse, which he knew to be dangerous to mankind, into a field which he knew people were in the habit of crossing on their way to a railway station, and that the plaintiff was injured by the horse when so crossing the field. The Court of Appeal treated the county court judge's G judgment as amounting to a finding that the plaintiff was a trespasser, and accordingly decided in favour of the defendant. This House reversed the decision expressly on the ground that the county court judge's finding amounted to a decision that the plaintiff was in the field as a licensee. LORD LOREBURN says ([1911] A.C. at p. 12): "I think that the effect of his finding is that the plaintiff was there with the permission of the defendant." LORD HALSBURY agrees; and H LORD ATKINSON says ([1911] A.C. at p. 14):

> "On the interpretation which I think is most rightly and properly put upon the findings of the learned county court judge it is clear that the plaintiff was lawfully in the place where the injury happened to him."

LORD SHAW expressly reserved any opinion as to the legal position if the plaintiff I had been a mere trespasser. It is clear, therefore, that this case affords no support to the respondent's contention. This explanation of the case has been most clearly stated in the Court of Appeal in the judgment of HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (3) ([1913] 1 K.B. at p. 419), a judgment with which I find myself in full agreement. Apart from these two cases, counsel for the respondent were bound to confess that they were unable to find any case, either in the English or in the Scottish reports, which lent any support to the doctrine that there was any duty owed by an occupier to a trespasser apart from the duty not maliciously to cause him injury.

On the other hand, there is a number of decided cases in England, Scotland, and Ireland to the contrary effect. So far as English law is concerned, it is sufficient to refer to *Hardy* v. *Central London Rail. Co.* (4), in which a child was injured on a moving staircase on the Underground Railway, where he had no right to be. SCRUTTON, L.J., says ([1920] 3 K.B. at p. 473):

> "If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers."

I believe that that sentence accurately summarises the English law. In Ireland the law has been similarly stated in the Court of Appeal in *Coffee* v. *M'Evoy* (5). The Scottish law seems to me to be the same and to be supported by a large number of authorities. In *Haughton* v. *North British Rail. Co.* (6), where children had been injured on the railway line in the course of shunting operations, it was held that the pursuers could only succeed in raising a relevant case by an averment which stated that the persons engaged in the shunting knew, when they proceeded to shunt, that the children were upon the line. In *Devlin* v. *Jeffray's Trustees* (7) LORD KINNEAR says (5 F. (Ct. of Sess.) at p. 135):

> "It was said that there is a doctrine admitted in the law of England which has not been received in our law, that when people come on the lands of others for their own purposes, without right or invitation, they must take the lands as they find them, and if they are exposed to injury from unseen dangers, they must take care of themselves, and cannot throw any responsibility upon the persons on whose lands they have trespassed. If that is a correct statement of the law, I am of opinion that there is no such distinction as is supposed between English and Scotch law, and that this doctrine is just as clearly a part of our law as it is said to be of the law of England."

In *Holland* v. *District Committee of Middle Ward of Lanarkshire* (8), where children who had been in the habit of playing upon a strip of waste ground got access to the defenders' ground through a gap in a fence and fell into a disused and unfenced quarry, the defenders were assoilzied on the ground that there was no duty on them to fence the quarry. In *Reilly* v. *Greenfield Coal and Brick Co., Ltd.* (9), where a child had been injured at a level crossing, it was held that the company was responsible because the child was lawfully on the road when the accident happened. In *Mackenzie* v. *Fairfield Shipbuilding and Engineering Co., Ltd.* (10), where a child was killed by a fall of sand in a pit belonging to the defenders, the pursuers' averments were held relevant because they contained a statement that the defenders knew of the children's practice of entering the ground and using the pit as a playground and allowed it, and the Lord Justice Clerk says (1913 S.C. at p. 216): "The real ground of liability as alleged is the fact that the defenders allowed the children to make use of the pit." In *Boyd* v. *Glasgow Iron and Steel Co., Ltd.* (11), where a boy was killed by falling from the wall of a ruinous engine house while birds' nesting, the Court of Session held that the pursuers had stated a relevant case for inquiry because they averred that the defenders knew the condition of the building and knew and tolerated the practice of children playing there. The Lord Justice Clerk points out that on the pursuer's statement the pursuer's son was a licensee, and that, as such, it was the duty of the defenders to protect him against any concealed danger or trap, and LORD ORMIDALE says, "The pursuer's son was not a trespasser, but was doing what he did with the leave and licence of the defenders." Turning finally to the law as laid down by the Privy Council, we find in *Grand Trunk Rail. Co. of Canada* v. *Barnett* (12), where the plaintiff was injured by a collision which took place on the appellants' railway line, it was held that the plaintiff could not recover because he was a trespasser on the train, and LORD ROBSON in giving the decision of the

A Board that the defendants were not liable states ([1911] A.C. at p. 370): "The general rule, therefore, is that a man trespasses at his own risk."

The only question, therefore, that remains for decision in this case is whether upon the findings of fact of the Court of Session (which are not open to review) the respondent's son may properly be regarded as having been at the wheel at the time of the accident with the leave and licence of the appellants. If this had B been proved, I should have been prepared to hold that the wheel which was at times stationary and which was started without any warning, and which was, in the words of the Court of Session, "dangerous and attractive to children and insufficiently protected at the time of the accident," amounted to a trap, and that the respondent would, therefore, have been entitled to recover. But, in my opinion, the findings of fact effectually negative that view. It is found that the C appellants warned children out of the field and reproved adults who came there, and all that can be said is that these warnings were frequently neglected and that there was a gap in the hedge through which it was easy to pass on to the field. I cannot regard the fact that the appellants did not effectively fence the field or the fact that their warnings were frequently disregarded as sufficient to justify an inference that they permitted the children to be on the field, and in the absence D of such a permission it is clear that the respondent's child was merely a trespasser. The sympathy which one cannot help feeling for the unhappy father must not be allowed to alter one's view of the law, and I have no doubt that in law the respondent's son was a mere trespasser and that as such the appellants owed him no duty to protect him from injury. On these grounds I am of opinion that this appeal succeeds and must be allowed with costs, and I move your Lordships E accordingly.

VISCOUNT DUNEDIN.—I am of the same opinion and might have contented myself with a simple concurrence, had it not been that the case is an important one so that I thought it better to write my opinion before I had seen that of the Lord Chancellor.

F I cannot do better than preface my remarks by a quotation from the exceedingly comprehensive and able judgment pronounced by VISCOUNT SUMNER, at that time HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (3). I quote from [1913] 1 K.B. at p. 410:

> "Where a question arises, not between parties who are both present in the exercise of equal rights inter se, but between parties of whom one is the owner G or occupier of the place and the other, the party injured, is not there as of right, but must justify his presence there if he can, the law has long recognised three categories of obligation. In these the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly, though never very definitely measured. . . . Contractual obligations, of course, stand apart. The lowest is the duty towards a trespasser. More care, though not much, is owed to a H licensee—more again to an invitee. . . . The owner of the property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity towards him'; but otherwise a man 'trespasses at his own risk.' On this point Scottish law is the same. In English and Scottish law alike, when people come on the lands of others for their own purposes without right or invitation, they must take the lands as they find I them, and cannot throw any responsibility upon the person on whose lands they have trespassed: per LORD KINNEAR, *Devlin* v. *Jeffray's Trustees* (7), 5 F. (Ct. of Sess.) at p. 135. The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not if they will walk they walk at their peril."

With every word of this passage I agree and I agree that it is the law of Scotland as well as that of England. What I particularly wish to emphasise is that

there are the three different classes—invitees, licensees, trespassers. I think, in the Scottish cases at least, there has been a little laxity in distinguishing between invitees and licensees. A

The best test of who is an invitee is, I think, given by LORD KINNEAR in *Devlin's Case* (7). He must be on the land for some purpose in which he and the proprietor have a joint interest. A licensee is a person whom the proprietor has not in any way invited—he has no interest in his being there—but he has either expressly B permitted him to use his lands or knowledge of his presence more or less habitual having been brought home to him, he has then either accorded permission or shown no practical anxiety to stop his further frequenting the lands. The trespasser is he who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to. The line that separates each of these three classes is an absolutely rigid line. C There is no half-way house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law. When one comes to the facts, it may well be that there is great difficulty—such difficulty as may give rise to difference of judicial opinion—in deciding into which category a particular case falls, but a judge must decide, and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category. I cannot help D thinking that the use of epithets, "bare licensees," "pure trespassers" and so on, has much to answer for in obscuring what I think is a vital proposition; that, in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls.

Accordingly, in the present case the first query I put to myself is: Was this child a trespasser or a licensee? As to invitee, there is obviously no question. E On this point I am bound to take the findings as they stand. Accorded permission is out of the case, but licence may be either expressed or implied. There is no finding in terms that licence was implied. Taking the situation as it is disclosed on the findings as a whole, I am of opinion that implied permission is not proved. It is here that I think this becomes a case of great importance. Judgments on this class of case are so numerous that it is impossible to review them all and a F mere citation of a string of authorities is inimical to clear decision, but there are certainly to be found among them expressions which would countenance the idea against which I wish to raise my protest—that, unless a proprietor takes such measures as effectually to stop trespass, the trespasser becomes a licensee. Something has been said about fencing. There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over G it become licensees. Of course, a proprietor may do nothing at all to prevent people coming over his lands and they may come so often that permission will be held to be implied, or he may do something, but that something so half-heartedly as to be equivalent to doing nothing. For instance, a mere putting up of a notice, "No Trespassers Allowed" or "Strictly Private," followed, when people often come, by no further steps would, I think, leave it open for a judge or jury to hold H implied permission. But when a proprietor protests and goes on protesting, turning away people when he meets them as he did here, and giving no countenance in anything that he does to their presence there, then I think no court has a right to say that permission must be implied. As I have said, circumstances vary infinitely and one cannot ab ante furnish a test which will fit every case; but it is permission that must be proved, not tolerance, though tolerance in some circum- I stances may be so pronounced as to lead to a conclusion that it was really tantamount to permission. I, therefore, find that the child who met with an accident in this case was a trespasser.

I do not quote further from VISCOUNT SUMNER's judgment in *Latham's Case* (3). In that case he was content to take the child as a licensee. On the duty to trespassers there is a considerable body of authority. There is no duty, save only that of not inflicting malicious injury. LORD HALSBURY mooted the question in *Lowery* v. *Walker* (2), the case where the proprietor of a field where there was a frequented

A pathway put a horse which he knew to be vicious into the field. The county court judge had used the word "trespasser" and then in a subsequent note said that he did not mean trespasser in the legal sense, and Lord Halsbury says ([1911] A.C. at p. 12):

> "The learned judge did, I think, inadvertently, in the first instance use the word 'trespasser' which would have carried the learned counsel for the respondent [the proprietor] all the way he wants to get, to a somewhat difficult and intricate question of law upon which various views may be entertained."

This does not lay down the law but at least it shows clearly, even if it were doubtful before, that *Lowery's* Case (2) was decided upon the view that the person injured was a licensee.

C Later in the same volume came the Privy Council case of *Grand Trunk Rail. Co. of Canada* v. *Barnett* (12), where a trespasser on a railway company, a trespasser by having taken his place in a train not meant for passengers, was held not entitled to recover for the negligence of the servants of the proprietors of the line which had caused an accident. The judgment of Lord Robson is a little confused as to *Lowery* v. *Walker* (2), but that does not affect the judgment. Then there is *Hardy* D v. *Central London Rail. Co.* (4), the case of the moving staircase. That had been decided by the court below as the case of a licensee. The Court of Appeal on the facts held that the child was a trespasser, not a licensee, and found for the defendant. Bankes, L.J., there says ([1920] 3 K.B. at p. 467):

> "If the plaintiff is a trespasser then he has no right of action, as there is no evidence of allurement with malicious intent to injure,"

E and quotes Hamilton, L.J., in *Latham's* Case (3) and Lord Robson in the *Grand Trunk* Case (12). Warrington, L.J., takes the same course. Scrutton, L.J., says ([1920] 3 K.B. at p. 473):

> "If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure F them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers."

These are English cases. In Scotland in *Thompson* v. *North British Rail. Co.* (13) a man who had jumped into the guard's van without a ticket was held to have no case against the railway company for damages caused in respect of a G collision occasioned by the negligence of the company's servants. Then came *Devlin* v. *Jeffray's Trustees* (7), from which Hamilton, L.J., made the quotation in *Latham's Case* (3) with which I began, but it is worth remarking that Lord Kinnear's dictum is stronger than the quotation, which omits a few words. The actual words of Lord Kinnear were:

> H "When people come on the lands of others for their own purposes, without right or invitation, they must take the lands as they find them, and, if they are exposed to injury from unseen dangers they must take care of themselves, and cannot throw any responsibility upon the person on whose lands they have trespassed."

Then *Cummings* v. *Darngavil Coal Co., Ltd.* (14) is exactly the same as the I present case. There there was the contrivance of a wheel set in motion from time to time to haul trucks over the bing. The place was known to be frequented by children, who strayed in from a public road within eighteen yards of the wheel, but the case was held irrelevant. I have, indeed, considerable doubt whether on the averments there ought not to have been allowed an inquiry whether the child was a licensee, but on the assumption that he was a trespasser, the case is a direct authority. Lord Trayner says in so many words (5 F. (Ct. of Sess.) at p. 517):

> "I agree entirely with what Lord Kinnear said in the case of *Devlin* (7). I think that if the case set forth on record is a case of trespass the trespasser

must take the risk of trespass—that he must take all risks incidental to his use of another's property." A

LORD YOUNG says, at p. 517—this has a direct bearing on a former part of my opinion—

"I do not know of any law, and none was cited to us, which puts a duty on a proprietor to fence his property so as to prevent trespassers from running into danger through the working of machinery which he is quite legitimately using on his property." B

So far the positive authority, but then comes the cogent fact that the respondent's counsel was unable to produce any case in which there was laid down any duty towards a trespasser except that of abstaining from maliciously injuring him. He could only quote various pronouncements as to the special duty of care towards C children of tender years, but these pronouncements were all either in cases of licensees or in the class of case which may at once be put aside in which the injured person, though on land belonging to the defender, is at a place on a road where the public has a confirmed habit of passage, e.g., *Reilly* v. *Greenfield Coal and Brick Co., Ltd.* (9). At first sight *Haughton* v. *North British Railway Co.* (6) might seem an authority. The facts were that there was a railway siding adjoin- D ing a public square, from which it was separated by a fence and a gate. The gate was left open, children strayed through on to the siding, shunting operations were going on, and a child was killed. LORD ADAM specially states that the child was a trespasser and an issue was allowed, LORD M'LAREN dissenting. But when the case is more narrowly looked into it is really an authority all the other way. When the case was first brought there were only averments of carelessness in E leaving the gate open and allowing children to get into danger and these were held irrelevant, but the pursuer was given the opportunity to amend. He did amend, and it was only the last sentence of his amendment which made LORD KINNEAR, who, be it remembered, had said what he had in *Devlin's Case* (7), and the Lord President hold that it was relevant. That sentence set forth that the defendant's servants who began the shunting knew that the children were on the line—in other F words, that was malicious injury to a trespasser.

The truth is that in cases of trespass there can be no difference in the case of children and adults, because, if there is no duty to take care, that cannot vary according to who is the trespasser. It is quite otherwise in the case of licensees, because there you are brought into contact with what is known as trap and allurement. Allurement, I take it, is just the bait of the trap, itself a figurative ex- G pression. HAMILTON, L.J., deals with these expressions in *Latham* (3), and I need not quote, but obviously what is allurement and a trap to a child is not so to an adult. And then one has the doctrine of contributory negligence affecting an adult, but not affecting a very young child. To take concrete instances: The learned judges in *Hardy's Case* (4), the moving staircase, say explicitly that, if they could have held the children to be licensees, they would have held the defendants liable; H yet an adult would have found no allurement in playing with the strap. In the present case, had the child been a licensee I would have held the defendants liable; secus if the complainer had been an adult. But if the person is a trespasser, then the only duty the proprietor has towards him is not maliciously to injure him: he may not shoot him; he may not set a spring gun, for that is to arrange to shoot him without personally firing the shot. Other illustrations of what he I may not do might be found, but they all come under the same head—injury either directly malicious or an acting so reckless as to be tantamount to malicious acting. I concur in the motion made.

LORD SHAW.—I agree. The facts of the case have been stated by your Lordships who have preceded me. The substance of them is as follows. The appellants, who are colliery owners, are proprietors of the field in which there is haulage machinery working over a considerable extent of ground. Part of this machinery consists of an endless chain passing at its outer end over a horizontal pulley and

working very near the ground. By means of this apparatus the waste from the pitmouth can be distributed in bings from hutches hauled by the chain. The field adjoins a public road, in what has for a period of years been a populous neighbourhood. The field is quite insufficiently fenced from the road, there being large gaps in it. It has been for a considerable period traversed on occasion as a short cut to a chapel and a railway station, and has been often used by children as a playground. To these the moving apparatus was an attraction. This invasion has not been consented to by the owners. On the contrary, they have frequently warned trespassers from the ground. They were aware, however, that these warnings were ineffectual and that the trespass continued. The machinery when in motion was dangerous. The owners gave no special warning when it was put in motion and neither fenced the field nor the machinery. They did not appoint a watchman to warn off intruders or to give notice of the starting of the chain and hutches.

Upon these facts, had the question of principle been open, it is plain that a delicate question might have arisen as to the duties, if any, of public and of owner respectively or mutually. A perusal of the most careful judgment of the learned Lord President makes this plain. His Lordship says:

> "I think it is clear that the defenders owed a duty to the pursuer's child to prevent any accident occurring to him by reason of the pulley wheel because he was a member of a class of persons whom the defenders knew to be in the habit of resorting to the field and the neighbourhood of the haulage system."

His Lordship founds upon the failure sufficiently to fence the field, saying with much force:

> "The point is not that the fence should be impenetrable or unclimbable, but that it should present an obstacle to an invader, adult or infantile, which the invader must consciously overcome,"

while with regard to the moving machinery and the danger caused by that to trespassers he adds:

> "I think it is clear that while nothing in the shape of positive permission for public resort to the field and the neighbourhood of the pulley wheel can be charged against the defenders, they did but little to prevent it and knew that what they did do was ineffectual."

I can hardly figure the considerations in support of the view of an owner's liability in such cases being more clearly stated than in the sentences which I have taken the liberty to quote. But, I need express no opinion upon the general question, for I think it to be concluded by legal authority. When I reach that point I do not find that there is any difference between the laws of England and Scotland; and having considered the decided cases very fully I am humbly of opinion that the dissenting opinion of LORD BLACKBURN must be preferred. I can, indeed, come to no other conclusion upon the state of the law under the decided cases than those formed upon them by my noble and learned friend, LORD DUNEDIN, with whose judgment I agree. Excluding, as, of course, I do, all instances of loss and injury wilfully inflicted, I am of opinion that the digest of the decided law of England and Scotland on the point under consideration is compressed in the few words of LORD KINNEAR in *Devlin's Case* (7), when he says (5 F. (Ct. of Sess.) at p. 135):

> "When people come on the lands of others for their own purposes, without right or invitation, they must take the lands as they find them, and if they are exposed to injury from unseen dangers, they must take care of themselves, and cannot throw any responsibility upon the persons on whose lands they have trespassed."

LORD BUCKMASTER.—It is essential in considering this case first to determine in what capacity the child was upon the appellants' premises when the most

lamentable accident occurred which robbed it of life, and, secondly, to keep clearly in mind the distinction between a moral and a legal obligation. A

The conclusion, to my mind, is irresistible that the child, who could know nothing of the law of trespass or licence, was in fact a trespasser. The only alternative to that conclusion is that the child was there by licence. Licence may either be express or implied by conduct. Express licence is out of the question in the present case and I can find no sufficient material from which it can be implied. B There is nothing in the findings to show that the presence of children upon this spot was ever sanctioned by the appellants. It is quite true that there was a large unfenced gap through which children might reasonably be expected to wander, and it may have been that a few strands of barbed wire would at a little cost have prevented their entrance, but there was no legal obligation to establish such a barrier, and it is only the legal obligation with which we are concerned. C

The learned Lord President, who gave judgment against the appellants, admitted there was no duty to fence, but said that the fact that the owner allows the fence enclosing his private property to fall into more or less permanent disrepair, has a certain evidential value on the question whether he consented to the use of his property. That, I think, is true, but by itself it cannot amount to a licence, and the best that can be urged in favour of the respondent is that the appellants were D aware that the children disregarded the warnings which from time to time were given by the appellants' employees and continued to frequent the field. There is, however, no evidence that they were tacitly permitted to do it and nothing which, in my judgment, can justify the inference that the appellants so acquiesced as to cause the use of the field by the children to be lawful. It is this fact that is the clear distinction between the present case and the case of *Lowery* v. *Walker* (2), E where this House held that the circumstances relating to the use of land by a person injured upon it amounted to a licence, which threw upon the owner of the land the duty of taking steps to avoid the existence of a danger due to the presence of a fierce animal. If it once be held that the child was a trespasser, innocent as the trespass was, there was no legal duty cast upon the appellants to afford protection against the danger which they must have known use of the land by the F children almost necessarily involved. The cases have already been examined, and there is no need to discuss them anew. I agree in thinking that they show that in the circumstances of this case there was no legal duty cast upon the appellants to guard against the deplorable consequences out of which these proceedings have arisen.

LORD HAILSHAM stated that he had been desired by **LORD CARSON** to say G that he concurred in the opinions which had been already expressed.

Appeal allowed.

Solicitors: *Beveridge & Co.*, for *W. T. Craig*, Glasgow, and *W. & J. Burness*, W.S., Edinburgh; *George Brown, Son & Vardy*, for *John W. Snodgrass*, Writer, Glasgow, and *Alexander Campbell & Son*, S.S.C., Edinburgh.

H

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

A

ALLEN *v.* WHITEHEAD

[King's Bench Division (Lord Hewart, C.J., Avory and Branson, JJ.), July 19, 1929]

B [Reported [1930] 1 K.B. 211; 99 L.J.K.B. 146; 142 L.T. 141; 45 T.L.R. 655; 94 J.P. 17; 27 L.G.R. 652; 29 Cox, C.C. 8]

Refreshment House—Permitting prostitutes to resort—Conduct of house delegated to manager—Liability of proprietor—Metropolitan Police Act, 1839 (2 & 3 *Vict., c.* 47), *s.* 44.

The respondent, who was the keeper of a refreshment house, did not him-
C self manage the house, but employed a manager for the purpose and visited the premises himself once or twice a week. On Sept. 1, 1928, he was warned by the police about harbouring prostitutes at the house, and he thereupon instructed his manager that no prostitutes were to be allowed to congregate in the premises, and a notice was displayed forbidding women to enter the house after midnight. On Feb. 26, 1929, and on each of the seven days following,
D women known by the manager to be prostitutes resorted to the house and remained there until 4 a.m. with a number of men. There was no evidence that the respondent knew of misconduct occurring on any occasion.

Held: the respondent having delegated to the manager the exercise of his discretion in the conduct of the house, the knowledge of the manager was his knowledge, and he was liable to be convicted of an offence under s. 44 of the
E Metropolitan Police Act, 1839.

Notes. Applied: *Linnett* v. *Metropolitan Police Comr.*, [1946] 1 All E.R. 380. Referred to: *Wilson* v. *Murphy*, [1937] 1 All E.R. 315.

As to the liability of a master for the wrongful act of his servant, see 25 Halsbury's Laws (3rd Edn.) 535 et seq.; and for cases see 34 Digest 125 et seq. For
F Metropolitan Police Act, 1839, see 13 Halsbury's Statutes (2nd Edn.) 134.

Cases referred to:

(1) *Wilson* v. *Stewart* (1863), 3 B. & S. 913; 2 New Rep. 115; 32 L.J.M.C. 198; 8 L.T. 277; 27 J.P. 661; 9 Jur.N.S. 1130; 11 W.R. 640; 9 Cox, C.C. 354; 122 E.R. 341; 34 Digest 149, *1178*.

(2) *Police Comrs.* v. *Cartman*, [1896] 1 Q.B. 655; 74 L.T. 726; 60 J.P. 357;
G 44 W.R. 637; 18 Cox, C.C. 341, D.C.; 14 Digest (Repl.) 49, *159*.

(3) *Bond* v. *Evans* (1888), 21 Q.B.D. 249; 57 L.J.M.C. 105; 59 L.T. 411; 52 J.P. 613; 36 W.R. 767; 4 T.L.R. 614; 16 Cox, C.C. 461, D.C.; 14 Digest (Repl.) 50, *164*.

(4) *Collman* v. *Mills*, [1897] 1 Q.B. 396; 66 L.J.Q.B. 170; 75 L.T. 590; 61 J.P. 102; 13 T.L.R. 122; 18 Cox, C.C. 481, D.C.; 14 Digest (Repl.) 47, *142*.

H (5) *Mousell Bros., Ltd.* v. *London and North Western Rail. Co.*, [1917] 2 K.B. 836; 87 L.J.K.B. 82; 118 L.T. 25; 81 J.P. 305; 15 L.G.R. 706, D.C.; 14 Digest (Repl.) 47, *147*.

(6) *Mullins* v. *Collins* (1874), L.R. 9 Q.B. 292; 43 L.J.M.C. 67; 29 L.T. 838; 38 J.P. 629; 22 W.R. 207; 14 Digest (Repl.) 49, *161*.

(7) *Coppen* v. *Moore* (*No. 2*), [1898] 2 Q.B. 306; 67 L.J.Q.B. 689; 78 L.T. 520;
I 62 J.P. 453; 46 W.R. 620; 14 T.L.R. 414; 42 Sol. Jo. 539; 19 Cox, C.C. 45; 14 Digest (Repl.) 47, *148*.

(8) *Somerset* v. *Hart* (1884), 12 Q.B.D. 360; 53 L.J.M.C. 77; 48 J.P. 327; 32 W.R. 594, D.C.; 14 Digest (Repl.) 46, *136*.

(9) *Somerset* v. *Wade*, [1894] 1 Q.B. 574; 63 L.J.M.C. 126; 70 L.T. 452; 58 J.P. 231; 42 W.R. 399; 10 T.L.R. 313; 10 R. 105, D.C.; 14 Digest (Repl.) 39, *89*.

(10) *Jones* v. *Hartley* (1918), 88 L.J.K.B. 271; 118 L.T. 815; 82 J.P. 291; 26 Cox, C.C. 255, D.C.; 14 Digest (Repl.) 49, *158*.

Case Stated by a metropolitan magistrate.

An information was laid at the Old Street Police Court by John Allen, the appellant, acting by order and on behalf of the Commissioner of Metropolitan Police, charging that Albert Whitehead, the respondent, on Feb. 26, 1929, being the keeper of premises, namely, 16 Norton Folgate, in the county of London, where refreshments were sold or consumed, did knowingly suffer prostitutes to meet together and remain therein, contrary to s. 44 of the Metropolitan Police Act, 1839.

The hearing took place on April 22 and May 2, 1929, when the following facts were proved or admitted. The respondent was the occupier and licensee of premises at 16 Norton Folgate, Stepney, which he used as a licensed refreshment house, open day and night. The respondent, although he received the profits of the business, did not himself manage the refreshment house, but employed a manager for the purpose. On Feb. 26, 1929, and on each of the seven days following, a number of women known to the respondent's manager to be prostitutes resorted to the said refreshment house, meeting there together and with a number of men, and remaining therein between the hours of 8 p.m. and 4 a.m. and indulging in obscene language. From time to time men and women were seen to leave the premises in couples and to return within a few minutes. This conduct took place frequently in the presence of the manager, and on one occasion disorderly conduct took place on the part of those resorting to the café. On Sept. 1, 1928, the respondent had been warned by the police about harbouring prostitutes at the refreshment house, and he thereupon gave instructions to his manager that no prostitutes were to be allowed to congregate in the premises, and a notice was displayed forbidding women to enter the refreshment house after midnight. The respondent visited the premises about once or twice a week. There was no evidence that misconduct occurred on any occasion in his presence or to his knowledge, but there was evidence that he had given general instructions to his manager to prevent the assembling of prostitutes on the premises, and had caused a notice to this effect to be displayed on the walls.

On behalf of the respondent it was contended that, as the respondent did not himself manage the refreshment house and had no personal knowledge that prostitutes met together and remained therein, had not been negligent in failing to notice these facts, and had not wilfully closed his eyes to them, he could not in law be held responsible for the acts of his manager in his absence acting in direct contravention to his instructions. On behalf of the appellant it was contended that the position of the respondent was analogous to that of a licensee under the Licensing Acts, and that he was responsible for the acts of his manager within the scope of his employment. Attention was called to ss. 75 and 76 of the Licensing (Consolidation) Act, 1910, and *Wilson* v. *Stewart* (1), *Police Comrs.* v. *Cartman* (2), *Bond* v. *Evans* (3), and *Collman* v. *Mills* (4) were referred to. The learned magistrate said that *Wilson* v. *Stewart* (1) was the only case to which he had been referred which was a decision on s. 44 of the Metropolitan Police Act, 1839, the section under which this information was laid. The observations of BLACKBURN, J., in that case seemed to indicate clearly that, in his view, a complete absence of knowledge of misconduct would have afforded a good defence. Accordingly, he (the learned magistrate) felt bound, relying upon these observations, to dismiss the information, being of opinion that the respondent was not responsible in law for the acts of his manager in the above circumstances, such acts having taken place without the respondent's knowledge and contrary to his express instructions.

The question of law for the opinion of the court was whether, upon the facts stated, the learned magistrate was right in dismissing the information. By the Metropolitan Police Act, 1839, s. 44

> "Whereas it is expedient that the provisions made by law for preventing disorderly conduct in the houses of licensed victuallers be extended to other houses of public resort; be it enacted that every person who shall have or keep

any house, shop, room, or place of public resort within the metropolitan police district, wherein provisions, liquors, or refreshments of any kind shall be sold or consumed (whether the same shall be kept or retailed therein or procured elsewhere) and who shall wilfully or knowingly permit drunkenness or other disorderly conduct in such house, shop, room or place . . . or knowingly permit or suffer prostitutes or persons of notoriously bad character to meet together and remain therein, shall for every such offence be liable to a penalty of not more than £5."

H. D. Roome, for the appellant, referred to *Mousell Bros., Ltd.* v. *London and North Western Rail. Co* (5) ([1917] 2 K.B. at p. 845), *Wilson* v. *Stewart* (1), *Mullins* v. *Collins* (6), *Coppen* v. *Moore* (*No. 2*) (7), *Bond* v. *Evans* (3), *Somerset* v. *Hart* (8), *Police Comrs.* v. *Cartman* (2), *Somerset* v. *Wade* (9), and *Jones* v. *Hartley* (10).

St. John Hutchinson, for the respondent: Of all the cases cited *Wilson* v. *Stewart* (1) only is a decision on s. 44 of the Act of 1839.

LORD HEWART, C.J.—This is a Case Stated by one of the learned magistrates of the police courts of the metropolis, and it raises a question under s. 44 of the Metropolitan Police Act, 1839. The respondent was summoned to answer an information laid by the appellant, which charged that the respondent, on a day in February, 1929, being the keeper of certain premises where refreshments were sold or consumed, did knowingly suffer prostitutes to meet together and remain therein contrary to s. 44 of the statute. The material words in the statute are:

". . . be it enacted that every person who shall have or keep any house, shop, room or place of public resort within the metropolitan police district, wherein provisions, liquors or refreshments of any kind shall be sold or consumed (whether the same shall be kept or retailed therein or procured elsewhere) . . . and who shall knowingly permit or suffer prostitutes or persons of notoriously bad character to meet together and remain therein, shall, for every such offence, be liable to a penalty. . . ."

The magistrate, having heard the evidence, came to the conclusion that the prosecution was not made good, and the question for this court is whether he came to a correct determination in point of law in dismissing the case.

It is found as a fact that the respondent, who was the occupier and licensee of the premises, a refreshment house, which was open day and night, did not himself manage the premises. He received the profits of the business, but for the purpose of the conduct of the business he chose to employ a manager. In those circumstances, it was proved that on a certain day in February, 1929, and on each of the seven days following, a number of women, known to the respondent's manager to be prostitutes, resorted to the refreshment house, meeting there together with a number of men and remaining therein between the hours of 8 p.m. and 4 a.m., and indulging in obscene language, and there are other findings of fact of a similar character. Before the happenings of those events, namely, on Sept. 1, 1928, the respondent had been warned by the police about harbouring prostitutes at this refreshment house. Having received that warning, he gave instructions to the manager that no prostitutes should be allowed to congregate in the premises, and, more than that, a notice was displayed forbidding them to enter the refreshment house after midnight. So far as the respondent's own acts are concerned, the case finds that he visited the premises about once or twice a week.

What is the fair meaning of those facts, if it be not that he was, to all intents and purposes, an absentee who had told his manager to use the discretion which, if he had been upon the premises, he must have exercised himself? The learned magistrate appears to have thought that the case was governed by the decision in *Wilson* v. *Stewart* (1), but there seems to have been a misapprehension about that case. That was a case which was concerned, not with the question in what circumstances is a master criminally liable for the act of his servant, but with the converse question—in what circumstance is the servant criminally associated with the act of his master? The point that was raised there was whether, in the

words of BLACKBURN, J., "the mere relation of master and servant will make the servant liable to conviction," and that question was naturally enough answered in the negative. With all due respect to the learned magistrate, it does not appear to me that that case throws much light upon the present case. The question here was whether it was true to say that the position of the respondent was analogous to that of a licensee under the licensing Acts, in the sense that he was responsible for the acts of his manager within the scope of his employment. On the facts of the case it is abundantly plain that there was knowledge on the part of the manager. The question is whether, upon the proper construction of this section, that knowledge in the servant is to be imputed to the employer, so as to make the employer liable.

In my opinion, the answer to that question is in the affirmative. The principle seems to me to be that which was explained, for example, in *Mousell Bros., Ltd.* v. *London and North Western Rail. Co.* (5) ([1917] 2 K.B. at p. 845), where ATKIN, J., said:

> "I think that the authorities cited by my Lord make it plain that while primâ facie a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not, regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

Applying that canon to the present case, I think that this provision in this statute would be rendered nugatory, if the contention raised on behalf of this respondent were held to prevail. That contention was that, as the respondent did not himself manage the refreshment house, had no personal knowledge that prostitutes met together and remained therein, had not been negligent in failing to notice these facts, and had not wilfully closed his eyes to the facts, he could not, in law, be held responsible. There is a whole chain of cases on the lines of the passage which I have just read from *Mousell Bros., Ltd.* v. *London and North Western Rail. Co.* (5). Reference has been made to *Mullins* v. *Collins* (6), *Coppen* v. *Moore* (7), *Bond* v. *Evans* (3), and other cases. This seems to me to be a case where the proprietor, the keeper of the house, had delegated his position to a manager, so far as the conduct of the house was concerned; he had transferred to the manager the exercise of discretion in the conduct of the business, and it seems to me the only reasonable conclusion is, regard being had to the purpose of this Act, that knowledge in the manager was knowledge in the keeper of the house. I think, therefore, that this case ought to go back to the learned magistrate, with a direction to convict.

AVORY, J.—I am of the same opinion. I think the manager in this case, although acting contrary to his instructions in doing what he did, was acting in the course of his employment, and that being so, the employer is responsible for his acts. With reference to *Wilson* v. *Stewart* (1), I think it is plain, when looked at carefully, that it is an authority in support of the appellant's contention here, because it appears that in *Wilson* v. *Stewart* (1) the proprietor of the business, one John Fryer, was not present on the premises at the time when the alleged offence was committed, but that the manager, as he is described, was on the premises and was the person who, in fact, was permitting the prostitutes to remain. CROMPTON, J., in the course of his judgment, said:

> "I have no doubt that the magistrate might well have found, from the circumstances of the case, that Fryer [the proprietor who was absent] knowingly suffered prostitutes to meet together and remain in his house and that Stewart aided and abetted him."

A So that, upon the facts of the present case, the learned judges in that case would, apparently, have found that the employer was responsible. I agree that the appeal should be allowed.

BRANSON, J.—I agree. The essence of the respondent's case was that he had no personal knowledge of the fact that prostitutes were meeting and remaining B upon these premises. It is found that his manager knew, and it is said in *Somerset* v. *Hart* (8) that a man may put another in his position, so as to represent him for the purpose of knowledge. I think that is what the respondent has done here, and that consequently his contention fails. I agree that the appeal should be allowed and that the case should go back to the learned magistrate with a direction to convict.

C *Appeal allowed.*

Solicitors: *Wontner & Sons*; *Charles Watson Brown.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

D

CLAN LINE STEAMERS, LTD. *v.* BOARD OF TRADE THE CLAN MATHESON

E

[HOUSE OF LORDS (Lord Hailsham, L.C., and Viscount Sumner, Lord Buckmaster, Lord Blanesburgh and Lord Warrington), February 19, 21, April 16, 1929]

[Reported [1929] A.C. 514; 98 L.J.K.B. 408; 141 L.T. 275; F 45 T.L.R. 408; 35 Com. Cas. 15; 18 Asp.M.L.C. 1]

Insurance—Marine insurance—Proximate cause of loss—Collision—Peril insured against rendering collision inevitable.

The claimants were the owners of the steamship *Clan M.*, which, during the war, was requisitioned by the British government under the terms of the charterparty T.99, by the terms of which the government was responsible for G loss or damage due to a warlike operation, and the owners were responsible for ordinary marine risks. While the vessel was proceeding in a convoy from the United States to France she suddenly left her course owing to a defect in her steering gear, which was never explained, came into collision with the *W.F.*, another ship in the convoy, and sank. At the time of the collision the *Clan M.* carried a cargo the greater part (amounting to 84 per cent. of the H whole cargo) of which consisted of cereals intended for the civil population, and it was agreed that she was not engaged on a warlike operation. The *W.F.* was carrying war supplies, and it was admitted that she was engaged in a warlike operation at the time of the accident. On a claim by the claimants for compensation on the ground that the loss of the *Clan M.* was due to a warlike operation,

I **Held:** it was a well-settled principle of marine insurance law that causa proxima non remota spectatur, but that did not mean that consideration of everything which happened before the actual impact took place must be excluded; in the present case the collision was due solely to the breakdown of the steering gear of the *Clan M.*; from the moment when that breakdown occurred nothing which could be done by those in charge of either vessel could prevent the collision; and, therefore, the collision was the consequence of that breakdown, the character of the ship with which the *Clan M.* collided became immaterial, and the claimants were not entitled to recover.

Per VISCOUNT SUMNER: (i) Whenever it is necessary to consider whether or not a limited insurance applies it becomes necessary also to inquire in what exactly the loss consists and when it happens, and in such cases it cannot be predicated of the subject-matter insured that no loss has happened to it, when it has been so affected by perils insured against that nothing can save it from ultimate destruction. The element of uncertainty as to the effect of subsequent events may go to the measure of the loss or to the necessity of giving notice of abandonment, but it cannot prevent an operative peril, which has already taken charge of the ship, from being its cause of loss when its complete operation cannot be arrested. (ii) In arguing questions of proximate cause in marine insurance the temptation is always strong to resort to a minute analysis of the circumstances of a casualty in order to place the cause as proximately to the conclusion of them as possible. It is a natural way in which to apply the rule as it is laid down in the books. I think, however, that LORD BACON'S warning against inquiry into the causes of causes applies equally forcibly to a microscopic analysis of the incidents of a casualty as a means of discovering the proximate cause.

Notes. Distinguished: *Board of Trade* v. *Hain Steamship Co., Ltd.*, post, p. 26. Considered: *Liverpool and London War Risks Insurance Association, Ltd.* v. *Ocean Steamship Co.*, [1947] 2 All E.R. 586. Referred to: *Lazard Bros. & Co.* v. *Brooks* (1932), 37 Com. Cas. 224; *Yorkshire Dale Steamship Co.* v. *Minister of War Transport*, [1942] 2 All E.R. 6; *Clan Line Steamers, Ltd.* v. *Liverpool and London War Risks Insurance Association, Ltd.*, [1942] 2 All E.R. 367; *Royal Greek Government* v. *Minister of Transport* (1949), 66 (pt. 1) T.L.R. 504.

As to the determination of proximate cause in marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 90–92; and for cases see 29 DIGEST 205, 206, and 41 DIGEST 990–992.

Cases referred to:

(1) *Britain Steamship Co., Ltd.* v. *R.*, *Green* v. *British India Steam Navigation Co., Ltd.*, *British India Steam Navigation Co., Ltd.* v. *Liverpool and London War Risks Insurance Association, Ltd.*, [1921] 1 A.C. 99; 89 L.J.K.B. 881; 123 L.T. 721; 36 T.L.R. 791; 64 Sol. Jo. 737; 15 Asp.M.L.C. 58; 25 Com. Cas. 301, H.L.; 29 Digest 230, *1860*.

(2) *A.-G.* v. *Ard Coasters, Ltd.*, *Liverpool and London War Risks Insurance Association, Ltd.* v. *S.S. Richard de Larrinaga Marine Underwriters*, [1921] 2 A.C. 141; 91 L.J.K.B. 31; 125 L.T. 548; 37 T.L.R. 692; 15 Asp.M.L.C. 353; 26 Com. Cas. 352, H.L.; 29 Digest 228, *1851*.

(3) *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*, [1923] A.C. 191; 92 L.J.K.B. 142; 39 T.L.R. 133; 67 Sol. Jo. 182; 28 Com. Cas. 296, H.L.; 29 Digest 226, *1838*.

(4) *A.-G.* v. *Adelaide Steamship Co.*, [1923] A.C. 292; 92 L.J.K.B. 537; 39 T.L.R. 333; 67 Sol. Jo. 455; 28 Com. Cas. 315; sub nom. *Adelaide Steamship Co.* v. *R.*, 129 L.T. 161; 16 Asp.M.L.C. 178, H.L.; 29 Digest 228, *1850*.

(5) *Re Hain Steamship Co., Ltd.* (*Trevanion* (*Owners*)) *and Board of Trade* (1928) 97 L.J.K.B. 630; sub nom. *Hain Steamship Co., Ltd.* v. *Board of Trade*, [1928] 2 K.B. 534; 139 L.T. 566; 44 T.L.R. 624; 72 Sol. Jo. 399; 17 Asp.M.L.C. 520; 34 Com. Cas. 1, C.A.; affirmed sub nom. *Board of Trade* v. *Hain Steamship Co., Ltd.*, post, p. 26; [1929] A.C. 534; 98 L.J.K.B. 625; 141 L.T. 435; 45 T.L.R. 550; 18 Asp.M.L.C. 15; 35 Com. Cas. 29, H.L.; 41 Digest 992, *8760*.

(6) *Ionides* v. *Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur.N.S. 18; 11 W.R. 858; 1 Mar.L.C. 353; 143 E.R. 445; 29 Digest 229, *1854*.

(7) *Bondrett* v. *Hentigg* (1816), Holt, N.P. 149, N.P.; 29 Digest 221, *1766*.

(8) *Hahn* v. *Corbett* (1824), 2 Bing. 205; 9 Moore, C.P. 390; 3 L.J.O.S.C.P. 253; 130 E.R. 285; 29 Digest 205, *1648*.

(9) *Reischer* v. *Borwick*, [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238; 10 T.L.R. 568; 7 Asp.M.L.C. 493; 9 R. 558, C.A.; 29 Digest 206, *1650*.

Appeal from an order of the Court of Appeal (SCRUTTON and LAWRENCE, L.JJ., GREER, L.J., dissenting) ([1928] 2 K.B. 557) on an award stated in the form of a Special Case.

The question raised by the Special Case and by the appeal was whether the loss of a requisitioned vessel during the war was the consequence of a warlike operation.

The claimants, Clan Line Steamers, Ltd., were the owners of the steamship *Clan Matheson*, which was a cargo vessel, built in 1917. The *Clan Matheson* was requisitioned by the British government on Sept. 28, 1917, while the first European war was still in progress, on the terms of the charterparty known as charterparty T.99, under cl. 18 of which the shipowners remained liable for loss by ordinary marine risks, while, under cl. 19, the government undertook liability for loss from all consequences of hostilities or warlike operations. In May, 1918, the *Clan Matheson* sailed in convoy from New York with about forty vessels escorted by cruisers for Europe. The convoy sailed in columns, the *Clan Matheson* being the third ship in the second column from the port hand, and the steamship *Western Front* being in the corresponding position in the port column. The convoy sailed without lights. On the night of May 22–23, the steering gear of the *Clan Matheson* broke down, and she sheered out of her line across the bows of the *Western Front*, which rammed and sank her. The *Clan Matheson* carried a cargo of which only 16 per cent. was for military purposes, and was bound for Nantes, a war base as well as a commercial port. The *Western Front* was carrying a cargo made up entirely of war supplies for St. Nazaire, a war base. The claimants pleaded that at the time of the collision both vessels were engaged upon and were carrying out a warlike operation within the meaning of cl. 19 of the charterparty, and that the loss was a consequence of warlike operations. The respondents admitted that the *Western Front* was engaged upon and carrying out a warlike operation, but denied that the *Clan Matheson* was so engaged, or that the loss was in consequence of a warlike operation. The value of the vessel was agreed at the sum of £265,000. Subject to the opinion of the court, the arbitrator held in favour of the claimants upon the ground that there was no negligence on the part of either vessel, and that the loss was a consequence of warlike operations within the meaning of cl. 19 of the charterparty T.99. In the Court of Appeal it was held, affirming the decision of WRIGHT, J., by SCRUTTON, L.J., and LAWRENCE, L.J., GREER, L.J., dissenting, that the loss was not the consequence of a warlike operation. The claimants appealed.

W. A. Jowitt, *K.C.*, *G. P. Langton*, *K.C.*, *A. T. James*, *K.C.*, and *J. MacMillan* for the appellants.

The Attorney-General (*Sir Thomas Inskip*, *K.C.*), *W. Norman Raeburn*, *K.C.*, and *Russell Davies* for the Crown.

The House took time for consideration.

April 16. The following opinions were read.

LORD HAILSHAM, L.C.—This is an appeal from an order of the Court of Appeal affirming the decision of the King's Bench Division upon an award stated in the form of a Special Case. The question which arises for determination is whether upon the facts as found by the arbitrator the respondents are liable to pay to the appellants a sum of £265,000, representing the value of a steamship known as the *Clan Matheson* at the date of her loss in May, 1918. The appellants were at all material dates the owners of the *Clan Matheson*, which was requisitioned by letters dated Sept. 28, 1917, upon the terms of a charterparty known as "T.99."

By cl. 18 of the charterparty it was provided as follows: A

"The Admiralty shall not be held liable if the steamer shall be lost, wrecked . . . injured or rendered incapable of service by, or in consequence of . . . collision . . . or any other cause arising as a sea risk."

Clause 19 of the charterparty provided:

"The risks of war which are taken by the Admiralty are those risks which B would be excluded from an ordinary insurance policy of marine insurance by the following but not more extensive clause: 'Warranted free of capture, seizure, or detention and the consequences thereof . . . and also from all consequences of hostilities or warlike operations. . . .' "

On May 17, 1918, while the *Clan Matheson* was still under requisition upon the terms of the charterparty, she sailed from New York in convoy. She was bound C for Nantes and her cargo consisted as to 84 per cent. of stores intended for the civil commissariat and as to 16 per cent. for the military authorities. The convoy sailed in columns. The *Clan Matheson* was the third ship in the second column from the port hand; the regulation distance between each ship in the same column was 400 yards and the regulation distance between the columns was 800 yards. The corresponding ship in the port column was a vessel called the *Western Front*, which D was under charter to the government of the United States of America and was bound for St. Nazaire with a cargo made up entirely of war supplies for that government. St. Nazaire was a war base. On the night of May 22–23, 1918, the convoy was proceeding at a speed of from nine to nine-and-a-half knots; there was a rough sea; the convoy was sailing without lights, but it was a moonlight night, visibility was good and every vessel in the convoy could easily be seen. About 1 a.m. the E second officer of the *Clan Matheson*, who was then on watch, noticed that the ship ahead of him in his column was on his starboard bow. He ordered the quartermaster to port the helm, but found that the ship did not respond. He repeated the order, and then went to the helm and found the wheel hard a-port. He suspected that something in the steering gear had suddenly given way, and he called the captain and the chief engineer. The engines were put astern and F attempts were made to adjust the steering gear, but meanwhile the *Clan Matheson* swung right across the bows of the *Western Front*, which struck her amidships and approximately at right angles. The *Clan Matheson* sank within two hours and became a total loss; the time which elapsed between the moment when the second officer first noticed that the *Clan Matheson* was out of her course and the moment of the collision was estimated by him at from two-and-a-half minutes to four G minutes, and this seems on the data given to be an outside estimate. It was admitted on the pleadings that the *Western Front* was engaged upon a warlike operation; it was contended before the arbitrator that the *Clan Matheson* was also engaged upon a warlike operation. The arbitrator negatived this contention, and, though the appellants challenged this finding in the court below, at your Lordships' Bar it was conceded that the finding was one of fact and that there was material H to support it and the contention was abandoned. There was no express finding upon the question whether there was negligence in the navigation of the *Western Front*; but in the courts below counsel for the appellants admitted that negligence on the part of those in charge of the *Western Front* could not be suggested—that is to say, in the language of the learned judge:

I

"The *Western Front* could not avoid striking the *Clan Matheson* as she did when the *Clan Matheson* swung out of her course and across the bows of the *Western Front*."

The arbitrator held that there was no negligence on the part of the appellants or those in charge of the *Clan Matheson*, and he found

"that immediately before the collision the steering gear of the *Clan Matheson* broke down and failed to operate, and that by reason thereof the said vessel sheered to port and across the course of the *Western Front*."

A So far as appears, there was no suggestion at the time of the accident that the Admiralty was under any liability in respect thereof; but, on Aug. 11, 1926, encouraged apparently by their reading of certain decisions in your Lordships' House, the appellants by their solicitors wrote a letter to the respondents alleging that at the date of the collision the *Clan Matheson* was upon a warlike operation, and that there was, therefore, a claim upon those bearing the war risk insurance under the B charterparty. The claim was referred to the sole arbitration of Mr. Claughton Scott, from whose award I have extracted the findings of fact to which I have called your Lordships' attention. The learned arbitrator held upon these findings that the loss of the *Clan Matheson* was a consequence of warlike operations within the meaning of cl. 19 of the charterparty, and, consequently, that the respondents were liable; and he stated his award in the form of a Special Case. The Special C Case was argued before WRIGHT, J., and he reversed the decision of the arbitrator. From that judgment the appellants appealed to the Court of Appeal, and by a majority (SCRUTTON, L.J., and LAWRENCE, L.J., GREER, L.J., dissenting) that court upheld the decision of the judge and dismissed the appeal. From this decision the present appeal is brought.

To decide the question raised in the appeal it is necessary to refer to certain D decisions which have already been given in this House upon the construction to be placed upon these two clauses in the charterparty. In *Britain Steamship Co., Ltd.* v. *R.* (1) it was held that sailing without lights is not a warlike operation. In *Green* v. *British India Steam Navigation Co., Ltd.*, *British India Steam Navigation Co., Ltd.* v. *Liverpool and London War Risks Insurance Association, Ltd.* (1), which was heard and decided at the same time, it was held that sailing under E convoy is not a warlike operation. In *A.-G.* v. *Ard Coasters, Ltd.* (2) and *Liverpool and London War Risks Insurance Association, Ltd.* v. *S.S. Richard de Larrinaga Marine Underwriters* (2) it was held that if a warship carrying out her naval duties in time of war comes into collision with a merchant vessel without any negligence on the part of those in charge of either the warship or the merchant vessel, the resultant damage to the merchant vessel is a consequence of warlike operations. F In *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (3) it was held that a merchant vessel carrying war stores from one war base to another war base for the British government in time of war was engaged upon a warlike operation, and, therefore, in the same position as a war vessel. In *A.-G.* v. *Adelaide Steamship Co.* (*The Warilda Case*) (4) it was held that where a ship engaged on a warlike operation comes into collision with another vessel, the G damage done to the former ship is none the less a consequence of a warlike operation because those in charge of that vessel have been guilty of negligence which brings about the collision. There is in addition a decision of the Court of Appeal in *Re Hain Steamship Co., Ltd.* (*Trevanion* (*Owners*)) *and Board of Trade* (5) that, if a collision occurs between a vessel engaged in a warlike operation and a merchant vessel owing to negligence in the navigation of both vessels, the collision is none the H less a consequence of warlike operations within cl. 19 of the charterparty. Your Lordships were informed that this last decision is under appeal to your Lordships' House; it is not necessary to express any opinion as to its correctness in order to determine the present case, and I do not propose to discuss it in this judgment. [The decision of the Court of Appeal was affirmed by the House of Lords sub nom. *Board of Trade* v. *Hain Steamship Co., Ltd.*, post, p. 26.]

I Counsel for the appellants contended that these authorities established that a collision between a vessel engaged in a warlike operation and a merchant vessel is the consequence of a warlike operation where neither vessel is to blame; that it is none the less a consequence of a warlike operation if those in charge of the warship are to blame; that if the decision in *The Trevanion* (5) be correct it is none the less the consequence of a warlike operation if those in charge of both vessels are to blame; and they asked your Lordships to say that the true principle was that whenever a collision occurred between a vessel engaged upon a warlike operation and another vessel, the damage resulting from that collision was the consequence of a

warlike operation within the meaning of cl. 19 of the charterparty. On the other hand, the Attorney-General argued that in the cases cited the warship was, as he expressed it, the aggressor; and he contended that in order to determine whether the loss fell within cl. 18 or cl. 19 of the charterparty, it was necessary to decide whether the collision was due to the action of the war vessel or to some other cause.

It is a well-settled principle of marine insurance law that causa proxima non remota spectatur; and it was expressly determined in the well-known case of *Ionides* v. *Universal Marine Insurance Co.* (6) that this maxim is applicable in cases in which the question to be decided is whether the loss is due to a marine risk or to a war risk. There is no doubt, therefore, that it must be applied in the present case. But, in my opinion, its application does not lead to the result for which the appellants contend. By the express terms of cl. 18 of the charterparty, the Admiralty is not liable if the steamer be lost in consequence of a collision; while cl. 19 excludes from these losses for which the Admiralty is not liable, collisions which are the consequence of warlike operations. This necessarily imposes upon the tribunal the duty of determining in the case of loss by collision whether or not that collision is the consequence of a warlike operation; and I have no doubt that in determining this question the proximate cause of the collision is the one which has to be looked at. This does not mean that one must exclude from consideration everything which happened before the actual impact took place. The illustrations given by ERLE, C.J., in his judgment in *The Ionides Case* (6) are sufficient to establish that proposition. In the present case the facts found by the arbitrator show that the collision was due, and was due solely, to the breakdown of the steering gear of the *Clan Matheson*. From the moment when that breakdown occurred nothing which could be done by those in charge of either vessel could prevent the collision, and, in my opinion, in law as well as in ordinary parlance, the collision was the consequence of that breakdown.

The conclusion which I have reached is supported by the high authority of LORD SUMNER in *The Warilda Case* (4), to which I have already referred. LORD SUMNER says ([1923] A.C. at p. 305):

> "When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same, if this action was only an error of judgment or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision."

It was contended that this passage was only an obiter dictum and that it should be overruled; but, in my opinion, it is an essential part of the reasoning upon which the judgment proceeds, and in any event I regard it as a correct statement of the law. I agree with the view taken by WRIGHT, J., in his admirable judgment, and it follows that I am unable to accept the reasoning of GREER, L.J., in the Court of Appeal. It seems to me that the learned lord justice fails to give sufficient weight to the fact that from the moment when the steering gear broke down the collision was inevitable, in view of the situation in which the *Clan Matheson* then found herself in relation to the *Western Front*. In my opinion, the order appealed from is correct, and I move your Lordships accordingly. **LORD BLANESBURGH** asks me to say that he concurs in this judgment.

VISCOUNT SUMNER.—In a claim for indemnity made in the shipowner's name on charterparty T.99, the claimants must show that the loss was one (a) excluded from an ordinary marine risks policy by the specified f.c. and s. clause, and (b) caused in the insurance sense of that term by a peril, which in this case is some

warlike operation. The *Clan Matheson* foundered after being in collision with the *Western Front*. Foundering and collision are perils insured against under an ordinary marine policy. Before the collision the *Western Front* and the *Clan Matheson* were sailing together in convoy at night, the *Western Front* admittedly being, by reason of her cargo and her employment, herself engaged in the warlike operation of proceeding with munitions of war for the government of the United States to a war base in France, while, on the other hand, the *Clan Matheson* in herself admittedly was not so engaged, though it was argued, somewhat faintly, that she became so when she sailed in convoy. Your Lordships have already decided the contrary of this last contention, and any discussion of it is merely academic and in legal proceedings irrelevant. The appellants' case, therefore, is that the *Clan Matheson* was lost because the *Western Front*, in the course of her warlike operation, cut her down amidships in collision. On this it is necessary to examine the facts set out and the conclusions arrived at in the award, which is stated in the form of a Special Case for the opinion of the court.

Both these vessels were large. The *Clan Matheson's* length was 405 ft. and that of the *Western Front* must have been considerable also. In the prescribed order of the convoy the *Western Front* was on the *Clan Matheson's* port hand and was in line with her distant 800 yards, while in each case the distance from the ships ahead and astern was 400 yards. The speed of the convoy generally was nine to nine-and-a-half knots. The *Clan Matheson's* steering gear fortuitously went wrong and she took and kept a fixed sheer to port. By estimate two-and-a-half to four minutes passed from the time when this sheer was first noticed to the actual collision. As the *Clan Matheson* got across the *Western Front's* bows and the angle of impact was about a right-angle, either the *Western Front* was abaft or the *Clan Matheson* was ahead of her due station, or both, at the commencement of and during the sheer, but its duration can only be estimated generally, for the exact positions of the ships are not known. The award finds that, when the breakdown of the *Clan Matheson's* steering gear had been discovered, her engines were put astern and the appropriate signals were made. It does not find whether the *Western Front* used, or could have used, either her engines or her helm to arrest or modify the consequences of the *Clan Matheson's* sheer, but the appellants' counsel disclaimed any charge of negligence in the *Western Front's* navigation, just as the award itself exonerated those in charge of the *Clan Matheson*. There was a moon and the sea was rough with considerable swell, but all the same visibility is said to have been good. In these circumstances it is not to be expected that the change of the *Clan Matheson's* course would be apparent to those on the *Western Front* till after, and probably substantially after, the moment at which it was visible to her own officers, and, in view of the shortness of the time between the change of course and the collision and the difficulties in the way of any manœuvring of the *Western Front* owing to the proximity of other vessels, I think that the effect of these facts and of the absence of any charge of negligent navigation is logically that in the circumstances nothing could have been done to avert the collision. The award concludes that the proximate cause of the foundering of the *Clan Matheson* was the impact of the *Western Front* and not her own sheer, but this conclusion the arbitrator submits to the court. It appears to me that on the facts found the collision had become inevitable for a material, if not a measurable, time before the impact occurred, and, if so, the character of the other vessel, as well as the direction of her course and of the blow, fail to become material. The *Clan Matheson* had become irretrievably a loss by a marine peril before the collision happened, and the character of the object with which she collided was a pure incident. If it had not been the *Western Front* it would have been some other ship.

There are many cases in the books in which a ship or cargo, though still physically untouched, is held to have been so affected by a peril as to be lost by it, though disappearance or dissolution only come at a substantial interval afterwards. This peril, having "begun to operate," and there being no escape, is held then to be the proximate cause. Such is ERLE, C.J.'s illustration in *Ionides* v. *Universal*

Marine Insurance Co. (6) (14 C.B.N.S. at p. 286) of a ship which gets embayed on a lee shore while flying from captors and so is wrecked, the loss here being by capture or a similar consequence of hostilities. Probably this is the best illustration to be found, but reference may also be made to *Bondrett* v. *Hentigg* (7) and *Hahn* v. *Corbett* (8). At first sight there may seem to be something paradoxical in saying that a ship is lost when she is still afloat and, apart from the jamming of the steering gear, is still uninjured, but it is not illogical. In the great majority of cases the question may be of no moment, since the ordinary policy covers so many perils, but whenever it is necessary to consider whether a limited insurance applies or not, for example a time policy or a policy against the risks excluded by the f.c. and s. clause, it becomes necessary also to inquire in what exactly the loss consists and when it happens, and in such cases it cannot be predicated of the subject-matter insured that no loss has happened to it, when it has been so affected by perils insured against that nothing can save it from ultimate destruction. The element of uncertainty as to the effect of subsequent events may go to the measure of the loss or to the necessity of giving notice of abandonment, but it cannot prevent an operative peril, which has already taken charge of the ship, from being its cause of loss when its complete operation cannot be arrested.

The appellants' argument took up the incidents of this casualty in the reverse order. They found a sinking of the *Clan Matheson* in consequence of a collision, in which, having fallen athwart the course of the *Western Front*, she was cut into by that vessel's bows, as she proceeded on her course pursuing the warlike operation in which she was engaged. "Here," said they, "is the cause of the loss, and the rule of proximate cause forbids any anterior research for a remoter cause or condition." The validity of this argument depends entirely on its being established that the impact of the *Western Front* was the proximate cause of the loss, that the collision which thus took place would have been excluded from an ordinary marine policy by the perils specified in cl. 19, and that the advance of the *Western Front* through the water was, in the circumstances, in itself a warlike operation. For this purpose the facts must be looked at. When an assured is covered equally by two policies he may be entitled to recover against whichever policy he chooses to rely on, but, if he is covered in one event only by one and by another only in another event, he has not a free choice to elect what peril he will declare to win on, but must be governed by the facts of the casualty. If the true view of the facts is that the *Clan Matheson* was already a lost ship before the impact occurred, the subsequent events only determine the mode and measure of a loss, already caused aliunde. On the facts, WRIGHT, J., and, as I read their judgment, the majority of the Court of Appeal, considered that this was so, and I agree with them. If so, the above argument fails in limine, and the *Western Front* was not the cause of this loss. I forbear to criticise the other elements involved in that argument. Hostilities only terminated a little over ten years ago, nor were warlike operations necessarily brought to an end even by the armistice, and in the deliberate gestation of government law suits we do not know what further appeals may yet await decision or what arguments founded on the "warlike operations" cases and *Reischer* v. *Borwick* (9) may need consideration in the course of them. Accordingly, I will only venture to add this. In arguing questions of proximate cause in marine insurance the temptation is always strong to resort to a minute analysis of the circumstances of a casualty in order to place the cause as proximately to the conclusion of them as possible. It is a natural way in which to apply the rule as it is laid down in the books. I think, however, that LORD BACON'S warning against inquiry into the causes of causes applies equally forcibly to a microscopic analysis of the incidents of a casualty as a means of discovering the proximate cause. His phrase appears to me to apply equally to an infinitely intensive analysis as to an infinite historical retrospect. I think that the appeal fails.

LORD WARRINGTON.—On the night of May 22–23, 1918, in mid-Atlantic, the *Clan Matheson*, a ship belonging to the appellants, was sunk as the result of a

collision with a ship called the *Western Front*, in charter to the American government, manned by naval ratings and carrying war stores to Nantes, the American base in France. The *Clan Matheson* was in charter to the British government under the well-known pro forma charter T.99, under which the government take the risks of war, including particularly all consequences of hostilities or warlike operations. The appellants contend that the sinking of the *Clan Matheson* was a consequence of warlike operations, and that accordingly the government, now represented by the respondents, the Board of Trade, is liable for her loss. The respondents, on the other hand, insist that the sinking was an ordinary peril of the seas for which they are not liable. The question was referred to the late Mr. Claughton Scott as sole arbitrator, and on March 28, 1928, he made his award in the form of a Special Case. He found as facts and held in so far as they were questions of law: (i) That the *Clan Matheson* was not at any material time engaged upon or carrying out a warlike operation. (ii) That there was no negligence on the part of the appellants or any of those in charge of the *Clan Matheson*. (iii) That immediately before the collision the steering gear of the *Clan Matheson* broke down and failed to operate and that by reason thereof the said vessel sheered to port and across the course of the *Western Front*. (iv) That the sinking of the *Clan Matheson* was proximately caused by the impact of the *Western Front* moving in the course of a warlike operation which she was then carrying out. (v) That the sheering of the *Clan Matheson* to port was not the real or proximate cause of her loss within the meaning of the charterparty. (vi) That the sinking of the *Clan Matheson* was a consequence of warlike operations within the meaning of the charterparty, and he accordingly held, subject to the opinion of the court upon the question of law submitted by him, that the sinking of the *Clan Matheson* was a consequence of warlike operations within the meaning of the charterparty, and that the respondents were liable to pay to the appellants the value of the ship at the time of the accident, viz., £265,000.

The Special Case was heard by WRIGHT, J., on May 9 and 14, 1928, and he, in a very careful and elaborate judgment, held that the loss of the *Clan Matheson* was not a consequence of warlike operations, and that, accordingly, the respondents were not liable. On appeal to the Court of Appeal that court, on July 19, 1928, by a majority (SCRUTTON and LAWRENCE, L.JJ.; GREER, L.J., dissenting), affirmed the judgment of WRIGHT, J., and dismissed the appeal. Hence the present appeal.

It is unnecessary to state the facts in detail. It is enough to say that the ships were sailing in convoy under escort of ships of war and without lights, but it is not contended, and in fact could not on the authorities be successfully contended, that that in itself was a warlike operation: *Britain Steamship Co., Ltd.* v. *R.* (1) and *Green* v. *British India Steam Navigation Co., Ltd., British India Steam Navigation Co., Ltd.* v. *Liverpool and London War Risks Insurance Association, Ltd.* (1). It is admitted on both sides that the *Western Front* was and the *Clan Matheson* was not engaged in a warlike operation. It is also, in my opinion, clear that from the moment the breakdown of the steering gear occurred—a matter of from two-and-a-half to four minutes before the collision—the collision was inevitable. The question then is: What was the real or proximate cause of the loss? Was it the impact of the *Western Front* against the side of the *Clan Matheson*, and that alone, or was it the breakdown of the steering gear of the *Clan Matheson* rendering the collision inevitable? In *Ionides* v. *Universal Marine Insurance Co.* (6) the main question was whether the hostile act of the confederate authorities during the civil war in America in extinguishing a light on Cape Hatteras was the proximate cause of the stranding of a ship or whether the fact that the master was out of his reckoning was such proximate cause, and it was held that the latter was the proximate cause, although, if the light had not been extinguished, the stranding would probably not have happened. In giving judgment, ERLE, C.J., gives some illustrations (14 C.B.N.S. at p. 286) which are of value in the present case. A ship driven by an attempt at capture into an inhospitable bay and there driven ashore by the wind and lost. The attempt at capture would be the real and proximate

cause, though the loss would not have happened but for the violence of the wind. In the converse case the ship succeeds in getting out of the bay, but encounters a gale which she would not have encountered but for the delay and is lost. Here the proximate cause is the gale, though but for the attempt at capture it might not have been encountered.

So here the collision in a sense occurred, inasmuch as it became then inevitable, as soon as the steering gear of the *Clan Matheson* broke down, and I think this misfortune should be regarded as the real and proximate cause of the loss, though the loss would not have occurred had not the *Western Front* been in the position in which she in fact was. I desire to express agreement with and to adopt the remarks of LORD SUMNER in *A.-G.* v. *Adelaide Steamship Co.* (4) ([1923] A.C. at p. 305), the case of *The Warilda*:

> "When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation."

In my opinion these remarks apply equally where it is proved, as I think it is in this case, that the collision was caused by the failure of the ship to obey the will of the officer. For these reasons I think that I am justified in coming to the conclusion that the judgments of WRIGHT, J., and SCRUTTON and LAWRENCE, L.JJ., are correct, and that this appeal fails and ought to be dismissed, with costs.

LORD BUCKMASTER concurred.

Appeal dismissed.

Solicitors: *Ince, Colt, Ince & Roscoe; Solicitor to the Board of Trade.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BOARD OF TRADE *v.* HAIN STEAMSHIP CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Viscount Dunedin, Viscount Sumner, Lord Atkin and Lord Warrington), April 25, June 14, 1929]

[Reported [1929] A.C. 534; 98 L.J.K.B. 625; 141 L.T. 435; 45 T.L.R. 550; 18 Asp.M.L.C. 15; 35 Com. Cas. 29]

Insurance—Marine insurance—War risk—Exclusion—Loss six weeks after armistice declared—"Warlike operation"—Carriage of mines—Collision with merchant vessel due to joint negligence.

In 1917 the steamship *T.*, belonging to the claimants, was requisitioned by the Admiralty, under charterparty T.99, which provided that the Crown would undertake to indemnify the owners in respect of all consequences of warlike operations while the owners would continue to bear the marine risks. On Dec. 25, 1918, six weeks after the armistice had been signed, the *T.* was on a voyage from the United States with a cargo of oats, and a steamer, the *R.*, which had been requisitioned by the United States government, was on a voyage from England to the United States with a cargo of mines. The ships came into collision in mid-Atlantic owing to the negligence of both of them, both being equally to blame.

Held: (i) there was evidence on which the arbitrator could find that the collision was a consequence of warlike operations, even although it happened after the declaration of the armistice; (ii) at the time of the collision the *R.* was engaged in a warlike operation; (iii) the negligence of the *T.* did not prevent the collision being the consequence of warlike operations; and, therefore, the Crown was liable under the charterparty.

Notes. Referred to: *Yorkshire Dale Steamship Co.* v. *Minister of War Transport*, [1942] 2 All E.R. 6; *Clan Line Steamers, Ltd.* v. *Liverpool and London War Risks Insurance Association, Ltd.*, [1942] 2 All E.R. 367; *Larrinaga Steamship Co., Ltd.* v. *R.*, [1945] 1 All E.R. 329.

As to the perils insured against in a marine policy, see 22 HALSBURY'S LAWS (3rd Edn.) 73 et seq.; and for cases see 29 DIGEST 197 et seq.

Cases referred to:

(1) *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*, [1923] A.C. 191; 92 L.J.K.B. 142; 39 T.L.R. 133; 67 Sol. Jo. 182; 28 Com. Cas. 296, H.L.; 29 Digest 226, *1838*.

(2) *A.-G.* v. *Adelaide Steamship Co., Ltd.*, [1923] A.C. 292; 92 L.J.K.B. 537; 39 T.L.R. 333; 67 Sol. Jo. 455; 28 Com. Cas. 315; sub nom. *Adelaide Steamship Co.* v. *R.*, 129 L.T. 161; 16 Asp.M.L.C. 178, H.L.; 29 Digest 228, *1850*.

(3) *Reischer* v. *Borwick*, [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238; 10 T.L.R. 568; 7 Asp.M.L.C. 493; 9 R. 558, C.A.; 29 Digest 206, *1650*.

(4) *Leyland Shipping Co., Ltd.* v. *Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp.M.L.C. 258, H.L.; 29 Digest 229, *1858*.

(5) *Clan Line Steamers, Ltd.* v. *Board of Trade, The Clan Matheson*, ante, p. 17; [1929] A.C. 514; 98 L.J.K.B. 408; 141 L.T. 275; 45 T.L.R. 408; 35 Com. Cas. 15; 18 Asp.M.L.C. 1, H.L.; Digest Supp.

Appeal from an order of the Court of Appeal on a Special Case stated by an arbitrator.

In 1917 the steamship *Trevanion*, of which the claimants were the owners, was requisitioned by the British Admiralty under the terms of charterparty T.99. By cl. 18 of that charterparty,

> "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk."

By cl. 19:

> "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

On Christmas Day, 1918, about six weeks after the armistice was signed by Germany and the Allies in the first European war, the *Trevanion*, which was then carrying a cargo of oats, the property of the British War Department, from the United States of America, to Portland, for orders, collided in mid-Atlantic with the steamship *Roanoke*, which was then in the possession and under the control of the United States government, employed by that government solely for naval purposes as a regularly commissioned mine planter of the United States Navy, operated by the Navy Department, officered by commissioned officers of the United States Navy and manned by a United States naval crew. The arbitrator found that, at the time of the collision, the *Roanoke* was proceeding "under her aforesaid public employment" from Portland, England, to Hampton Roads, Virginia,

having 720 mines on board, but no other cargo and no passengers, and that there was no evidence with regard to the circumstances in or the purposes for which the mines were being carried. He found that both vessels were negligent and both were equally to blame.

The duration of the armistice was originally fixed at thirty-six days, but was subsequently extended from time to time. During the armistice the blockade conditions set up by the allied and associated Powers remained unchanged, and German merchant ships at sea and vessels carrying contraband goods remained liable to capture, but other hostilities had ceased. Up to the time of the armistice, the *Roanoke* had been employed as a warship engaged in operations of war, and the question was whether she was performing a warlike operation when proceeding, under orders, from England to America during the temporary and qualified suspension of hostilities at sea brought about by the armistice. The owners of the *Trevanion* contended that the armistice did not change the character of the *Roanoke*'s employment, and that, as the war had not terminated, the case was simply one of a warship in the employ of one of the belligerent Powers carrying munitions of war from one place to another during a state of war, and, consequently, that the *Roanoke* was engaged in a warlike operation at the time of the collision. The Board of Trade, on the other hand, contended that in order to render an operation "warlike" within the meaning of cl. 19, it must be one performed in furtherance of hostilities, or for combatant purposes, and that an American warship proceeding to America after the cessation of hostilities, with munitions of war which were no longer required, was not engaged in a warlike operation. The arbitrator, in deciding in favour of the owners of the *Trevanion*, found as a fact and held as a question of law that the *Roanoke*, at the time of collision, was performing a warlike operation; and he held, further, following the decisions in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (1) and *A.-G.* v. *Adelaide Steamship Co., Ltd.* (2), that the collision was a consequence of warlike operations, and that, therefore, the Crown was liable to indemnify the owners of the steamship *Trevanion* under the war risks clause of the charterparty T.99. The Court of Appeal (Scrutton, Lawrence and Greer, L.JJ.) held, reversing the decision of Rowlatt, J., (i) that at the time of the collision the steamship *Roanoke*, which was carrying the mines, was engaged in a warlike operation, and (ii) that, as the *Roanoke* was engaged in a warlike operation, though conducted negligently, the Crown was not excused from liability under its war-risks clause, because the loss was equally caused by the negligence of another ship. The Crown was, therefore, liable, and the award of the arbitrator in favour of the shipowners must be restored. The Board of Trade appealed.

The Attorney-General (*Sir Thomas Inskip, K.C.*), *The Solicitor-General* (*Sir Boyd Merriman, K.C.*) and *Russell Davies* for the appellants.

C. R. Dunlop, K.C., and *R. H. Balloch* for the respondents.

The House took time for consideration.

June 14. The following opinions were read.

LORD BUCKMASTER.—At about 8.20 p.m. on Dec. 25, 1918, the steamship *Trevanion* collided in the North Atlantic with the steamship *Roanoke*, and suffered damage by which she was disabled for ninety-nine days. The *Trevanion* was at the date of the collision under requisition to His Majesty's Government upon the terms of the charterparty which, under the reference of T.99, has become familiar to the courts. The *Roanoke* was in the possession and control of the United States of America, and was employed by the United States Navy as a mine-planter, officered by officers of the United States Navy, and manned by a United States Navy crew. At the time of the collision the *Trevanion* was on a voyage from New York to Portland laden with a cargo of oats, and the *Roanoke* was proceeding from Portland to Hampton Roads, Virginia, with 720 mines on board belonging to the Navy Department of the United States of America, and she was carrying no other cargo and no passengers. The collision was due to the joint negligence

A of both vessels and both were equally to blame. The consequent dispute as to liability was referred to arbitration and the arbitrator found that the steamship *Roanoke* was at the time in question performing a warlike operation and that the collision was a consequence of hostilities or warlike operations. ROWLATT, J., on appeal, disagreed with this view, but his judgment was reversed by the Court of Appeal.

B The terms of the charterparty, the rights under which are in issue, need only a brief reference. Clause 18 exempts the Admiralty from liability if the ship be lost, among other things, "by collision . . . or by any other cause arising as a sea risk," but by cl. 19 the Admiralty themselves undertake the risks excluded from an ordinary insurance policy of marine insurance under the following clause: "Warranted . . . free from all consequences of hostilities or warlike operations C whether before or after declaration of war." Upon those clauses it is only necessary to make this comment—that, in my opinion, taken together, they provide a complete insurance against all loss arising as a sea risk, all that is excepted from the general clause being undertaken by the Admiralty. If, therefore, the Admiralty had been the marine insurer the result would have been that the ship would have had the benefit of a complete marine insurance policy without any of the exclusions D referred to in cl. 19. The first question that arises, therefore, is whether the collision was a consequence of hostilities or warlike operations; and the second, if this be so, is whether the fact of the negligence of the *Trevanion* prevents her owners from being entitled to recover. The first point appears to me to be one upon which it is possible that different views might reasonably be held. In December, 1918, the armistice had been declared and had been existing for some six weeks, and E it provided by art. 20 that there should be an immediate cessation of hostilities at sea, so that loss as a consequence of hostilities, meaning as I think it does, existing hostilities, is negatived. The war, however, had not ended, and, however improbable it may have been, it was quite possible that it could at any moment have been revived, and it is certain that the position must be regarded in the light of that possibility. The *Roanoke* was sailing into peaceful waters with a cargo of F mines, for what purpose is not stated, and these considerations point, to my mind, to the conclusion that she was not engaged in a warlike operation; but it is clear that there were other matters upon which the learned arbitrator might take the opposite view. It is essentially a question of fact, and I am not prepared to disturb his finding.

The remaining question can be shortly dealt with. This House has decided that G if a vessel is engaged on warlike operations and by its negligence collides with another vessel, the negligence does not prevent the collision from being the result of warlike operations: see *A.-G.* v. *Adelaide Steamship Co., Ltd.* (2). It is neither necessary nor fitting to discuss or examine the grounds of that judgment, for the law upon this point is authoritative and clear. It follows, therefore, that the negligence of the *Roanoke* does not prevent this collision from being the result of H warlike operations. Does, then, the negligence of the *Trevanion* produce that result? In my opinion it does not. I think that *Reischer* v. *Borwick* (3), approved by this House in *Leyland Shipping Co., Ltd.* v. *Norwich Union Fire Insurance Society, Ltd.* (4), shows that it is no answer to a claim under a policy which covers one cause of a loss that the loss was also due to another cause that was not so covered. It follows from this that the claim made against the *Roanoke*, which, I if it stood alone, would have been covered by the policy, is not the less covered because the *Trevanion* also contributed to the accident. For these reasons I think the appeal should be dismissed.

VISCOUNT DUNEDIN.—I concur.

VISCOUNT SUMNER.—In his award the learned arbitrator says:

"If and in so far as it is a question of fact, I find, and if and in so far as it is a question of law, I hold (subject to the opinion of the court) that the *Roanoke*,

at the time in question, was performing a warlike operation and that the collision was a consequence of hostilities or warlike operations" A

and your Lordships have to decide in this appeal whether he was right. I think he was. Though the armistice had been signed, and, having been renewed, was still current, war was not over nor was the renewal of war by any means out of the question. Except in so far as her destination may make the difference, the *Roanoke* was apparently doing what would have been one of her ordinary duties B flagrante bello, and, if she had been proceeding to her station off the coast of Germany, I do not think it would have been argued, in view of the authorities, that her voyage so made was not a warlike operation. The temporary cessation of hostilities, which is all that an armistice in itself involves, could not deprive the operation of that character.

The appellants' proposition was that it is not enough to prove what the *Roanoke* C was, unless it is also shown what she was doing. I recognise the high importance of considering the ship's errand and the purpose of her voyage, but I should have thought that, having proved an animal at large to be a lion, it was not further indispensable to prove that he was not at the moment merely performing as a lamb, unless, of course, some circumstances of ovine behaviour happened to be apparent. In truth the contention that the operation was not warlike—in other D words, that in the circumstances, whatever it was like, it was in truth peaceful—is founded mainly on the *Roanoke*'s destination, and partly, I think, on what is now knowledge, but then was only hope, that hostilities were actually over. Your Lordships were not much troubled with the question whether this matter was one of fact or of law; the point really urged was that there is no presumption here one way or the other as to the purpose of this voyage; that its character E depends on its purpose; and that for the purpose nothing short of affirmative proof will do. Had the vessel not been a regularly commissioned ship of war of the United States Navy this might well be so, but that is what she was in fact, namely, a "mine-planter," with 720 mines on board, ready and, for all we know, waiting, to be "planted." We have no right, in law or in fact, to assume without evidence that such a ship is not engaged on the duty for the service of which she F forms part of the Navy to which she belongs, and the mere fact that we do not know why she was sailing away from the ordinary area of hostilities for purposes unknown does not establish such a conclusion, however ample the scope for speculation may be. It is not for us to presume to know all the purposes of the naval authorities of the United States at that time. In the absence of knowledge I think that the arbitrator committed no error of law in presuming that the purpose G of her voyage was such as to consist with her general warlike character, and in the like absence I think it would be useless for me to estimate the chance of her mission being of one kind rather than of another. This is a stronger case than that of a man-of-war, returning to her home port still equipped with her permanent armament. Live mines, I hope one may be justified in saying, are not generally supposed to be things either required in time of peace or convenient for storage H at home against the next war, nor do they constitute so safe a cargo as to tempt any prudent authority to keep them on hand if they are no longer wanted, and, in so far as this was a question of fact, I think that the learned arbitrator was entitled, if he was so minded, to say so.

It was argued, though I do not think that this question was submitted by the Special Case, that the collision here was not a risk taken by the Admiralty under I charter form T.99, because cl. 18 excepts "collision." I think this reasoning is fallacious. Each ship ran into the other, and, as the award finds, the collision "was caused by the negligent navigation of both vessels" and "both were equally to blame." For the purpose of an insurer's liability this means that the loss—whichever ship is regarded as the sufferer—was the result of two causes, jointly and simultaneously in operation—for the *Roanoke* ran into the *Trevanion* and the *Trevanion* ran into the *Roanoke*. If the respondents had claimed indemnity for this from Lloyd's underwriters the answer would have been: "This loss, which is a

collision loss, is one loss, the product of two causes, joint and simultaneous, namely the eccentric courses steered by the two vessels. The whole voyage of the *Roanoke*, and, therefore, this part of it, was a warlike operation, and from losses so caused this policy is warranted free. Neither in law nor in fact is this collision and its resulting damage apportionable—hence no part of it can fall on this policy." This defence would have succeeded and, under cl. 19 of charterparty T.99, this, coupled with proof that the *Roanoke*'s voyage truly was a warlike operation, would have brought the case within the cover given by the Admiralty. Clause 18 must not be read so as to eviscerate cl. 19; both stand together. I think cl. 18 only excludes such collisions as do not otherwise come under cl. 19 as being both excluded by the ordinary f.c. and s. clause and also caused by a warlike operation. Accordingly, I think that the appeal fails.

LORD WARRINGTON.—On Dec. 25, 1918, the respondents' steamship *Trevanion* came into collision in the North Atlantic with the steamship *Roanoke* and suffered considerable damage. The *Trevanion* was at the time of the collision under requisition to H.M. Government upon the terms of the pro forma charterparty known as T.99. The question in this appeal is whether the damage sustained by the *Trevanion* was a consequence of warlike operations within the meaning of cl. 19 of the charterparty. The question was in the first instance referred to Mr. Raeburn, K.C., who stated his award in the form of a Special Case. He held that on the facts found or admitted the collision was a consequence of warlike operations. This decision was reversed by ROWLATT, J., whose judgment was in turn reversed by the Court of Appeal (SCRUTTON, LAWRENCE and GREER, L.JJ.). Hence this appeal.

At the date of the collision the armistice, concluded on Nov. 11, 1918, was in force. Under its terms hostilities at sea were suspended, but the existing blockade conditions were to remain unchanged. It is common ground that the *Trevanion* was not engaged in a warlike operation. She was on a voyage from New York to Portland. At the time of the collision she was exhibiting the regulation lights, but not the optional masthead light. The following are the findings of the arbitrator on which the question turns:

> "5. The steamship *Roanoke* at the time in question was in the possession and control of the United States of America under a bare boat charter. During the period from June 25, 1918, to Jan. 25, 1919, she was employed by the United States of America solely for naval purposes as a regularly commissioned mine-planter of the United States Navy, operated by the Naval Department, officered by commissioned officers of the United States Navy, and manned by a United States Navy crew. At the time of the collision with the *Trevanion* the *Roanoke*, under her aforesaid public employment, and officered and manned as above stated, was proceeding from Portland, England, to Hampton Roads, Va., with 720 mines on board belonging to the Navy Department of the United States of America and was carrying no other cargo and no passengers. She was exhibiting the regulation lights. There was no evidence before me as to the circumstances under, or the purposes for, which the mines in question were being carried. 6. Having carefully considered the evidence as to the said collision, I find that it was caused by the negligent navigation of both vessels, and that both were equally to blame. The said negligence consisted in a bad look-out on both, insufficient porting by the *Trevanion*, and failure to keep her course on the part of the *Roanoke*."

The appellants contended: (i) That the fact of the collision occurring during suspension of hostilities of itself prevented it from being caused by a warlike operation; (ii) that, even if this fact was insufficient, the absence of any evidence as to the circumstances in and the purposes for which the mines were being carried rendered it impossible properly to find that the *Roanoke* was engaged on a warlike operation; (iii) that the negligence of those on the *Trevanion* prevented the collision from being a consequence of warlike operations. As to the first of these conten-

tions, I agree with the arbitrator and the Court of Appeal. Hostilities were suspended, but the war was not at an end, and, in my opinion, it was open to the arbitrator to hold that, notwithstanding the suspension of hostilities, the voyage of the *Roanoke* in the circumstances found by him was a warlike operation. As to the second, the arbitrator has found that during the period including the day of the collision the *Roanoke* was employed solely for naval purposes as a regularly commissioned mine-planter carrying a large cargo of mines. In a state of war that fact is, in my opinion, enough to constitute her voyage a warlike operation. It could not be denied that on the voyage out she was engaged in such an operation, and, in the absence of evidence to the contrary, the same quality must, in my opinion, attach to the remainder of her voyage. Supposing the impact of the collision had exploded the mines or some of them causing further damage, it would have surely been impossible to contend that this was not a consequence of a warlike operation, yet the mere accident of the explosion would not alter the nature of the voyage. As to the third contention, I think the point is concluded by the decision of this House in *A.-G.* v. *Adelaide Steamship Co., Ltd.* (2). It was there held that the negligence of the warship did not prevent the collision from being a consequence of warlike operations. If this is so, how can the negligence of the other ship contributing, but only contributing, to the collision have that effect? On the finding of the arbitrator it is impossible to say that the negligence of either ship by itself was the proximate cause of the collision.

This case is clearly distinguishable from *Clan Line Steamers, Ltd.* v. *Board of Trade*, *Clan Matheson* (5), recently decided in your Lordships' House, in which it was held that the proximate cause of the collision was the breaking down of the steering gear of the merchant vessel, rendering the collision inevitable from the moment when it occurred. I agree that the appeal fails and must be dismissed.

LORD ATKIN.—I agree with the opinion which has been delivered by my noble and learned friend, VISCOUNT SUMNER, and have nothing to add.

Appeal dismissed.

Solicitors: *Solicitor to the Board of Trade*; *Thomas Cooper & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HOBBS *v.* C. T. TINLING & CO., LTD.
HOBBS *v.* NOTTINGHAM JOURNAL, LTD.

[COURT OF APPEAL (Scrutton, Greer and Sankey, L.JJ.), February 7, 8, 11, 12, 13, 14, March 13, 1929]

[Reported [1929] 2 K.B. 1; 98 L.J.K.B. 421; 141 L.T. 121; 45 T.L.R. 328; 73 Sol. Jo. 220]

Libel—Definition of defamatory libel—Damages—No need to prove special damage—Mitigation—Proof of plaintiff's bad reputation—Matters for consideration—Right of plaintiff to nominal damages—Evidence—Cross-examination of plaintiff to credit—Direction to jury—Inadmissibility of evidence in chief to contradict plaintiff's answers.

The civil wrong of publishing a defamatory libel is committed by anyone who publishes a written or printed statement expressed in such a way that it would be understood by reasonable people to injure appreciably the reputation of another person among reasonable people acquainted with him. A plaintiff may recover general damages for such a statement without proving his actual reputation or any actual damage.

A defendant may mitigate the damages for libel by proving that the plaintiff already has a bad reputation. The jury may take the view that his reputation is so bad that the defamatory statement complained of would reasonably and ordinarily cause much less damage to him than would be caused to a man of good reputation by the same statement. They may take the view that his reputation was so bad before the defamatory statement was published that no further defamatory allegation could make it worse, but they would have to consider, before taking such a view, the undoubted fact that the worse a man's character is, the more ready are people to believe evil reports about him, and to face the question whether it is lawful or desirable that, because a man's character is bad, anyone should be at liberty to make any defamatory statements they like about him, regardless of their untruth. They are also entitled, in estimating the amount of the damages, to consider, not only the character of the plaintiff, but also the character of the defendants, that a man with a damaged character is entitled to have that character protected, and, if newspapers for their own purposes falsely allege that he has been guilty of crimes and misconduct, that even a man of bad character ought not to have his character made out to be blacker than the proved facts warrant. It is not permissible, in mitigation of damages, to go into evidence which, if proved, would constitute a justification which has not been pleaded. Where a plaintiff has proved a statement which is primâ facie defamatory and not excused by justification, privilege, or fair comment, proof that he has a bad reputation is not an answer to the action, but he is always entitled at least to nominal damages.

The defendant may mitigate the damages by calling evidence to prove that the plaintiff is a man of bad general reputation, which the plaintiff may rebut by evidence of his good general reputation, but it is not open to him to give evidence of particular facts in support of his claim to have a good character, nor is it open to the defendant to give evidence or to cross-examine as to particular instances to show the disposition of the plaintiff with the object of diminishing the damages, nor may he give evidence of rumours at the time of publication to the same effect as the libel.

If in examination-in-chief the plaintiff gives evidence of any fact and the defendant disputes that fact, the defendant is entitled to cross-examine the plaintiff to credit on matters not directly material to the case—in particular, about details of misconduct—in order to ask the jury to infer from his answers that he is not worthy of belief, but great care has to be taken to see that a jury

appreciates that the destruction of the plaintiff's evidence does not prove the opposite and that answers given to such a cross-examination may not be relevant on the issue of mitigation of damages. As the cross-examination is on matters not directly material to the case, the defendant is not allowed to call evidence in chief to contradict the plaintiff's answers.

Judge—Duty—To inform parties of communication from jury—Procedure when jury intimate decision against party whose case is not yet concluded—Right of judge to comment on evidence.

Any communication from the jury to the judge in the course of a trial should, in the absence of compelling reason to the contrary, be communicated to the parties, the judge informing the parties what answer he proposes to make to it.

When a jury informs the judge before the plaintiff's case has finished that they desire to find for the defendant, or that they desire to find for the plaintiff before they have heard the defendant, the judge can, if he thinks that this premature intervention renders it impossible for the trial to proceed with justice, discharge the jury and order a re-trial, or, if he thinks that justice can still be done, he may inquire of the party whose case has not been completed if he wishes to complete it, and that party has the right to complete his case, to re-examine any witnesses under cross-examination, to call any other evidence he desires, and to address the jury if he wishes. The plaintiff's counsel, if his opponent has put in evidence, will address the jury last. The judge is bound to sum up to the jury sufficiently to make clear what are the issues which they have to decide. If the jury, after hearing counsel, say that they are still of the same opinion, this does not relieve the judge of the duty of so directing them that they understand what issues they are to decide and on what evidence.

A judge is entitled to form his own opinion about a plaintiff and his evidence and himself to cross-examine him whenever he thinks it proper to do so, provided that when the time comes he accurately sets out to the jury the evidence and gives them to understand that it is their judgment, and their judgment only, on which the case has to be decided. Throughout the giving of evidence and when he is directing the jury the judge is clearly entitled to express his opinion on the facts of the case and make such comments as he thinks right, provided that he leaves the issues of fact to the jury to determine, making it clear to them that they are the judges of fact and not he and that his observations are only submitted for their consideration and guidance and may be disregarded if they do not agree with them. He may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all.

Court of Appeal—New trial—Misdirection—No right to refuse new trial on ground of no miscarriage of justice.

Per GREER, L.J.: If there is any misdirection or other ground put forward in support of an application for a new trial the Court of Appeal cannot speculate whether the same verdict would have been given if there had been no such misdirection. If it is possible that on a proper direction the jury might have given another verdict, the court cannot assume that that proper direction would have made no difference and say that there has been no miscarriage of justice.

Notes. Considered: *Hawkins* v. *Express Dairy Co.* (1940), 84 Sol. Jo. 393, Applied: *D. and L. Caterers, Ltd., and Jackson* v. *D'Ajou*, [1945] 1 All E.R. 563. Distinguished: *Beevis* v. *Dawson*, [1956] 3 All E.R. 837. Referred to: *Farmer* v. *Hyde*, [1937] 1 All E.R. 773.

As to damages for libel, see 24 HALSBURY'S LAWS (3rd Edn.) 6, 113 et seq.; as to evidence of character, see 15 HALSBURY'S LAWS (3rd Edn.) 293, 294; as to impeaching the credit of a witness, see ibid., 446–449. As to procedure generally, see tit. PRACTICE AND PROCEDURE, 26 HALSBURY'S LAWS (2nd Edn.); and as to an

order for a new trial, see ibid., 124–128. For cases see 32 DIGEST 164 et seq.; 22 DIGEST (Repl.) 70, 477 et seq.; and vol. PLEADING, PRACTICE AND PROCEDURE.

Cases referred to:

(1) *Scott* v. *Sampson* (1882), 8 Q.B.D. 491; 51 L.J.Q.B. 380; 46 L.T. 412; 46 J.P. 408; 30 W.R. 541, D.C.; 17 Digest (Repl.) 113, *264.*

(2) *Bracegirdle* v. *Bailey* (1859), 1 F. & F. 536, N.P.; 32 Digest 167, *2037.*

(3) *Tripp* v. *Thomas* (1824), 3 B. & C. 427; 1 C. & P. 477; 5 Dow. & Ry. K.B. 276; 3 L.J.O.S.K.B. 42; 107 E.R. 792; 17 Digest (Repl.) 188, *840.*

(4) *Speck* v. *Phillips* (1839), 5 M. & W. 279; 7 Dowl. 470; 8 L.J.Ex. 249, 277; 3 J.P. 421; 151 E.R. 119; 17 Digest (Repl.) 107, *213.*

(5) *Watt* v. *Watt*, [1905] A.C. 115; 74 L.J.K.B. 438; 92 L.T. 480; 69 J.P. 249; 53 W.R. 547; 21 T.L.R. 386; 49 Sol. Jo. 400, H.L.; 17 Digest (Repl.) 177, 721.

(6) *Harris* v. *Tippett* (1811), 2 Camp. 637, N.P.; 22 Digest (Repl.) 485, *5352.*

(7) *A.-G.* v. *Hitchcock* (1847), 1 Exch. 91; 2 New Pract. Cas. 321; 16 L.J.Ex. 259; 9 L.T.O.S. 270; 11 J.P. 904; 11 Jur. 478; 154 E.R. 38; 22 Digest (Repl.) 485, *5367.*

(8) *R.* v. *Wood, Ex parte Anderson*, [1928] 1 K.B. 302; 97 L.J.K.B. 113; 138 L.T. 224; 91 J.P. 185; 44 T.L.R. 23; 25 L.G.R. 501; 28 Cox, C.C. 446, D.C.; Digest Supp.

(9) *Goby* v. *Wetherill*, [1915] 2 K.B. 674; 84 L.J.K.B. 1455; 113 L.T. 502; 79 J.P. 346; 31 T.L.R. 402, D.C.; 30 Digest (Repl.) 270, *343.*

(10) *De Freville* v. *Dill* (1927), 43 T.L.R. 431; 71 Sol. Jo. 430, C.A.; 30 Digest (Repl.) 267, *314.*

(11) *Ural Caspian Oil Corpn., Ltd.* v. *Hume-Schweder* (1913), "The Times," July 31.

(12) *Bray* v. *Ford*, [1896] A.C. 44; 65 L.J.Q.B. 213; 73 L.T. 609; 12 T.L.R. 119, H.L.; 17 Digest (Repl.) 185, *811.*

(13) *R.* v. *O'Donnell* (1917), 12 Cr. App. Rep. 219, C.A.; 14 Digest (Repl.) 331, *3209.*

(14) *Palmer* v. *Trower* (1852), 8 Exch. 247; 22 L.J.Ex. 32; 155 E.R. 1338; 22 Digest (Repl.) 486, *5369.*

Appeal from a verdict and judgment of LORD HEWART, C.J., and a special jury in an action for libel. The facts appear in the judgments.

Serjeant Sullivan, K.C., and *Martin O'Connor*, for the plaintiff.

Birkett, K.C., Roland Oliver, K.C., and *E. G. Kimber*, for the defendants.

Cur. adv. vult.

Mar. 13.—The following judgments were read.

SCRUTTON, L.J.—In this case, I have come, with regret, to the conclusion that the court should order a new trial. My regret is occasioned by the consideration that it is quite possible that a jury, properly directed on relevant evidence, may arrive at the same conclusion as that at which the jury arrived in this case, and the court will not be able, even if it wanted to, to disturb that verdict. But, in my opinion, the plaintiff is entitled to complain that he has not had a satisfactory trial in two respects. First, because evidence of particular acts and incidents was admitted in cross-examination in mitigation of damages. Second, and independently of the first ground, because the jury had no proper summing-up and direction on the question which they had to consider, especially on the failure of the defendants to justify their defamatory statements and the effect of the cross-examination to credit. The worst of criminals is entitled to a fair hearing according to rules of law. I am not expressing any opinion whether Hobbs will ultimately be proved, as the defendants contend, although they do not assert their libel to be true, to be of the character I have referred to; but he is entitled to be presumed innocent until he is proved, by a trial according to rules of law, to be guilty; and I regret to say that I do not think that he got such a trial. Mr. Hobbs is entitled to justice, and I hope that he will get it.

William Cooper Hobbs, on Mar. 9, 1925, was found guilty of a very disgraceful conspiracy to defraud in connection with a successful attempt to blackmail an Indian Prince, visiting Europe, very imperfectly disguised at the trial, under the pseudonym of "Mr. A." On Mar. 10, the day after the conviction, there appeared in a number of newspapers, articles purporting to give the previous life history of Hobbs—articles of a most defamatory nature—containing a series of allegations of crimes and misconduct, not connected with the offence for which Hobbs had just been convicted. On coming out of prison, at the end of 1926, Hobbs commenced a number of actions for libel against these papers—some twenty in all. Some of the papers justified and afterwards settled; others did not justify, but paid a very small sum into court; others settled the actions for sums not specified. We were told that in no case settled out of court had Hobbs obtained an apology or withdrawal of charges. The present action of *Hobbs* v. *C. T. Tinling & Co., Ltd.*, the proprietors of the "Liverpool Evening Express," was the first action which came into court. The libel complained of contained more than a dozen allegations of criminal or dishonest or disreputable conduct, not connected with the "Mr. A." case. He was said (i) to have financed burglaries; (ii) to have instituted a passport office for criminals; (iii) to have become a receiver of stolen property; (iv) to have been dismissed for dishonesty by a firm in Smithfield Market; (v) to have for long been associated with one of the worst race-gangs; (vi) to have run a gambling den in Paris, where a named person was fleeced of £46,000, and so on. The statement of claim set out the libel in its second paragraph, and its third paragraph alleged an innuendo which practically repeated the statements in the libel, but began with a general statement "that the plaintiff had practised dishonest methods all his life," and ended with a statement "that he had been all his life a notorious criminal." The defence was remarkable; it did not allege that any of the defamatory statements in the libel were true; there was no plea of justification or fair comment. But in respect of para. 2, setting out the words of the libel, the defendants paid 20s. into court as sufficient damages. They made no payment into court in respect of the innuendo in para. 3, as to which they denied "that the words were capable of bearing the alleged meanings or any of them." As the greater part of the innuendo was merely repeating the words of the libel, it was difficult to understand why this form of plea was adopted, or how any jury, properly directed, could have avoided finding that the words would reasonably be understood to have the meanings alleged in the innuendo. The junior counsel for the defendants informed the court that he pleaded in this form to avoid a motion for judgment. It appeared that the real line of defence was: "It is true that we have made a number of defamatory statements about you, none of which we can prove, and which must be taken to be untrue, but we are going to prove that your character is so bad that our defamatory lies can cause you no damage, and you have no remedy against us." It is, in my opinion, much to be regretted if this view is to be readily acceded to, and if persons, whether newspaper proprietors or private persons—and newspapers, except in one or two limited respects, have no greater rights than private persons—can recklessly publish untrue and defamatory statements about persons, and then shelter themselves under the plea: "Your character is so bad that we may make any untrue statement we like about you, with impunity." In my opinion, any jury to whom such a plea is addressed should receive the most careful direction from the judge, pointing out to them the effect of the course which they are asked to adopt.

The issues on the pleadings as they stood were (i) What damages has the plaintiff suffered by the publication of the words alleged in para. 2, with the dependent question of which the jury were—properly—not told: "Is the sum paid into court sufficient to cover those damages?" (ii) Would the words be understood by reasonable people to have the meanings alleged in the innuendo? (iii) If "Yes," what damages, there being no payment into court in respect of the innuendo? These being the pleadings, the plaintiff was called on to make an affidavit of documents, which, in my opinion, was properly a very short one. There was no justification of

A the libel, and he could not be called on to include every document which might conceivably be the subject of a plea in mitigation of damages, limited by the rule in *Scott* v. *Sampson* (1) to which I shall refer later, still less every document which might be material to every incident in his life on which he might be cross-examined as to credibility.

The defendants then filed a plea in mitigation of damages under Ord. 36, r. 37. B The first paragraph of this plea appears to be a statement of the conviction in the "Mr. A." case, which was alleged in the libel, and which, oddly enough, the defendants had not justified. The second paragraph states certain dates with regard to the business connected with the name of Appleton & Co., carried on by Hobbs in connection with various solicitors. If there was anything defamatory in the mention of Appleton & Co. in the libel, the defendants had not justified it, C and could not use particulars in mitigation to justify it. How these dates were admissible in mitigation of damages, in view of the rulings in *Scott* v. *Sampson* (1), I do not understand. There then followed six long paragraphs setting out the details of the evidence given in the "Mr. A." case, which I understood were said to be evidence justifying the conviction, and also evidence of the circumstances in which the libel, making untrue defamatory statements about entirely different D matters, was published, and, lastly, there was the allegation—in my opinion, the only allegation properly included in the particulars—which is in para. 10, and is as follows: "That the plaintiff was a man of worthless reputation and character, being known to the police, and in the profession of the law as such." Paragraph 9 may possibly have some relevance, though I doubt it. It reads: "Immediately following the result of the plaintiff's trial there were published in a great number of E newspapers and journals throughout the country articles purporting to give the story of the life of the plaintiff in this action, and the defendants had no reason to believe that the said articles were untrue." That appears to be a statement of rumours which has been excluded by *Scott* v. *Sampson* (1) as inadmissible.

The case then went to trial. The plaintiff's counsel might have abstained from putting the plaintiff in the box, risking the taunt that the plaintiff dare not face F a British jury, and either relying on the presumption that the plaintiff was of good character, or calling evidence, if he could, of the good general reputation of the plaintiff. He might admit the plaintiff's conviction and that he had been punished for it, but urge that this did not entitle the defendants to tell other defamatory lies about him. He might have put the plaintiff in the box for cross-examination, relying on the rule in *Scott* v. *Sampson* (1), and the decision in *Bracegirdle* v. G *Bailey* (2) that, if the plaintiff said nothing, one could not cross-examine him to credit, for there was nothing to credit or discredit, in order to limit the cross-examination. This might have put the defendants in a difficulty, though, of course, I am expressing no final opinion on the matter. Plaintiff's counsel took a third course; after stating the effect of the pleadings and the denial of the innuendo, he said: "It is necessary that I should state to you the true story of the plaintiff's H life, and especially point out to you what is the truth of the several matters alluded to in this publication." As the "several matters" were not justified, and must be taken to be untrue, I am not clear that plaintiff's counsel was entitled on the pleadings to give evidence of specific facts from which good character or reputation might be inferred, as distinguished from evidence of general good reputation. However, he did so without objection. The sort of statements made may be I illustrated by the fact that whereas the libel stated that Hobbs was employed in Smithfield Market and dismissed for dishonesty there, counsel stated and proved that Hobbs never was employed at the market at all, was never dismissed for dishonesty there, and that, on the contrary, his named employers made him presents on his leaving them. I shall deal later with the effect of such an opening and evidence on the conduct of the case.

In the course of the opening, counsel referred to Hobbs's connection with a Mr. Appleton, a solicitor, who died in 1917. The libel said that Hobbs, who was not a solicitor, persuaded Appleton, who was a solicitor, to enter into partnership with

him. It said nothing more about Appleton. Whatever defamatory meaning the words of the libel might reasonably bear were not justified by the defendants. The particulars of mitigation of damages said nothing more than that from 1896 to 1917 Hobbs was associated with C. F. Appleton, a qualified solicitor, in the business, profession and practice of a solicitor. The plaintiff's counsel said that Hobbs was not working for Appleton from 1910 to 1915, and that he went back to Appleton's service in 1915, on the terms of a letter from Appleton, which he read. On this the defendants' counsel, with the remark, "I do not want to make complaints," said that the letter was not disclosed, might he have a copy of the letter as well as a copy or copies of any other documents the plaintiff's counsel proposed to use. The Lord Chief Justice said "that seems reasonable"; plaintiff's counsel said, "Decidedly"; and the matter apparently dropped. Plaintiff's counsel, in one sentence, said that when Appleton became ill in 1916 he gave Hobbs a power of attorney, dated Sept. 8, 1916, and that when he died in 1917 he left Hobbs, by his will, half the proceeds of the sale of his business and of his bank balance. No comment was made at the time about the absence of the power of attorney or will from the affidavit of documents. In fact, the solicitor for the defendants, acting for another newspaper in another Hobbs' action where justification was pleaded, had had the power of attorney disclosed to him, and he was in close touch with the widow of Mr. Appleton and the independent solicitor who had advised her at the time of Appleton's death. There was no possible practical grievance to be made out of the absence of the power of attorney from the affidavit of documents in the present case, but counsel for the defendants, who was erroneously instructed, as he afterwards admitted, that the power of attorney, which, he said, was of the utmost importance, had never been disclosed, submitted that it and other documents had been intentionally omitted in order to keep the defendants in the dark.

The Lord Chief Justice then said to counsel for the defendants: "You submit that the omission here made by the person who made it was intentional?" Mr. Norman Birkett: "I do, my Lord." The Lord Chief Justice: "What do you ask me to do, Mr. Birkett?" Mr. Birkett: "Of course I must consider public time, and I must consider the money which a case of this kind necessarily involves. I should have asked, in the ordinary course, for an adjournment." The Lord Chief Justice: "If you ask me for an adjournment you shall have an adjournment." Mr. Birkett: "I do not. I prefaced it by saying that those considerations are in my mind. I submit that your Lordship should direct that all the documents which are to be referred to in this case, the power of attorney—which is of the utmost importance—given in 1916, before the death of Appleton, and the marriage settlement, to which reference has been made and a most partial view of it given by my learned friend, should be supplied." The Lord Chief Justice: "Most certainly. This is elementary. These documents ought to have been in the affidavit of documents, and nobody knows that better than your client, Serjeant Sullivan. I shall deal with the matter at the conclusion of the case, but in the meantime let me say two things very clearly. If any document is sought to be used in this case, the original or a copy of it must have previously been supplied to the other side. Secondly, I shall not allow any document to be used in this case which has not been so dealt with." This was a most unfortunate proceeding. The Lord Chief Justice's view that the supposed non-disclosure of the document was contrary to elementary rules, and Hobbs must have known it, was arrived at and stated without calling on plaintiff's counsel to hear what he had to say. Plaintiff's counsel then complained that he had not been called on and argued that there was no need to put the power of attorney in the affidavit of documents, and it was idle to talk about wilful suppression when the defendants' solicitor already had the document. This counsel for the defendants again denied, on erroneous instructions, and the Lord Chief Justice said very shortly that the suggested answer was no answer at all, and that he would deal later with the question of the affidavit. This was just before the mid-day adjournment; after the adjournment, the solicitor for the defen-

dants found that he was mistaken; the document had been disclosed on a plea of justification in the other action in which he was solicitor, and counsel for the defendants, of course, at once informed the judge of his error. But neither counsel nor judge withdrew the accusation of wilful suppression. That it should have been originally made without hearing plaintiff's counsel was not very satisfactory, but, in my opinion, the Lord Chief Justice was quite mistaken in thinking that the document ought to have been inserted in the affidavit.

It appeared from counsel for the defendants' subsequent cross-examination of the plaintiff that the relevance of the power of attorney was this. He cross-examined for some hours on an incident, to be referred to hereafter, connected with a cheque for £256, purporting to be drawn and initialled by Appleton just before his death in 1917 and cashed by Hobbs the day after Appleton's death. This incident was neither in the libel nor the particulars in mitigation of damages, but was justified by counsel for the defendants as cross-examination to credit. I cannot think that the Lord Chief Justice really appreciated that he was ruling that every document must be included in an affidavit which was relevant to any event in a plaintiff's life on which a defendant might cross-examine to credit, although the plaintiff had no previous notice of the intention so to cross-examine. If he did, I can only entirely disagree with the ruling. Yet the evidence, unfortunately, started with what is, in my opinion, an erroneous accusation against the plaintiff of suppression, wilful or otherwise, of a document which the defendants already had and which was not relevant to any direct issue in the action.

The plaintiff gave evidence substantially on the lines of his counsel's opening, concluding with a statement, which I understand is not disputed, that except in the "Mr. A." case, there had been no criminal charge, that is, a charge in criminal proceedings, made against him in his life. After a cross-examination with regard to his associates, defendants' counsel approached specific matters which he proposed to ask about, and an objection was taken to ascertain the purpose and limits of such cross-examination. It began with an objection to a question about the "Mr. A." case. This was soon extended by counsel for the defendants, as "manifestly important to questions which I am about to put," and he argued that as the plaintiff had put his good character in issue by affirmative evidence, the defendants' counsel was entitled to cross-examine to credit on specific incidents, for the purpose of negativing that good reputation, to mitigate damages, and to show the circumstances in which the libel was published. The only rulings which the Lord Chief Justice gave were, "of course it is not admissible"—to justify any part of the libel—"it is cross-examination as to damages. Mr. Norman Birkett is engaged in showing, if he can, that this person is a worthless character"—rather unfortunate language to use so early in the case about a man who is to be presumed innocent till he is proved guilty. Counsel for the defendants said: "The law as to mitigation of damages, I submit, is settled." The Lord Chief Justice said: "The law is perfectly well settled, and I have no doubt about that. I shall not disallow the question," and the case proceeded on the footing that the plaintiff might be cross-examined on specific instances and conduct not mentioned in the libel or particulars in order to mitigate damages.

I think that this ruling was wrong. The civil wrong of defamation by a published, written, or printed statement, commonly known as libel, is committed by anyone who publishes such a statement expressed in such a way that it would be understood by reasonable people to injure appreciably the reputation of another person among reasonable people acquainted with him. A plaintiff may recover general damages for such a statement without proving his actual reputation or any actual damage: *Tripp* v. *Thomas* (3). It follows that a defendant may reduce the damages for libel by proving that the plaintiff already has a bad reputation. To do this the jury must and may take the view that his reputation is so bad that the defamatory statement complained of would reasonably and ordinarily cause much less damage than would be caused to a man of good reputation by the same statement. They may conceivably take the view that his reputation was so bad

before the defamatory statement was published that no further defamatory allegation could make it worse. But they would have to consider, before taking such a view, the undoubted fact that the worse a man's character is, the more ready are people to believe such evil reports about him, and to face the question whether it is lawful or desirable that, because a man's character is bad, anyone should be at liberty to make any defamatory statements they liked about him, regardless of their untruth. I am not aware of, and counsel was unable to refer us to, any reported case where it has been held that, in the case of words primâ facie defamatory, proof that the plaintiff had a bad reputation which could not be made worse was an answer to the action. It is, I think, generally assumed that the plaintiff proving a statement primâ facie defamatory, and unexcused by justification, privilege, or fair comment, is always entitled to nominal damages. Questions have, of course, arisen with regard to the circumstances in which evidence can be given to mitigate damages, and the judgment of CAVE, J., concurred in by MATTHEW, J., in *Scott* v. *Sampson* (1), which carefully considered the authorities, has I think, been generally accepted as an accurate statement of the law. The defendant may mitigate damages by giving evidence to prove that the plaintiff is a man of bad general reputation, and the plaintiff may rebut it by "coming prepared with friends who have known him to prove that his reputation has been good" (8 Q.B.D. at p. 503). On the other hand, the defendant may not give evidence of rumours at the time of publication to the same effect as the libel. Nor may the defendant give evidence of specific facts and circumstances to show the disposition of the plaintiff, as distinct from general evidence that he has that reputation. If those specific facts are to the same effect as the libel, which he has not justified, he cannot justify under the plea of mitigation of damages. If those facts are different from the libel, they do not prove actual reputation, which can be proved under the first head, but that he ought not to have such a reputation. CAVE, J., says of this evidence (8 Q.B.D. at p. 505), that it would

> "throw upon the plaintiff the difficulty of showing a uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of."

LORD ABINGER said in *Speck* v. *Phillips* (4) (5 M. & W. at p. 281):

> "It is a principle as old as my recollection of Westminster Hall, that matter of justification cannot be given in an action, in order to mitigate the damages."

LORD HALSBURY repeated it in *Watt* v. *Watt* (5) ([1905] A.C. at p. 118):

> "Even in mitigation of damages it is well settled you cannot go into evidence which, if proved, would constitute a justification. Nor does it appear to me that it makes any difference that the evidence is offered in cross-examination."

In my opinion, just as one cannot prove in chief specific instances of misconduct, as distinguished from general reputation, whether involved in the libel or not, in order to mitigate damages, so also one cannot achieve that purpose by cross-examination with regard to such specific instances.

There is, however, another purpose for which cross-examination with regard to specific instances not involved in the libel can be used. When a witness has given evidence material to the issues in the case, one can cross-examine him on matters not directly material to the case, in order to ask the jury to infer from his answers that he is not worthy of belief, not a credible person, and, therefore, that they should not accept his answers on questions material to the case as true. This is cross-examination on his credibility, commonly called cross-examination to credit. But as it is on matters not directly material to the case, the party cross-examining is not allowed to call evidence in chief to contradict his answers. This would involve the court in an interminable series of controversies not directly material to the case, on alleged facts of which the witness had no notice when he came into court, and which he or the party calling him might not be prepared, without notice,

to meet. This rule, which has been established by cases in which the party cross-examining has desired to call rebutting evidence in chief, has been expressed in various ways. TAYLOR ON EVIDENCE (s. 1438) uses the phrases: "Cannot be contradicted by independent evidence"; "must be taken as conclusive." In *Harris* v. *Tippett* (6) that great judge, LAWRENCE, L.J., used the phrases (2 Camp. at p. 638): "You must take his answer...." "You cannot call other witnesses to contradict the answers he gives."

ALDERSON, B., in *A.-G.* v. *Hitchcock* (7) says (1 Exch. 91): "Public convenience requires that the answer be taken as decisive, and that no contradiction be allowed." But this does not go to the extent contended for by appellant's counsel, that the jury must believe the answers given by the witness. No case has been found where such a contention has been put forward, and if the jury hearing the answers given by the witness, do not believe him, they are entitled to do so, and to use the view thus obtained with regard to his credibility in rejecting answers given by him on matters material to the case. But rejecting his denial does not prove the fact which he denies, of which there is, and can be, no other evidence. It only destroys his credibility in respect of other evidence. This is illustrated by the nisi prius case of *Bracegirdle* v. *Bailey* (2), tried at Liverpool by BYLES, J. The action was for a slander imputing specific forgeries. The plaintiff was put in the box for cross-examination, but gave no evidence in chief. Counsel for the defendants proposed to ask him specific questions about his past life, but BYLES, J., said (1 F. & F. at p. 537): "These questions cannot be asked. Inasmuch as he has proved nothing, you cannot cross-examine him to discredit him." Counsel for the defendant then said: "Does your Lordship decide that I cannot cross-examine him generally in mitigation of damages?" BYLES, J., at first said: "There is no plea of justification, and you cannot ask any questions which would go to the justification," but then went to consult WILLES, J., and on returning held (1 F. & F. at p. 537),

> "that no evidence of bad character, or questions relating to the plaintiff's previous life or habits, tending to discredit him, and to mitigate damages, were admissible, either in cross-examination or examination in chief, and that he could not ask anything to prove the libel true."

So far as this excludes questions about general bad character in mitigation of damages, it is contrary to *Scott* v. *Sampson* (1), and would not now be followed. But so far as it excludes evidence of or questions in cross-examination with regard to specific acts irrelevant to the libel, to mitigate damages, it is in accordance with *Scott* v. *Sampson* (1), and, in my opinion, correct. Its exclusion of questions tending to discredit him is based on the fact, peculiar to the case, that he had given no evidence to be discredited, but where such questions were admissible, their effect would be limited to discrediting his answers, and would not extend to proving the facts which he was questioned about, for the purpose of mitigating damages. If this statement of the law is correct, as, in my opinion, it is, it follows that when the Lord Chief Justice ruled that though cross-examination to justify any part of the libel was not admissible, cross-examination with regard to particular facts to mitigate damages was, and counsel for the defendants followed it up, having said that "the objection would arise upon questions he was about to put," by a question: "Would a man who was a forger, and deliberately robbed the widow of his best friend, be entitled to any damages at the hands of a British jury?" and then followed this up by a long cross-examination suggesting that eleven years before Hobbs had forged a cheque for £250, or had robbed Mrs. Appleton of £250, neither of which matters were mentioned in the libel, or the particulars in mitigation of damages, the Lord Chief Justice was allowing answers in cross-examination to be used for a purpose—mitigation of damages—for which they could not legitimately be used, and evidence of such matters was being used for a purpose for which it was not available.

It was argued that when counsel for the plaintiff opened and called evidence with regard to his client's actual life as distinguished from the version put forward in the libel, he let loose cross-examination with regard to every fact of his past life. I think he did entitle the defendants to endeavour to destroy his evidence by cross-examination to credit to show that his evidence should not be accepted, because he was not a credible witness, but I do not think that (i) he entitled the defendants to justify when they had not pleaded justification. Nor do I think (ii) that it entitled the defendants to cross-examine with regard to other specific facts in the plaintiff's life to mitigate damages, contrary to the ruling in *Scott* v. *Sampson* (1). The defendants would, however, be entitled to cross-examine on such facts, to prove that the witness was not a credible person, and to apply that proof of unreliability to the evidence he had given in chief. But by destroying that evidence, one does not prove its opposite. If by cross-examination to credit one proves that a man's oath cannot be relied on, and he has sworn that he did not go to Rome on May 1, one does not therefore prove that he did go to Rome on May 1. There is simply no evidence on the subject.

After this ruling there followed a day's cross-examination on two incidents, one of which had occurred eleven years before the trial and another twenty-three years before the trial. Neither of them was in the libel or in the particulars in mitigation. As those may be referred to on the new trial which we are ordering, I propose to say very little about them except that the fact that Hobbs denied most of the suggestions of the cross-examining counsel, rendered it essential that the presiding judge should carefully explain to the jury what evidence there was apart from the suggestions, and for what purpose that evidence was to be used. The first incident related to a sum of £250 which Hobbs obtained from Appleton's bank the morning after Appleton's death. Counsel suggested, and Hobbs denied, that he knew of the death when he cashed the cheque. The cheque appeared to have been signed by Appleteon in blank. Hobbs's authority to use it to obtain the £250 was contained in two documents purporting to be signed by Appleton. I think it was suggested that these were forgeries, but so many crimes were suggested with regard to this incident that I am not sure. The cheque signed by Appleton was altered by Hobbs from "Order" to "Bearer," by initials "C. F. A." written by Hobbs. Hobbs said that he was authorised to do this by a power of attorney produced. I think it was suggested again that this was a forgery. Hobbs said that he was to pay and did pay the £250 to the account of one Percival, at a named bank. Counsel suggested that Percival was a well-known steamship gambler; Hobbs denied any knowledge of this. Whether Hobbs was entitled to have received this £250 was in 1917–18 investigated by an independent solicitor, by no means friendly to Hobbs, on behalf of the widow, and he allowed the item in account. It is clear that in any proceeding where it was material this transaction would require close investigation. But it seems very unsatisfactory that the jury should be invited to find that Hobbs had committed one or more crimes, not the subject of the libel, without any precise notice by indictment or otherwise of what crimes he was accused, without any evidence first presented for the prosecution, with the restraint with which English criminal proceedings are conducted, and without the careful explanation to the jury of the evidence, and the issues, and the purpose for which they might be used, which any English judge would give to the jury if he were trying a prisoner for a specified crime.

The other matter, also not in the libel or particulars, was an incident, said to be one of several, which had occurred in 1905 and had been dealt with by FARWELL, J. It concerned a county court case in which Appleton's firm, acting for a man called Long, had settled with the defendants for £45 and 25 guineas costs, but had only paid £35 to Long, alleging that Long had authorised them to settle for £35 to himself, and that the £10 was extra costs. A clerk called Fraser had claimed £2 extra from Long; it was not suggested that this had gone to Hobbs. Long's and Hobbs's affidavits were read to the jury, Hobbs contradicting many of Long's statements. It was suggested that FARWELL, J., had condemned the system of Appleton's clerks,

A including Hobbs, but no report of his judgment was produced. I do not think that Long's affidavit was evidence against Hobbs in these proceedings; it might be on the authority of well-known criminal cases, if Hobbs dealt with it in a way to constitute an admission, but Hobbs had contradicted many of the statements in it. Again, in my opinion, the jury should have been directed with regard to what evidence was available for them and for what purpose they could use their B finding.

The cross-examination occupied the second day and was unfinished at its close. We now know, though counsel did not know it for some time afterwards, that on the second day the jury made what the Lord Chief Justice calls a "tentative intimation," and followed it on the third morning by a communication that "they are unanimously agreed that they have heard sufficient evidence in the case." The C first communication was never shown to counsel and we do not know what the terms of the "tentative intimation" were, or what answer, if any, the Lord Chief Justice made. It may be that it was not made till the close of the second day at the rising of the court. The second communication was never shown to counsel, though the Lord Chief Justice, as he twice used the same words, was probably reading all or part of it. But counsel for the plaintiff was required to answer D whether he was going to call other evidence without being told that the jury had made any communication to the judge. I am clearly of opinion that this procedure was not in accordance with the usual practice of judges and was very unsatisfactory. It is clear that neither a High Court nor any subordinate judge can discuss matters in private with the jury, nor can, in answer to their private question, give them a direction on law or fact which is not communicated to the parties. E Trials must be in public, in that the parties hear all that goes on, except the consultation of the jury among themselves. No one must communicate with the jury except to ask them, by direction of the judge, whether they have agreed or are likely to agree on their verdict: see *R.* v. *Wood*, *Ex parte Anderson* (8) and *Goby* v. *Wetherill* (9). In the same way any communication from the jury to the judge should be communicated to the parties. An apparent exception is when F the jury ask for extra remuneration, and the judge, as he frequently and wisely does, takes on himself the responsibility of saying that request cannot be complied with. But even then it is better that the parties should know of the request, though they need not be made to bear the odium of refusing it.

When a jury, as sometimes happens, informs the judge before the plaintiff's case has finished that they desire to find for the defendant, or that they desire to G find for the plaintiff before they have heard the defendant, the judge can take two courses: (i) He may, if he thinks that this premature intervention renders it impossible for the trial to proceed with justice, discharge the jury and order a re-trial: see *De Freville* v. *Dill* (10). (ii) If he thinks that justice can still be done, he may inquire of the party whose case has not been completed if he desires to complete it, and that party has the right to complete his case, to re-examine any H witnesses under cross-examination, to call any other evidence he desires, and to address the jury if he desires. The plaintiff's counsel, if his opponent has put in evidence, will, of course, address the jury last; otherwise his opponent, who has put in no evidence, will have the last word. The judge is, in my opinion, bound to sum up to the jury sufficiently to make clear what are the issues which they have to decide, and especially where the evidence largely consists of answers and com- I plete or partial denials to the assertions of cross-examining counsel in the form of questions. If the jury, after hearing counsel, say that they are still of the same opinion, this does not relieve the judge of the duty of so directing them that they understand what issues they are to decide, and on what evidence.

This position is illustrated by the decision of the House of Lords in the *Ural Caspian Oil Corpn., Ltd.* v. *Hume-Schweder* (11), reversing the decision of the Court of Appeal. Mr. Hume-Schweder, who was a director, sued his company for commission for placing shares of the company. There was an article which provided that a director might, for special services, have special remuneration.

The jury, during the plaintiff's case, said that they thought the plaintiff was entitled to remuneration for introducing a purchaser; the defendants elected to continue, and the judge allowed the case to continue. What then happened, as stated in the judgment of the Lord Chancellor, was:

> "The learned judge did not warn the jury that the defendants were entitled to have their evidence heard, but the case was adjourned for the defendants to consider what they would do. Nor did the learned judge point out to the jury that proof of an introduction was by no means sufficient to establish the plaintiff's case. If, after the evidence was completed, the learned judge had explained the issues to the jury, and upon that they had still found for the plaintiff, the verdict might have been sustained, notwithstanding their unfortunate intervention. But after the defendants' case was closed, he merely told them that they had already expressed an opinion about the case, and that if they had any doubt in their mind, altering that matter, he would deal with it, but if they remained of the same opinion he did not see any good in wasting further time by further discussion. Thereupon the jury found for the plaintiff. I cannot think that such a verdict ought to stand."

Lord Shaw, Lord Parker and Lord Halsbury concurred.

The proper procedure being as above, in the present case, what happened was as follows. At the beginning of the third day, the Lord Chief Justice asked plaintiff's counsel two questions: "Serjeant Sullivan, may I ask you, is it your intention to offer evidence for the plaintiff other than the evidence of the plaintiff himself?" Serjeant Sullivan: "That, when the cross-examination is finished, I will consider." The Lord Chief Justice: "I ask you to consider it now, if you please." Serjeant Sullivan: "So far, I did not intend, as the matter stands now." The plaintiff's counsel was entitled to postpone his answer till he had re-examined, and in any event had not been informed, as he should have been, of the message from the jury. The Lord Chief Justice then continued: "Now I have received an intimation from the members of the jury in which they say that they are unanimously agreed that they have heard sufficient evidence in this case." To the jury: "Members of the jury, do you mean by that intimation that upon the plaintiff's own evidence you desire, if you can, to find a verdict for the defendants?" The foreman of the jury: "Yes, my Lord, that is our opinion." The Lord Chief Justice: "And may I take it that as a consequence if, as a matter of law, upon these pleadings, it is necessary that there should be a verdict for the plaintiff for some amount, your verdict would be for the smallest possible amount?" The foreman: "Yes, my Lord." Here the Lord Chief Justice, without having informed the jury that the plaintiff's case was not finished, or directed them with regard to the issues they had to decide on the evidence, was suggesting to them what their answers meant. Plaintiff's counsel then said: "Before that result is arrived at, my Lord, I would insist upon addressing the jury." It is obvious and elementary that he had such a right, if he thought it worth while to claim it, whether against a jury who had said before the end of the plaintiff's case that they had heard sufficient evidence, or a judge who showed any signs of disputing the right. However, the word "insist," or perhaps the tone in which it was said, seems to have annoyed the Lord Chief Justice, who objected to the word. He then asked the plaintiff's counsel to argue what I had thought was an obvious proposition. He said: "I will hear you upon that point, Serjeant Sullivan. Are you entitled to address the jury when the jury have said upon the evidence of the plaintiff himself they are satisfied that he ought not to recover?" and the Lord Chief Justice called on counsel for defendants, who very prudently declined to oppose the application and left it to the judge. The Lord Chief Justice then asked counsel for defendants if he wished to continue the cross-examination of Hobbs. He said that he did not, but in a moment of forgetfulness said that he reserved the right to address the jury last. Counsel for the defendants must have forgotten that he had put in

A evidence, which, of course, deprived him of the right to speak last. However, the Lord Chief Justice, also in a moment of forgetfulness, agreed with counsel for the defendants, and said: "Quite." Plaintiff's counsel then said that he had a right to re-examine the plaintiff, as he obviously had. That point seemed not to have occurred to the Lord Chief Justice, but counsel did not insist on it, and he proceeded to address the jury.

B Before us counsel for the defendants seriously argued that this address of the plaintiff's counsel took the place of and supplied the necessity for a summing-up by the judge. Considering that both the Lord Chief Justice and counsel for the defendants during the speech protested against its inaccuracy, the Lord Chief Justice saying at one point, in answer to a complaint of counsel for the defendants, that some proposition was not correct: "Most incorrect, but really Mr. Birkett, C I think it is better to let the matter go on," without directing the jury what was the correct proposition of law in the matter, I think it is impossible to treat this argument seriously. At the end of the speech, counsel for the defendants said that he did not propose to address the jury—and, indeed, he had no right to—but raised the question of the innuendo. As he had expressly limited his payment into court to the words, without the innuendo, he clearly saw difficulties ahead. The jury D could not reasonably find that the words could not bear the meanings alleged, but he had not protected himself against a verdict of a farthing by payment into court, which failure might prevent him from recovering costs of that issue. He argued (i) that there was no evidence to enable the jury to find that the words bore the meanings alleged. But the words being plain English words and having been read with the alleged innuendo to the jury, they were the judges, without E further evidence, of whether the words would be reasonably understood to bear the meanings alleged. (ii) Council for the defendants argued that he was entitled to the jury's verdict on that part of the case; why, I do not understand. The Lord Chief Justice dealt with the matter in this way, and what follows, in my opinion, shows the confusion into which the jury had got, and the absolute necessity for a careful explanation of the issues which they had to try, and the evidence they had F heard, as distinguished from the suggestions of counsel. The Lord Chief Justice said: "I propose to take a simpler course. Members of the jury, at half-past ten this morning, following upon a tentative intimation yesterday, you intimated to me, in terms, that you are unanimously agreed that you have heard sufficient evidence in this case. It is now nearly half-past eleven. Are you still of the same mind?" The foreman of the jury: "Yes, my lord." The Lord Chief Justice: G "And does that mean that you desire, if you may, to find for the defendants?" The foreman: "We desire to find for the plaintiff." The Lord Chief Justice: "You mean the defendants, do you not?" The foreman: "That is what we want to know." The Lord Chief Justice: "You know the plaintiff is the man who is bringing the action." The foreman: "Yes, I understand that." The Lord Chief Justice: "The defendants are the persons who are meeting the action. You said H to me an hour ago that you desired to find in favour of the defendants. Is that so?" The foreman: "Yes, my Lord." The Lord Chief Justice: "Further, you said that as a consequence, if upon these pleadings the plaintiff was entitled to some damages you would award the smallest possible sum, that is to say, a farthing?" The foreman: "That is so." The Lord Chief Justice: "Now will you confer with your colleagues of the jury and tell me if you are still of the same mind." The I jury conferred from 11.27 to 11.31. The foreman of the jury then said: "My Lord, we are willing to find for the defendants as far as the law permits it." The Lord Chief Justice: "Very well, then you are still of the same mind?" The foreman: "We are still of the same mind." Mr. Norman Birkett: "My Lord, I ask for judgment for the defendants." The Lord Chief Justice: "There must, of course, be judgment for the defendants, and in view of the fact that there was a payment into court of a very small sum it is perfectly obvious that you are entitled to the costs from the date of the payment in." Mr. Birkett: "If your Lordship pleases." The Lord Chief Justice: "But a further question arises, and it is an interesting

question. The jury have expressed twice the very clear, and, if I may say so, the obviously proper opinion, that there ought to be a verdict in this case for the defendants if such a verdict is lawful on these pleadings. Now no doubt where you are dealing with printed words, as distinguished from spoken words, if the words are defamatory the law presumes that there is some damage." Mr. Birkett: "Yes, my Lord." The Lord Chief Justice: "But may that presumption be rebutted? May a plaintiff appear obviously to be so worthless a person that it is impossible that he could suffer damage from any libel?" Mr. Birkett: "I can most certainly conceive the possibility of such a plaintiff existing, but, my Lord, in view of the fact that I have paid into court 20s.—19s. 11¾d. too much—even a verdict for the plaintiff, and judgment for the plaintiff for a farthing damages would, of course, from the practical point of view, be judgment for the defendants." The Lord Chief Justice: "Yes." Mr. Birkett: "With regard to the point your Lordship raises, I am bound to say that I know of no case where a plaintiff who has recovered damages, and been entitled to damages, has failed to get a farthing." Then counsel refers to a case before McCardie, J. The Lord Chief Justice said: "So far as I know, there is no case in the books." Mr. Birkett: "No, my Lord." Then the Lord Chief Justice referred to an unreported case and said: "However, I gather that in this case you are asking for judgment for the defendants on the footing that the plaintiff has a verdict of a farthing." Mr. Birkett: "Yes, my Lord." The Lord Chief Justice: "You are content with that?" Mr. Birkett: "Yes, I am." The Lord Chief Justice: "Very well then, judgment for the defendants with the usual consequences where there has been a payment into court." Mr. Birkett: "Yes, my Lord. That covers the point I desire to make."

So far, the procedure is almost exactly that condemned by the House of Lords in the *Ural Caspian Oil Corpn. Case* (11)—no summing-up, but: "Are you of the same opinion as when you first addressed me?" The Lord Chief Justice then suggested to counsel for the defendants whether there need be a verdict for a farthing, or nominal damages, and discussed the point with counsel for the defendants, ending by saying that there must be judgment for the defendants with the usual consequences, when there has been a payment into court. It will be noticed that again, as had been the case on the Lord Chief Justice's decision on the affidavit of documents, plaintiff's counsel was not called on to state his views on the matter. Counsel for the plaintiff said so, and said that he had asked the judge to leave the matter of innuendo to the jury. The Lord Chief Justice said as to the first matter that he had "looked at him three times"; as to the second, counsel for the defendants said "that it was plain that the jury did find the matter which I expressly raised" and the Lord Chief Justice said, "Yes, it was quite plain." I cannot understand what this means; what are the jury supposed to have found? That the words complained of would not be reasonably understood to have the meanings alleged? But that was an impossible finding. That the damages for the words with the innuendo were a farthing? But that would leave the question of costs to be considered, without a payment in to cover the innuendo.

I have, with great reluctance, come to the conclusion that the trial was so unsatisfactory that we must order a new trial. My reluctance arises from my feeling that if the case had proceeded to its end and the jury had received a proper direction, it is very possible, even probable, that the jury might have arrived at the same result, and their verdict could not be interfered with. But again, I have the guidance of the views of the House of Lords on a similar question in *Bray* v. *Ford* (12). In that case the judge at the trial misdirected the jury with regard to part of a long libel. The jury had given £600 damages, and the Court of Appeal took the view that such an amount might reasonably be given by the jury in respect of the part of the libel with regard to which no misdirection had occurred and, therefore, declined to interfere. The House of Lords took a different view. Lord Halsbury said ([1896] A.C. at p. 47):

"My Lords, I think there has been a substantial wrong and a miscarriage. I think there has been a substantial wrong, since I think the defendant was not permitted to present his case to the jury with the argument that his original complaint was true. This seems to me a substantial wrong, and I am not prepared to say what a jury might think if they were told that the original complaint was itself unfounded, or if they were told that, though this original complaint was well founded, there was excess in the language by which that original complaint was made; but it appears to me that it was, in this case, withdrawing from the jury a question which the defendant had a right to have submitted, a right which was so relevant and important to the discussion that I must say I cannot regard it as trivial or immaterial matter; but I think it was a miscarriage, as this view was not presented to the jury. What influence such a wrong might have had upon the verdict or upon the amount of damages, I am not disposed to consider. The case must be tried again, and I desire to say nothing which can in any way influence the arguments upon the trial which must take place. It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict to the same amount of damages. I absolutely decline to speculate what might have been the result if the judge had rightly directed the jury. It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant."

LORD HERSCHELL ([1896] A.C. at p. 52) says:

"But in the case of an action for libel, not only have the parties a right to trial by jury, but with the assessment of damages is peculiarly within the province of that tribunal. The damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at £500 or £1,000. Where, then, the judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, and this view may have affected their minds in considering what damages they should award, I think there has been a substantial miscarriage within the meaning of the rule. The court may think, as I might think in the case before your Lordships, that the jury would have given the same damages if the law had been correctly expounded; but this is a mere matter of speculation: it cannot be asserted with the least certainty that they would have done so. The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them. I find it impossible to say that the case upon which the jury ought to have adjudicated ever was wholly before them, and that they were allowed to give to all the circumstances which might legitimately have influenced the verdict their due weight. This seems to me to establish that there has been a substantial miscarriage, and that the appellant is entitled to a new trial."

I act on this view. If the jury had received a direction explaining to them the position with regard to the libel complained of, and the purposes for which they might use the evidence they had been listening to for a day, I cannot say what verdict they would have returned. In my opinion, the absence of such a direction, combined with the other circumstances of the case, constituted a substantial miscarriage, entitling the plaintiff to a new trial. The grounds on which I think it right that a new trial should be granted are two: First, that the Lord Chief Justice gave a wrong direction when he ruled that specific acts of misconduct not the subject of the libel might be given in evidence by questions in cross-examination in mitigation of damages. Secondly, and independently, that when the jury purported to decide against the plaintiff before his case was finished, they should have received a direction to listen to the re-examination, if any, and the

speech of counsel for the plaintiff, and should then have been directed carefully with regard to the issues they had to try and the nature of the evidence they had listened to, especially its effect as cross-examination to credit, and the position when the defendants did not attempt to justify their libels.

A good deal of the notice of appeal was taken up by complaints of interlocutory observations of the Lord Chief Justice, which were mostly unfavourable to the plaintiff. If these observations had stood by themselves, they would, in my opinion, have shown no ground for disturbing the verdict, and I regret that, with much better grounds available, it was thought right to insist on them. Though the jury and not the judge are the judges of fact, the judge is entitled to make such comments on fact as he thinks right either during the trial or in the summing-up, provided that he makes it clear to the jury that they are the judges of fact and not the judge, and that his observations are only submitted for their consideration and guidance and may be disregarded if the jury do not agree with them. It was unfortunate that the evidence started with an erroneous censure of the plaintiff in the matter of the affidavit, but the substantial ground for thinking that the trial was unsatisfactory is the erroneous direction on the use that might be made of the evidence of specific acts not the subject of the libel, and the absence of any summing-up or explanation of the effect that might be given to the cross-examination or to the absence of a plea of justification.

The judgment for the defendants must be set aside and a new trial ordered. Following the usual practice of this court, the plaintiff must have the costs of the appeal, and the costs of the first trial must abide the event of the second. As there may be some doubt with regard to what "the event" of the second trial is, in case of any difficulty, the matter must be left to the discretion of the judge who presides over the new trial.

There remains the interlocutory appeal against the refusal to adjourn the hearing of the following case of *Hobbs* v. *Nottingham Journal, Ltd.*, an action relating to a very similar but not identical libel, published on the same day, where the defendants, appearing by the same solicitors and counsel, did not justify, but paid into court in respect of the words, but not of the innuendo. The Lord Chief Justice originally proposed to proceed with the second action before the same jury, and plaintiff's counsel objected. If this course had been pursued, the plaintiff's counsel had challenged for cause, asking each juryman whether he had already formed an opinion about Hobbs, considerable difficulties would have arisen. There would also have been the difficulty that the jury knew of the payment into court in the first action. Both the Lord Chief Justice and counsel for the defendants appreciated this, and as no other special jury was available, the case was adjourned till the following morning. But the Lord Chief Justice then said: "Very well; to-morrow morning at half-past ten, Mr. Birkett, as that adjournment has taken place, I must say now what otherwise I would have said at the end of the second case. Those documents are impounded and will go to the Public Prosecutor." I do not understand what useful purpose was served by taking this course. The papers sent to the Public Prosecutor were (i) the correspondence, cheque, counterfoil, and power of attorney, in the matter of the £250, which had taken place nearly twelve years before, which case at that time had been investigated by an independent solicitor, who acquiesced in the payment, and in which case, Mr. Appleton, a most material witness, was dead. Whatever might be the result of a civil action in which Hobbs was plaintiff, if there could be such an action, I think the most experienced prosecuting counsel would find the greatest difficulty in proving any criminal charge against Hobbs in this respect, or of re-opening the settlement of 1918, in any civil action. The other papers sent were the affidavits in the proceedings in Chancery about Long, heard by FARWELL, J., twenty-two years before; and I cannot understand why the Public Prosecutor should be asked in 1929 to consider a matter which a High Court judge had considered and dealt with in 1905, without finding it necessary to consult the Public Prosecutor. In my opinion, the remission to the Public Prosecutor should be suspended while these actions are being re-heard, the

documents remaining in the custody of the court for production at the second trial, and that it be referred to the judge at the second trial to consider, after reading these judgments and the course of the second trial, whether it is necessary to consult the Public Prosecutor any further. In any event, I cannot understand why, if the Lord Chief Justice, as he says, would not have made his intimation about the Director of Public Prosecutions till the end of the second case if the cases had been heard before the same jury on the same day, he should make it before the second case was tried next day before a different jury. I should have thought that the first jury might have suspected what was happening when the Lord Chief Justice during the trial was asking for the original letters, but counsel for the defendants tell us, and of course the court accepts his statement, that he himself did not understand that the Lord Chief Justice was going to send the originals to the Public Prosecutor, and the jury may have been equally in the dark. But the result of the Lord Chief Justice's statement, made when it was, was that the London evening newspapers, and no doubt the morning newspapers too, gave the fullest publicity to "Hobbs case: Judge Sends Papers to Public Prosecutor," a fact which could not fail, in my opinion, to prejudice the hearing of the second case.

The next morning counsel for Hobbs moved for an adjournment of the second case, on the ground that they were appealing in the first case, and of the publicity given to the announcement about the Director of Public Prosecutions. The application was refused; the second case was called on, counsel for the plaintiff did not appear, and judgment was entered for the defendants. In the opinion of this court, the first case was, as the plaintiff contends, unsatisfactorily tried. The judge who tried the first case would have tried the second case in the same way and on the same ruling, with the additional disadvantage of the prejudice resulting from his premature action with regard to the Director of Public Prosecutions. I cannot see that it was the duty of plaintiff's counsel to incur the expense of a second hearing to obtain the same rulings and have the same appeal. If they had failed in the first appeal they would have paid the penalty of their non-appearance in the second action, but, in succeeding as they do in convincing the court that the first case was not satisfactorily tried, they succeed in showing that the second and similar case should not have been tried before the same judge, with the same opposing counsel, and a jury who probably had heard of the action of the judge in sending papers to the Director of Public Prosecutions. I do not say that a plaintiff who brings twenty-four actions for libel is entitled to twenty-four judges to try them. An English judge, according to the traditions of the English Bench, does his best to decide each case according to the evidence and arguments in it, regardless of any decision he may have given against one of the parties on other evidence and arguments. But there are cases where it is desirable that the feeling created by a first case should be allowed time to disappear, and the rulings in a first case have an opportunity of being affirmed or corrected before a second and similar case is tried; in my opinion, the present is such a case. In *Hobbs* v. *Nottingham Journal, Ltd.*, the interlocutory appeal must be allowed; the judgment in favour of the defendants set aside. The plaintiff must have the costs of this appeal; the costs of the first trial and of the interlocutory motion must abide the event of the second trial, with, as in the last case, power to the judge before the second trial to decide what shall be done if the event is uncertain.

GREER, L.J.—This is an application by the plaintiff for a new trial in an action for libel tried before the Lord Chief Justice and a special jury which resulted in a verdict for the plaintiff for one farthing damages and judgment for the defendants, £1 having been paid into court with an admission of liability, the defendants to receive all costs after the date of payment in. By his notice of appeal the plaintiff alleged various grounds of complaint with reference to the conduct of the trial by the Lord Chief Justice. Most of these complaints, in my judgment, are trivial, without substance, and such as afford no justification for asking a new trial.

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It is impossible, however, to leave them out of account when dealing with the main question raised by the appeal, which is concerned with the premature expression of opinion by the jury before the plaintiff's case was concluded, and the way in which that matter was dealt with by the learned Lord Chief Justice, because they afford, in my view, an explanation of the way in which the learned Lord Chief Justice dealt with the case when it became necessary to decide what should be done when the jury so expressed their view.

The plaintiff was a man who came into court having to admit at the outset that he had been rightfully convicted of a serious criminal offence, namely, conspiracy to defraud Sir Hari Singh out of a large sum of money. His conduct in this matter had become notorious by reason of the public trial of a civil action, and by reason of his own public trial at the Central Criminal Court, and the verdict and conviction recorded against him, and it was obvious that the atmosphere in which the present action started was unfavourable to him. It was not unnatural that he should be regarded with suspicion, and naturally, though I think unfortunately, the Lord Chief Justice in observations which he made from time to time, and in questions which he put to the plaintiff, exhibited an unfavourable view of him and his evidence. Before the plaintiff was put into the box the Lord Chief Justice made a mistake with reference to the plaintiff's affidavit of documents, and what he said in the presence of the jury must have left the impression that the plaintiff had dishonestly refrained from putting relevant documents into his affidavit of documents. The mistake was a natural one to make, inasmuch as the documents in question had all been referred to by the plaintiff's counsel in opening, and the explanation as to why they were not in the affidavit of documents was not too clear, the main point made being that the defendants' solicitors had had these documents in another case. This, of course, afforded no real answer, if they were relevant documents, but when the issues in the action are properly appreciated it is quite clear that the documents were not relevant at the time the affidavit was made, and they only became relevant by being used in anticipation of cross-examination to credit. The other objections made to the observations and questions of the learned Lord Chief Justice are such as could not in any event justify, in themselves, an application for a new trial. A judge is entitled to form his own opinion about a plaintiff and his evidence, whether given in examination in chief, or cross-examination, and himself to cross-examine whenever he thinks it proper to do so, provided that when the time comes he accurately sets out to the jury the evidence, and gives them to understand that it is their judgment, and their judgment only, upon which the case has to be decided, but I cannot help feeling that the Lord Chief Justice was too greatly influenced when he came to deal with the premature intervention of the jury by the unfavourable opinion he had formed of the plaintiff. In order to understand the importance of the question which ultimately arose it is necessary to state shortly the nature and course of the action.

By his statement of claim the plaintiff claimed damages on the ground that the defendants had falsely and maliciously published in their newspaper on Mar. 10, 1925, an article containing some twelve to fourteen grossly defamatory statements about him. In substance the articles charged him with a long career of dishonesty, and association with dishonest people and criminals and in one or two instances with actual crimes. After setting out the words of the libel, the plaintiff pleaded that the libel meant, inter alia, and was understood to mean, that the plaintiff had practised dishonest methods all his life, and that he had been all his life a notorious criminal. The rest of the innuendo consisted of a mere repetition of the substance of the defamatory statements appearing on the face of the libel. The defendants by their defence admitted the publication and that the words were defamatory, but denied the innuendo and paid into court the sum of £1 in respect of the printing and publication of the libel without the meanings set out in the innuendo. It is plain from these pleadings (i) that the defendants could not escape a verdict for some damages; (ii) that if the innuendo was not merely surplusage and the words were capable of the alleged meanings, the plaintiff was entitled to have a decision

by the jury as to whether the innuendo was proved, as this would have an important bearing on the question of the form of the judgment and the order to be made with regard to costs.

It seems to me convenient at this stage to state certain rules of law that have been established by the decisions. (i) It is not permissible for a plaintiff to give evidence of particular facts in support of his claim to have a good character, nor is it open to a defendant to give evidence or to cross-examine as to particular instances with the object of diminishing the damages: see *Scott* v. *Sampson* (1), *Bracegirdle* v. *Bailey* (2) and *Watt* v. *Watt* (5), per LORD HALSBURY. (ii) On the other hand, if a plaintiff in chief gives evidence of any fact and the defendant disputes that fact, the defendant is entitled to cross-examine to credit, and, in particular, to cross-examine about details of misconduct, but it has been laid down in a number of cases that the defendant is bound to be content with the plaintiff's answers. He cannot contradict them, but must be content to let them go to the jury as the only evidence on the matters involved in the cross-examination. (iii) If there is any misdirection or other ground for a new trial, the court cannot speculate whether the same verdict would have been given if there had been no such misdirection, and if it is possible that on a proper direction the jury might have given another verdict, the court cannot then assume that proper direction would have made no difference and say that there has been no miscarriage of justice: *Bray* v. *Ford* (12).

In the present case the plaintiff's counsel in opening, gave an account of the plaintiff's life before the "Mr. A." case, and put him forward as, apart from the "Mr. A." case, a man of unblemished reputation, and the plaintiff adopted this view himself in his evidence. As the defendants entirely disagreed with this view of his character they were, by their counsel, entitled to cross-examine him to credit. His answers could only be used to remove the impression he had created that apart from the instance mentioned he was a man of unblemished character, but in the circumstances it would have been difficult for any jury to exclude from their consideration in estimating the damages any admission that he made in cross-examination, but the jury should have been told that they ought as far as possible to do so. After a long cross-examination by counsel for the defendants, the jury at the beginning of the third day sent a message to the Lord Chief Justice. What happened thereon is stated as follows. It is the third day: The Lord Chief Justice: "Serjeant Sullivan, may I ask you, is it your intention to offer evidence for the plaintiff other than the evidence of the plaintiff himself?" Serjeant Sullivan: "That, when the cross-examination is finished, I will consider."—That was a perfectly proper answer.—The Lord Chief Justice: "I ask you to consider it now, if you please." Counsel was entitled, if he chose, to say: "My Lord, I still desire to postpone my consideration of it until the plaintiff's evidence is concluded," but he did not take that course. He said: "So far, I did not intend, as the matter stands now." The Lord Chief Justice: "Very well. Now I have received an intimation from the members of the jury that they are unanimously agreed that they have heard sufficient evidence in this case." (To the members of the jury): "Members of the jury, do you mean by that intimation that upon the plaintiff's own evidence you desire, if you can, to find a verdict for the defendants?" The foreman of the jury: "Yes, my Lord, that is our opinion." The Lord Chief Justice: "And may I take it that as a consequence if, as a matter of law, upon these pleadings, it is necessary that there should be a verdict for the plaintiff for some amount your verdict would be for the smallest possible amount?" The foreman: "Yes, my Lord." The Lord Chief Justice: "In other words, for a farthing?" The foreman: "Yes, my Lord." Serjeant Sullivan: "Before that result is arrived at, my Lord, I would insist on addressing the jury." The Lord Chief Justice: "You would insist, would you? That is a strange phrase to use to me." Serjeant Sullivan: "I would conceive that I am entitled to insist upon addressing the jury." The Lord Chief Justice: "Please do not use the word 'insist.'" Serjeant Sullivan: "Not as against your Lordship. I was not using it as against your Lordship; your Lordship appreciates that thoroughly." The Lord Chief Justice: "Thank you,

Mr. foreman. I will hear you on that point, Serjeant Sullivan. Are you entitled to address the jury when the jury have said upon the evidence for the plaintiff himself they are satisfied that he ought not to recover?" Serjeant Sullivan: "I most respectfully submit that I am so entitled. I am entitled to point out that on the evidence of the plaintiff, according to the rule of law, that there is nothing to disentitle the plaintiff from recovering substantial damages." The Lord Chief Justice: "I hear you say that. Mr. Birkett, what do you say?" Then counsel for the defendants says that he is loth to make any objection to counsel addressing the jury, and the Lord Chief Justice says: "Very well, Mr. Birkett, let me ask you this question: Do you, in these circumstances, desire to continue the cross-examination of the plaintiff?" and counsel for the defendants says that he is content not to continue the cross-examination of the plaintiff. After being pressed by the Lord Chief Justice, counsel for the plaintiff said that he did not propose to re-examine the plaintiff, but desired to address the jury, and after discussion he was permitted to do so, but the Lord Chief Justice did not give any direction to the jury on the questions involved in the case, and no question was left to them with reference to the innuendo. In my judgment, having regard to the course of the trial, this was unsatisfactory, and justifies this court in ordering a new trial.

It will be observed that when the jury intervened, the plaintiff's case was still in progress. The plaintiff had been cross-examined at great length and by questions which made grave insinuations against him in respect of particular transactions. His evidence was not concluded, and it is conceivable that a different complexion might have been put on some of his answers by re-examination. The time had not come for his counsel to determine whether he would or would not re-examine or whether he would or would not call any additional evidence. It seems to me that it would have been right before his counsel was called upon to form any decision with reference to a message which came from the jury that he ought to have been told what that message was. If such an intervention had taken place in a simple case which required no special directions on the law and on the facts, counsel would probably have been ready to accept the intimation of the jury and say that in the circumstances he would not proceed further with the case; but the present case was far from a simple one. It was a case in which it was obvious that the plaintiff, by reason of the conviction which he admitted, was at the outset liable to have his right to damages looked at with grave suspicion by the jury. He had put forward the case that, apart from the misconduct involved in the crime of which he had been convicted, he had behaved, with regard to the matters mentioned in the libel, with the propriety that was to be expected from an ordinary normal citizen in his position. The cross-examination had been rightly directed to show that that presentation of his character to the jury was not well founded, but the jury had not been informed that his answers, and his answers alone, afforded the only evidence on which they were entitled to form an opinion on the matters of credit as to which he was cross-examined. The cross-examination began by questions with reference to the number of similar actions he had brought against newspapers for similar libels, and he had to admit that he had settled several of them out of court without any public vindication of his character. This was obviously a point to be considered by the jury, though in this connection it is not immaterial to observe that in most of the cases no justification was pleaded, and that in those cases the jury might think it unnecessary that he should insist on the withdrawal in court of charges which the defendants admitted to be without foundation. He was then cross-examined with reference to various occasions on which he had been cross-examined by counsel, the implied insinuation being that there was something discreditable in the fact that he had been in a position in which it was necessary to cross-examine him, but with reference to these questions no admission was made of anything discreditable. He was then cross-examined about the kind of clients for whom he appeared, and again nothing discreditable to him appeared from his answers. He was also cross-examined with regard to his relations with a man named Morrison, a man named Stevens, and a man named New-

A ton, his answers afforded some ground for saying that he was not too particular about the company he kept. He was then asked whether he agreed that blackmail was the most horrible crime a man could commit. He protested that he had not been guilty of blackmail, but admitted, as he was bound to, that it was a grave offence.

Objection was taken that he could not be cross-examined about the details of this B case when there had been no justification pleaded, it being clear from *Scott* v. *Sampson* (1) that such questions were not admissible for the purpose of diminishing damages. In the first place the learned Lord Chief Justice suggested that the evidence was admissible as showing that the plaintiff was a man of worthless character. After discussion it was pointed out that in any event the questions were admissible as going to credit, and the Lord Chief Justice quite rightly ruled that C they were admissible. The plaintiff was then asked what he would say about a man who was not only a blackmailer but a forger. He said he was not a forger, but of course had to admit that forgery was a serious offence. At this stage of the case no questions were put to him of the facts suggested as indicating that he had been guilty of forgery. He was then asked: "Suppose a man deliberately robbed the widow of his best friend could there be any depth of infamy lower than D that?" He said he did not do so, but admitted that it would be a serious offence if it had been committed. He was then asked if he were guilty of swindling poor people whether that would be a terrible thing, but at this stage of the case no details were put to him. He was then asked whether he was a friend of confidence tricksters, convicted thieves, and swindlers, and the names of Stevens, Morrison, and Newton were put to him. His answers in effect were that he E knew nothing to the discredit of Stevens, and that at the time he was associated with Morrison he knew nothing to the discredit of Morrison, though he had learned afterwards that he had been convicted of being a suspected person and received a short sentence. It was suggested that Morrison had been convicted of swindling in Vienna, but the plaintiff said that he knew nothing about that. Newton, of course, was the man with whom he was associated in the "Mr. A." case.

F It will be observed that up to this point no admissions of any importance had been obtained from the plaintiff except as to the settlement of the other actions, and as to his conviction and his association with some people of bad character. It had been firmly implanted in the minds of the jury that the defendants' case about the plaintiff was that he had been guilty of forgery, and of robbing the widow of his best friend, and, without any warning to the jury that they could G not go beyond the evidence given by the plaintiff on these matters, the jury might well think that such accusations would not be gravely made by counsel unless he was in a position to call affirmative evidence to establish them. He was then cross-examined in detail with reference to the alleged forgery of a cheque for £256 6s., the forgery alleged being the unauthorised initialling of an alteration of a cheque signed by his employer Mr. Appleton, from "Order" to "Bearer." Accord- H ing to the plaintiff's evidence it was the custom of Mr. Appleton, who was ill at home, to sign a book full of cheques and to authorise the plaintiff to fill in the cheques for the purpose of paying sums legitimately due from Mr. Appleton, and he produced a power of attorney under which he had power to sign Mr. Appleton's name to cheques. He said he had altered cheques from "Order" to "Bearer" hundreds of times, and had put Mr. Appleton's initials to the alterations. He said I he had made and initialled the alteration before the death of Mr. Appleton. The cheque, as I have pointed out, was for £256 6s. The counterfoil in Mr. Hobbs' handwriting was only entered for £6 6s. He said that this was an oversight on his part, and that he had made out a cheque for £256 6s. in order to provide the sum of 6s. for a lady who was entitled to receive it from Mr. Appleton, £6 for office expenses, and £250 to provide him with money either to repay himself moneys he had paid on behalf of Appleton to a Mr. Percival, or to put him in funds to pay the amount which was due from Appleton to Percival, and that he should receive the £256 for this purpose had been arranged by him with Appleton, and he

produced documents which, if genuine, proved that this was true. It was proved by his admissions that in fact he had cashed the cheque after Mr. Appleton had died, but according to his sworn evidence without any knowledge of that fact, and that he refused to pay the money back into the banking account, but he also proved that in the final account between him and the representatives of Mr. Appleton, he was allowed credit for £250, and a settlement was arrived at on that basis. A

In these circumstances, and upon this evidence, it is clear that he could not be convicted of forgery, nor could he be convicted of defrauding Mr. Appleton's widow. He was also cross-examined about a transaction with clients of Mr. Appleton's which had happened twenty years before, the suggestion being that on behalf of Appleton he had retained for his employer a sum for solicitor and client costs which he was not entitled to retain. In my judgment, it was unlikely that the jury would have been able to come to a fair conclusion upon the effect of the cross-examination without having their attention called by the judge to the evidence, so as to enable them to judge fairly whether the plaintiff had made any admission which they were on his evidence justified in saying amounted to an admission of criminal conduct, and without it being pointed out to them that however emphatic the questions were that were put to him, they were bound to deal with the case upon his answers and upon his answers alone, inasmuch as this was a collateral matter on which neither the defendants nor the plaintiff could call evidence either, in the one case, to corroborate, or, in the other case, to displace the evidence given by the plaintiff. I am further of opinion that the jury ought to have been told that their intervention was premature, that they must keep an open mind until the conclusion of the plaintiff's case, that inasmuch as the defendants' counsel had put in documents the plaintiff's counsel would be entitled not only to re-examine but to address the jury last. I think, also, they ought to have been told that in estimating the amount of damages they were entitled to consider not merely the character of the plaintiff but also the character of the defendants; that a man does not lose his right to damages because his character is not free from reproach; that a man with a damaged character is entitled to have his damaged character protected, and if newspapers for their own purposes falsely allege that he has been guilty of crimes and misconduct the jury might well consider that even a man of bad character ought not to have his character made out to be blacker than the proved facts warrant. I am also of opinion that the jury ought to have been asked to consider whether the words of the libel meant all that was said in the innuendo. It was necessary to ask this question because, if they found the innuendo proved, then, even if they gave a verdict for one farthing, though the plaintiff might have been deprived of his costs, it would not have been right to say that he ought to pay the whole costs of the action. B C D E F G

We were urged by counsel for the defendants to say that this appeal ought not to be allowed because there was no miscarriage of justice as it is quite clear that, whatever the summing-up had been, the jury would have adhered to the view which they had expressed. I do not think we are entitled to speculate about what the jury would have done, nor am I entirely satisfied that, if there had been a sufficient direction to the jury that they should keep an open mind till the end of the case, and a sufficient direction with regard to the extent of the plaintiff's admissions, the jury would necessarily have remained of the same opinion as they had prematurely expressed. For these reasons I think there should be a new trial, and I agree with my Lord that it follows that in the second case—the case against the "Nottingham Journal"—there should be an extension of time to appeal from the order refusing to adjourn, and that the default judgment should be set aside and a new trial ordered in that case also. H I

SANKEY, L.J.—I agree that there must be a new trial, but in view of that fact I do not propose to comment at length upon the case. This litigation has been most unfortunate, and the trouble is mainly due to the premature action of the jury in stopping the case when the cross-examination of the plaintiff was not half-

A way through. I say "not half-way through" for the learned counsel for the defendants had been cross-examining for about a day and a half when the jury gave their decision, and then he said that he had still two days' cross-examination left.

The action was a peculiar one. The plaintiff, a man of disreputable character, was claiming damages for injury to his reputation. His counsel had to present him to the jury as a man who had recently come out of prison after a sentence of B two years' hard labour for a disgraceful conspiracy. On the other hand, the defendants were the owners of a newspaper and had to admit that they had spread a number of lies about the plaintiff, for they had published a number of bad libels on him. Their defence was of an unusual character. It admitted the publication of the libels and paid into court the sum of 20s., but denied the innuendo. The learned counsel who drew the defence was doubtless wise in so doing so as to C prevent at the time when he drew it the question being one of damages only. Subsequently, the defendants served notice under Ord. 36, r. 37, of circumstances on which they relied in mitigation of damages. It is possible in such a case as this to imagine one juryman saying: "The plaintiff's character is so bad that he only ought to have a farthing whatever the defendants have said"; and on the other hand another saying: "It is unfair to kick a man when he is down, to accuse him D untruly of having done many worse things, especially as their object was to increase their own circulation and enhance their own profits." It might be contended that the inequities were equal. In this state of affairs the case wanted very careful and patient investigation, which, in my view, it did not receive.

With reference to the first ground in the notice of appeal, namely, that the learned Lord Chief Justice prejudiced the jury, I think that in respect of the E affidavit of documents the Lord Chief Justice was under a misapprehension, due, possibly, to his not appreciating the opening speech of the counsel for the plaintiff. At the moment when the affidavit was sworn the documents which it was complained were not included could not, in the then state of the case, be relevant and need not have been included. It is unfortunate that the Lord Chief Justice did not appreciate that the submission of the learned counsel for the plaintiff was F correct. The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which we all desire, namely, that justice should not only be done, but should appear to have been done.

With regard to the remaining grounds on which it is suggested that the jury were prejudiced, none of them is of sufficient weight to entitle the plaintiff to a new G trial. The learned Lord Chief Justice, as appears from the shorthand note, evidently took what is sometimes described as a strong view against the plaintiff, but a judge is entitled to express his opinion provided he properly leaves questions of fact properly to be determined by the jury: see *R.* v. *O'Donnell* where LORD READING, C.J., said (12 Cr. App. Rep. at p. 221):

H "A judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issue of fact to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing-up such language as leads them to think that he is directing them that they must find the facts in the way he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury I that the prisoner's story is a remarkable one, or that it differs from accounts which he has given of the same matter on other occasions. No doubt the judge here did express himself strongly on the case, but he left the issues of fact to the jury for their decision."

The point may be tested by putting the converse case. If a judge has a strong belief in a prisoner's innocence, ought he to strive for a verdict of Not Guilty? It is impossible to argue that there is one principle only in the law. There are many principles; and one principle must recognise the necessity of accommodating itself

to another principle. The decision in such a case is for the jury, and the duty of the judge is to see that the proper facts, and the proper law appertaining to them, are properly placed before the jury. I should be disposed to say that a judge who delivers a manifestly hostile summing-up, accentuating all the points against the litigant and omitting those in his favour, or a jury who return a premature verdict, are failing in their functions. In a strong desire to do justice a judge may make mistakes; so may counsel; so may a jury. It is easy to criticise, but no system can ensure infallibility; the best it can do is to provide for finality. In attaining finality, open courts and a vigilant Bar will reduce the margin of error to a minimum.

Dealing with the cross-examination of the plaintiff, I am of opinion that it was legitimate in so far as it purports to be a cross-examination as to credit; but great care has to be taken to see that a jury appreciates, though it might be a difficult task for them, that answers given to such a cross-examination may not be relevant on the issue of mitigation of damages. The law is beyond question. The decision in *Scott* v. *Sampson* (1) states clearly the evidence that is admissible upon the issue of mitigation of damages. CAVE, J., after dealing exhaustively with the authorities, divides the evidence which it was suggested might be given in mitigation of damages into three heads: (i) General evidence of reputation, which is admissible. (ii) Evidence of rumours and suspicions to the same effect as the defamatory matter complained of, which is not admissible as only indirectly tending to affect the plaintiff's reputation. (iii) Evidence of facts and circumstances to show the disposition of the plaintiff, which is also inadmissible. No further word may be added to that judgment. A rule, Ord. 36, r. 37, with regard to mitigation of damages, was passed after the decision. *Watt* v. *Watt* (5) shows clearly that it is not permissible in mitigation of damages to go into evidence which, if proved, would constitute a justification which has not been pleaded, and it makes no difference that this evidence is offered in cross-examination.

A long argument was addressed to us with regard to the limits and effect of cross-examination with regard to credit, and a number of cases were cited, especially *A.-G.* v. *Hitchcock* (7): see also *Palmer* v. *Trower* (14). An opponent may be cross-examined as to his credit, but he cannot be contradicted upon any point not material to the issue in order to show that his evidence is not to be believed. The Indian Evidence Act, 1872, s. 153, correctly sums up the English law on the subject, and is as follows:

> "When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence."

The court can always exercise its discretion to decide whether a question as to credit is one which the witness should be compelled to answer, and, in my view, again referring to the Indian Evidence Act, s. 148, in the exercise of its discretion the court should have regard to the following considerations: (i) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court with regard to the credibility of the witness on the matter to which he testifies. (ii) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect or would affect to a slight degree the opinion of the court as to the credibility of the witness on the matter to which he testifies. (iii) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence. In a case like the present it is incumbent on the presiding judge and vital to a proper trial to explain clearly to the jury the inference to be drawn from and the legal effects of the answers given by a plaintiff to a cross-examination as to credit. Owing possibly to the jury's premature decision, the Lord Chief Justice was deprived of any oppor-

A tunity of doing this, and the jury returned their verdict without any direction on this head. That, in my view, vitiates the proceedings. It was argued for the plaintiff that the tribunal must always believe the answer of a witness given to a question which affects his credit. I am not prepared to accept that contention. Where such a question and answer are the only ones, different considerations may apply, but it cannot be that the tribunal is bound to believe an answer if, having regard to the B whole of the witness's evidence, they come to the conclusion that he is not a trustworthy person. Suppose at the beginning of a cross-examination as to credit, the witness returns one answer, and later on he returns just the opposite answer to the question when put again. Is the court to accept both answers as true?

Complaint was made that the learned Lord Chief Justice did not show to counsel communications sent to him by the jury, but as he told the parties the gist of the C communication the complaint is unfounded. In my view, whether a judge should or should not show every communication which he receives from the jury to the parties and their advisers is a matter for the discretion of the judge himself. Having regard to the different situations which may arise, it is impossible to lay down any hard-and-fast rule on the subject, but I think that it will be found that the better practice in nearly every case will be for the judge to show the communi- D cation to the parties, informing them what answer he proposes to make to it, and asking for their observations before giving his answer to the jury. There may be an exception in the case where a jury sends up a note asking for an increased remuneration. Even there it is better practice for the judge to tell the parties, but not to ask them for their opinion if it is likely to embarrass a poor litigant who does not like to refuse to pay the extra fee. There the judge, after telling the E parties of the application, should say that the jury are not entitled to it. The real difficulty in the way of the respondents arises from the fact, as above stated, that the jury were premature in coming to a conclusion before the cross-examination was half-way through, and consequently received no direction from the learned Lord Chief Justice. A perusal of the note will show that the Lord Chief Justice himself was embarrassed by this action. He says to the jury: "It is now half-past F eleven. Are you still of the same mind?" The foreman: "Yes, my Lord." The Lord Chief Justice: "And does that mean that you desire if you may to find for the defendants?" The foreman: "We desire to find for the plaintiff." The Lord Chief Justice: "You mean the defendants, do you not?" The foreman: "That is what we want to know." The Lord Chief Justice: "You know the plaintiff is the man who is bringing the action?" The foreman: "Yes, I understand that."

G Plaintiff's counsel was also in a very difficult position in having to address a jury who had made up their minds, while in the hurry of the moment the defendants' counsel, although he had put in evidence, claimed a right of reply, which, however, he did not subsequently use, although, in the exercise of a generous discretion, he said he was very loth, if his learned friend desired to address the jury as counsel, he should appear to be in opposition to it. The jury were not directed H with regard to the difference between the effect of answers given to questions impeaching the plaintiff's credit and answers to questions properly asked and directed to a mitigation of damages. Indeed, they were not directed at all, and the question of the innuendo was not even mentioned to them. They may have expected that witnesses would be called as to certain charges of forgery and perjury, and have assumed that the plaintiff was guilty of these charges, having regard to the I way in which he gave his evidence in reference to them, although as a matter of fact the charges went to his credit, were not proved, were denied by him, and witnesses could not be called to contradict him when, on such a cross-examination to credit, he denied them.

Learned counsel for the respondents repeatedly pressed us with the argument that, owing to the opening of the plaintiff's counsel, all the ordinary rules with regard to evidence in mitigation of damages went by the board, that the sole question in dispute was the character of the plaintiff, that the result of the trial was correct, and that no jury would give the plaintiff more than a farthing, and

we need not look too strictly upon the means by which the result was obtained. With this I profoundly disagree. It is not admissible to do a great right by doing a little wrong. The inequalities of life are not so dangerous in a State whose subjects know that in a court of law, at any rate, they are sure to get justice, and it is not sufficient to do justice by obtaining a proper result by irregular or improper means. In *Bray* v. *Ford* (12) ([1896] A.C. at p. 47) LORD HALSBURY, L.C., said:

> "I think there has been a substantial wrong, since I think the defendant was not permitted to present his case to the jury with the argument that his original complaint was true."

LORD WATSON says ([1896] A.C. at p. 49):

> "Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal. In the present instance the case made in evidence by the appellant was not submitted to the jury."

LORD HERSCHELL said ([1896] A.C. at p. 53):

> "The court may think, as I might think in the case before your Lordships, that the jury would have given the same damages if the law had been correctly expounded; but this is a mere matter of speculation; it cannot be asserted with the least certainty that they would have done so. The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them."

The respondents' counsel prophesies that the result will be the same on a new trial. Upon that question I entirely decline to speculate. Should the same result be achieved after a regularly conducted trial, it may well be that the plaintiff will have to put up with it, for a properly directed jury is the tribunal constituted by our country to give a decision in such a case as the present; but the plaintiff must have a proper chance of trying to persuade them to give a verdict in his favour—a chance which he has not yet had. For the reasons I have given, I think that the appeal succeeds, and a new trial must be ordered. I agree, too, with the other members of the court with regard to the orders to be made in respect of the interlocutory appeal and the other final appeal.

New trial ordered.

Solicitors: *Edmond O'Connor & Co.*; *Oswald, Hickson, Collier & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

JOHN LOVIBOND & SONS, LTD. *v.* VINCENT

[Court of Appeal (Scrutton, Greer and Sankey, L.JJ.), March 25, 1929]

[Reported [1929] 1 K.B. 687; 98 L.J.K.B. 402; 141 L.T. 116; 93 J.P. 161; 45 T.L.R. 383; 73 Sol. Jo. 252; 27 L.G.R. 471]

Rent Restriction—Death of tenant—Capacity to transmit statutory tenancy by will.

A statutory tenant has a purely personal right to retain possession of the property of which he is tenant, and that right ceases on his death and he cannot transmit his statutory tenancy by his will.

Keeves v. *Dean* (1), [1924] 1 K.B. 685, and *Roe* v. *Russell* (2), [1928] 2 K.B. 117, applied.

Notes. Considered: *Price* v. *Gould*, [1930] All E.R.Rep. 389; *Sutton* v. *Dorf*, [1932] All E.R.Rep. 70. Referred to: *Abbey* v. *Barnstyn*, [1930] 1 K.B. 660; *Skinner* v. *Geary*, [1931] All E.R.Rep. 302; *Oak Property Co.* v. *Chapman*, [1947] 2 All E.R. 1; *Thynne* v. *Salmon*, [1948] 1 All E.R. 49; *Baker* v. *Turner*, [1950] 1 All E.R. 834; *Moodie* v. *Hosegood*, [1951] 2 All E.R. 582.

As to the nature of a statutory tenancy, see 23 Halsbury's Laws (3rd Edn.) 805 et seq.; and for cases see 31 Digest (Repl.) 692–695.

Cases referred to:

(1) *Keeves* v. *Dean*, *Nunn* v. *Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 40 T.L.R. 211; 68 Sol. Jo. 321; 22 L.G.R. 127, C.A.; 31 Digest (Repl.) 694, *7865*.

(2) *Roe* v. *Russell*, [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253; 92 J.P. 81; 44 T.L.R. 278; 26 L.G.R. 145, C.A.; 31 Digest (Repl.) 695, *7868*.

(3) *Campbell* v. *Lill* (1926), 135 L.T. 26; 42 T.L.R. 397; 70 Sol. Jo. 621, D.C.; 31 Digest (Repl.) 693, *7846*.

(4) *Parkinson* v. *Noel*, [1923] 1 K.B. 117; 92 L.J.K.B. 361; 128 L.T. 538; 67 Sol. Jo. 184; 21 L.G.R. 130; 31 Digest (Repl.) 697, *7887*.

(5) *Collis* v. *Flower*, [1921] 1 K.B. 409; 90 L.J.K.B. 282; 124 L.T. 510; 19 L.G.R. 193, D.C.; 31 Digest (Repl.) 662, *7627*.

(6) *Mellows* v. *Low*, [1923] 1 K.B. 522; 92 L.J.K.B. 363; 128 L.T. 667; 39 T.L.R. 190; 67 Sol. Jo. 261; 21 L.G.R. 180, D.C.; 31 Digest (Repl.) 658, *7600*.

Appeal from an order of MacKinnon, J., at Taunton Assizes.

By an agreement dated June 2, 1913, and made between Mrs. Vincent and one Baxter, Mrs. Vincent became tenant of the George Hotel, Middle Street, Yeovil, at a rent of £35 10s. a year. On March 11, 1920, the executors of Baxter gave Mrs. Vincent notice to quit and give up possession of the premises on March 25, 1921. Notwithstanding the notice Mrs. Vincent remained in occupation of the George Hotel, which came within the provisions of the Rent Restrictions Acts, until her death on Aug. 8, 1928. Her daughter, Elizabeth Anne Vincent, the present defendant, was living with her mother at the hotel up to the time of her mother's death. By her will dated Nov. 30, 1903, Mrs. Vincent made her daughter her executrix and sole beneficiary. Probate of the will was granted in September, 1928, to the defendant, who continued to remain in occupation of the hotel. On Oct. 18, 1928, the plaintiffs, who were the assignees from Baxter's executors of his title, brought the present action against the defendant claiming possession of the hotel and mesne profits. The defendant claimed that under her mother's will she was entitled to remain at the hotel as a statutory tenant.

MacKinnon, J., gave judgment for the plaintiffs, holding that Mrs. Vincent's right under the Rent Restrictions Acts was a purely personal one and could not be transmitted by her will. The defendant appealed.

Rayner Goddard, K.C., and *L. R. Dunne* for the defendant.

A. M. Wilshere for the plaintiff was not called upon.

SCRUTTON, L.J.—If this case had come on for hearing six years ago I have no doubt that we should have required to ask counsel for the defendant to prolong his argument considerably, we should have called on the other side, we should have reserved judgment in what we should have thought was a very difficult case, and we should have given a more or less satisfactory judgment. But which way we should have given it I do not know. The Rent Restrictions Acts are gradually being moulded and explained and, I might almost say, passed. I am afraid there is no doubt that when in the urgency of the war and of deficient house accommodation persons who were contractual tenants were allowed by legislation to stay in their tenements against the will of the landlord, Parliament had very little idea, if it had been asked, what sort of privilege it was conferring on the tenant whom they allowed to stay in a house after his landlord had given him notice to quit. As I have had occasion to remark, particularly in *Roe* v. *Russell* (2), Parliament does not seem, when framing the provisions conferring this privilege upon tenants, to have thought of what would happen in the most ordinary incidents of life—the death of the statutory tenant leaving a will or intestate, the bankruptcy of the statutory tenant, or an attempt by the statutory tenant to transfer his interest, whatever it is, during his life to another and quitting the premises.

There are no signs in the earlier Acts that Parliament ever thought that such things might happen, still less that it formed any idea of what it proposed to do if those events did happen, and, consequently, as event by event has turned up, the courts have been perplexed with problems which very often could have been simply met by the passing of an Act of Parliament to meet the case, because the language used by the legislature has afforded very little clue. A stage, and a very marked stage, in the development of the Acts was arrived at when this court had to consider *Keeves* v. *Dean* (1), in 1924. The broad question there was: Can a statutory tenant, who remains in possession against the will of his landlord on the terms of the Rent Restrictions Acts, assign his whole interest, whatever it is, in the premises to a stranger so that he can pass on the privilege that he has to another without the consent of the landlord? Two lines of argument were put forward in that case. One was that, as the statute says that a tenant who stays in by virtue of the Act shall stay in on the terms and conditions of the original tenancy, and as under the original contractual tenancy he could have assigned, so under the statutory tenancy it was a term and condition of his tenancy that he could assign, for he had a kind of property. The other argument was that a tenant's right to assign was not a property at all, but a privilege personal to the tenant—not a term conditional to the tenancy, but an incident of the tenancy, and, therefore, it did not follow from the fact that a contractual tenant could assign that he could do so when he had become a statutory tenant. There was one point on which the whole of the court agreed in *Keeves* v. *Dean* (1), which was that if one could assign one could not assign for value because that was expressly prohibited by sub-s. 2 of s. 15 of the Rent and Mortgage Interest (Restrictions) Act, 1920. On the fundamental question of what was the interest of the statutory tenant, BANKES, L.J., said this ([1924] 1 K.B. at p. 690):

> "His right is a purely personal one, and as such, unless the statute expressly authorises him to pass it on to another person, must cease the moment he parts with the possession or dies."

LUSH, J., who was the third judge in the Court of Appeal on that occasion, after saying that one necessarily asked oneself what it was that the statutory tenant had to assign, said ([1924] 1 K.B. at p. 697):

> "He has no estate in the premises, that has come to an end, and all that the statute has given him is a purely personal right to be free from disturbance by his landlord."

When the same question was considered in *Roe* v. *Russell* (2), SARGANT, L.J., added the great weight of his opinion to that view and said ([1928] 2 K.B. 131):

A "Now this argument is directly in conflict with the reasoning of the majority of the Court of Appeal in *Keeves* v. *Dean* (1), which probably binds us and with which, moreover, I agree. For when once the conclusion is reached that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property, it is difficult to apply to him, as part of the terms and conditions of his former tenancy, rights essen-
B tially incidental and due to the possession of property."

When the Court of Appeal in *Keeves* v. *Dean* (1) was deciding that a man could not assign his statutory tenancy during his life they were doing so on the construction of the Acts prior to the Act of 1923. The facts which were being considered in that case arose before the coming into operation of the Act of 1923, and, therefore, the court were not referred by counsel to the provisions of that Act.
C Speaking for myself, and, I believe, for my colleagues, in that decision they were not aware that there were such provisions, because not having to consider the Act of 1923, as it did not apply to the facts in question, they did not investigate it. But side by side, though each in ignorance of the other, Parliament in the Act of 1923 had taken a very definite step towards making clear what were the rights of
D the statutory tenant, for in s. 4, which is substituted for s. 5 of the Act of 1920, a new cause of ejection from the statutory tenancy was inserted in head (h). It was to be a ground for ejecting a tenant if

> "the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet."

E [See now Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I, para. (d).] Consequently, in 1923 Parliament distinctly said that it did not confer upon a statutory tenant the right to assign during life.

In the present case we have to consider this question: What can the statutory tenant assign by will, making a disposition which will take effect on his death by his property passing to a beneficiary who may or may not be a member of the
F family? It is very odd that we have got up to 1929 in a set of Acts, the first of which came into force in 1915, without any statutory tenant apparently leaving a will on which this question arises; but it has come at last, for in the present case Mrs. Vincent was, under an agreement dated as far back at 1913, a yearly tenant of a house in Yeovil, called the George Hotel, at a rental which brings the house within the Rent Restrictions Acts. In March, 1920, the landlord gave notice to
G Mrs. Vincent to quit and give up possession of the premises on March 25, 1921. She did not go out, but stayed in under the Rent Restrictions Acts. She had a daughter, Elizabeth Anne Vincent, who was living with her. In 1903 Mrs. Vincent had made a will by which she appointed her daughter Elizabeth Anne Vincent her executrix and sole beneficiary. Of course, in 1903, no one knew anything about the Rent Restrictions Acts or statutory tenants, and I do not suppose that Mrs.
H Vincent then thought she was conferring upon her daughter anything in particular in respect of her yearly tenancy, but when Mrs. Vincent died in August, 1928, she was a statutory tenant and her daughter was her executrix and sole beneficiary, and the question was then raised: Can the statutory tenant, Mrs. Vincent, by her will assign her right and interest to her daughter?

It seems to me that that must turn fundamentally on what is the nature of the
I interest of a tenant remaining in possession against the will of the landlord after the determination of his contractual tenancy by virtue of the terms of the Rent Restrictions Act, and it appears to me that this court is bound by the view expressed by the majority of the court in *Keeves* v. *Dean* (1) and concurred in by the majority of the court in *Roe* v. *Russell* (2), that, in the language I have read of SARGANT, L.J. ([1928] 2 K.B. at p. 131): "He (the statutory tenant) has no estate or property as tenant at all, but has a purely personal right to retain possession of the property." Such a right does not confer on the tenant the privilege of assigning to somebody else during his life, and it seems to me to follow that, as it prevents him assigning

during his life, it equally prevents him assigning at his death. It seems to me it would be impossible to find a reasonable ground for saying: You may not during your life assign to A.B., but you may on your death leave a legacy to A.B. having the same effect. It is quite true that there is almost an equal absurdity the other way because, although there was nothing in the Rent Restrictions Acts up to 1920 about what happened on the death of a tenant intestate, in that year there was put into the definition of "tenant" a provision in s. 12 (1) (g), which said

> "the expression 'tenant' includes the widow of a tenant [dying intestate] who was residing with him at the time of his death, or, where a tenant [dying intestate] leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

[The words "dying intestate," in square brackets supra, were repealed by s. 1 of the Rent and Mortgage Interest (Restrictions) Act, 1935.] That is an express statutory provision, and it, therefore, follows that if Mrs. Vincent, instead of making a will leaving this property to her daughter, had died intestate while the daughter was the only member of her family living in the house, the daughter would, by the application of that clause, have become a statutory tenant, but that is only because the statute in terms has said so. The statute in terms has said nothing about leaving property at all; on the contrary, it has said that the tenant may not assign during his life, and it appears to me that the nature of his interest is such that he cannot assign by will at his death. One can only construe these Acts as one finds them; they are difficult enough and, in my view, as the result of the authorities now it is clear that the right conferred on the statutory tenant, unless one can find an express statutory provision altering it in a particular case, is a purely personal right with which he cannot part. It may be that that view, now established firmly by the Court of Appeal decisions, and by the statute of 1923, may render it necessary to re-consider previous decisions about executors, administrators and trustees in bankruptcy; it is not necessary to do so on this occasion. It is enough to suggest that those decisions may have to be re-considered now the general principle is established, and in this case to decide that a statutory tenant staying in after the determination of his contractual tenancy against the will of his landlord by the provisions of the Rent Restrictions Acts cannot leave by will his right or interest, or whatever you may describe it, as statutory tenant. For these reasons the appeal must be dismissed.

GREER, L.J.—I agree. There seems to be no end to the conundrums suggested by the Rent Restrictions Acts that come before the courts for decision, and I suppose there will be no end to those conundrums until the Rent Restrictions Acts are removed from the statute book; but as they come here, however difficult it may be to reconcile the various portions of the Acts or the various decisions that have been given on different parts of the Acts, the court has to decide the particular problem which is before it.

The question for decision in this case is whether the person, who is for convenience called a statutory tenant, is entitled by will to dispose of such rights as he has as a statutory tenant to a legatee or to his executor whom he nominates in such a way that the legatee or executor obtains the same right to possession and the same right to resist an order for possession by the owner as existed in the hands of the statutory tenant. The question turns on some sections of the Act of 1920 as amended by the Act of 1923. It will be remembered that Parliament, when it approached this question, did so by the device which appears in s. 5 of the Act of 1920 of restricting the powers of the court to order possession to be given in favour of the landlord as against a tenant whose tenancy had in some way come to an end. Parliament might, if it had so chosen, have said that there shall be substituted for the existing tenancy a tenancy on different terms, and if it had done that the statutory tenancy would be a tenancy that would have been capable of assignment and capable of devolution as property either to an administrator or to

an executor or to a legatee. Parliament did not pursue that course; it pursued the course of restricting the powers of the court to order possession so far as certain facts with reference to the behaviour of the tenant continued to exist, and it might well be that, if there had been no decision on the subject, the various amendments that have been made of the original Act of 1915 might have been construed, taking the whole Act together as it now exists, as meaning that a real tenancy was created by the rights which were given to the tenant, or, rather, by the restrictions which were put upon the landlord.

But it is impossible to take that view having regard to the decision in *Keeves* v. *Dean* (1). In that case the court had to consider whether an assignment of the statutory rights, whatever they were, inter vivos, was in accordance with the provisions of the Act, and they had to consider the definitions, if they are definitions, of "tenant" which are contained in s. 12 of the Act. So far as the definition relates to tenant it is in these words: s. 12 (1) (f): "The expression 'tenant' includes any person from time to time deriving title under the original landlord or tenant." If in s. 5 "tenant" means, not a person who is a real tenant, but a person who has ceased to be a tenant, and who, but for the Act, would be a trespasser, then one would have thought it right to read the word "tenant" in s. 12 as referring to the same kind of person; but, having regard to the decision in *Keeves* v. *Dean* (1), I do not think it is possible to read s. 12 (1) (f) so far as it is a definition of tenant as meaning other than someone who derives title under the original tenant during the existence of the original tenant's tenancy, that is to say, before he has ceased to hold at common law under his contract and before he has become what it has been convenient to call a statutory tenant. Curiously enough, s. 12 (1) (g) goes on to include, in the case of an intestacy, in the term tenant the

> "widow of a tenant [dying intestate] who was residing with him at the time of his death, or, where a tenant [dying intestate] leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

If we were to read the definition of "tenant" in s. 12 (1) (f) as including somebody taking title under what has been called the statutory tenancy, as a person deriving title from the original tenant, then in the case of an intestacy there might be one next-of-kin other than the widow, or two next-of-kin other than the widow who would be tenants under s. 12 (1) (f), and yet there would be the widow who would also be included in the term in para. (g), and an impossible situation would be created in that event. I can only read para. (f) as confined to persons who take title from the holder of the estate under the original contract of tenancy while the contract of tenancy still exists. That is the only way, as it seems to me, in which one can treat the decision in *Keeves* v. *Dean* (1), because para. (f), if interpreted literally as applicable to the statutory tenancy, would include an assignee under a statutory tenancy just as much as it would include the executor or devisee of a tenant. I think we must deem it to be confined to persons from time to time deriving title under the original tenant while that tenant has got some estate in reference to which it is appropriate to use the word "title," which is inappropriate to a mere personal right. The decision in *Keeves* v. *Dean* (1) must, I think, be binding on this court because we must follow the decision of the majority, especially as it has again been accepted by the Court of Appeal in *Roe* v. *Russell* (2), and also by two members of the Court of Appeal when sitting as a Divisional Court in *Campbell* v. *Lill* (3). The result is that there is no provision in the Act which includes any right in a tenant to transfer by assignment or by his will whatever rights he has. If his right is deemed to be a personal right to occupy, then it is inconceivable that his executor could take anything, because his personal right cannot exist after he has ceased to exist himself.

One problem that may have to arise for this court, having regard to this decision and the decisions in *Keeves* v. *Dean* (1) and *Roe* v. *Russell* (2), is whether I was

right in the view I took in *Parkinson* v. *Noel* (4) to the effect that the right of the tenant passed to his trustee in bankruptcy. But, for my part, I do not think that the decision we are giving to-day is really inconsistent with anything that was decided in *Parkinson* v. *Noel* (4). The decision in that case was not that the trustee in bankruptcy had the right to go and live on the premises, take possession of the premises, and resist in his own name an order of the court to deliver up possession. The ground of that decision was that the landlord was restricted from taking possession of the property, and that restriction was in favour of the tenant. So long as the tenant was there and other conditions had been complied with, the landlord could not turn him out. It seemed to me that that was a right which was a valuable right and one which could be made valuable in the hands of the trustee. It did not mean that the trustee was entitled to say: "You cannot turn me out." All it meant was that the trustee was entitled to say to the landlord: "You cannot turn the bankrupt out," and if that right could be converted into money for the benefit of the creditors I see no reason in the Act or anywhere else why that benefit should not pass to the trustee for the benefit of creditors. But I agree with my Lord that, having regard to the decision in *Keeves* v. *Dean* (1), the necessary result is that this appeal should be dismissed with costs and the judgment below held to be right.

SANKEY, L.J.—I agree. I think that the question which falls for determination in this case is really concluded by the reasoning of the decision in *Keeves* v. *Dean* (1). BANKES, L.J., said ([1924] 1 K.B. at p. 690):

> "The person who so seeks to assign has come to be known as a 'statutory tenant,' and I think it is a pity that that expression was ever introduced. It is really a misnomer, for he is not a tenant at all; although he cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has. His right is a purely personal one, and as such, unless the statute expressly authorises him to pass it on to another person, must cease the moment he parts with the possession or dies."

That reasoning was accepted by SARGANT, L.J., in *Roe* v. *Russell* (2), where the lord justice says ([1928] 2 K.B. at p. 131):

> "For when once the conclusion is reached that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property, it is difficult to apply to him, as part of the terms and conditions of his former tenancy, rights essentially incidental and due to the possession of property."

It is to be observed that *Collis* v. *Flower* (5) and *Mellows* v. *Low* (6), to which we were referred, are quite different in their facts from the present case, for in both those cases the contractual tenancy was in existence between the landlord and the tenant at the date of the tenant's death. If the right of a statutory tenant is purely a personal one, that right must cease on his death, and cannot be transmitted by him by will to anybody. I think the decision of the court below was correct and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Langlois, Harding & Co.*, for *Mayo & Son*, Yeovil; *Gregory, Rowcliffe & Co.*, for *Watts, Moore & Bradford*, Yeovil.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

ANKIN *v.* LONDON AND NORTH EASTERN RAIL. CO.

[Court of Appeal (Scrutton and Slesser, L.JJ.), December 19, 1929]

[Reported [1930] 1 K.B. 527; 99 L.J.K.B. 293; 142 L.T. 368; 46 T.L.R. 172; 74 Sol. Jo. 26]

Discovery—Production of document—Privilege—Production contrary to public interest—Copy of document retained by maker also privileged—Communications at request of solicitor after action threatened to obtain for solicitor evidence to enable him to defend action and advise defendants—Regulation of Railways Act, 1871 (34 & 35 *Vict.*, *c.* 78), *s.* 6.

In an action brought by a passenger claiming damages for personal injury sustained by him while travelling on the defendants' railway an application was made to the defendants for a copy of the statutory return made by them under s. 6 of the Regulation of Railways Act, 1871, to the Ministry of Transport with regard to the accident. The defendants refused to produce the document upon the ground that the Minister had intimated to them that he declined, in the public interest, to comply with any request which he might receive for permission to inspect or to obtain copies of such return.

Held: (i) it was the practice of our courts to accept the statement of a Minister that the production of a document was contrary to the public interest, and it must be equally contrary to the public interest to produce a copy of that document which the person making it had kept for his own information, and, therefore, no order would be made for the production of a copy of the return.

Per Scrutton, L.J.: The defendant company should have included the copy of the return in their affidavit of documents with a statement why they claimed privilege for it.

Woolley v. *North London Rail. Co.* (1) (1869), L.R. 4 C.P. 602, explained.

Communications, stated to have been "at the instance and request and for the use of the defendants' solicitor, between the officials of the defendant company and between such officials and third persons, after this action was threatened or anticipated, for the purpose of obtaining for and furnishing to the defendants' solicitor evidence, and information as to the evidence, which will be obtained, and otherwise for the use of the said solicitor to enable him to defend this action and advise the defendants,"

Held to be privileged.

Notes. Considered: *Spigelman* v. *Hocken*, *Goldblatt* v. *Hocken* (1933), 150 L.T. 256; *Duncan* v. *Cammell Laird & Co., Ltd.*, [1941] 1 All E.R. 437; *Broome* v. *Broome*, [1955] 1 All E.R. 201. Referred to: *Rowell* v. *Pratt*, [1936] 2 All E.R. 576.

As to privilege from producing documents for inspection, see 12 Halsbury's Laws (3rd Edn.) 39 et seq.; and for cases see 18 Digest (Repl.) 90 et seq. For Regulation of Railways Act, 1871, see 19 Halsbury's Statutes (2nd Edn.) 806.

Cases referred to:

(1) *Woolley* v. *North London Rail. Co.* (1869), L.R. 4 C.P. 602; 38 L.J.C.P. 317; 20 L.T. 613; 17 W.R. 650, 797; 18 Digest (Repl.) 111, *937*.

(2) *Smith* v. *East India Co.* (1841), 1 Ph. 50; 11 L.J.Ch. 71; 6 Jur. 1; 41 E.R. 550, L.C.; 18 Digest (Repl.) 142, *1276*.

(3) *Birmingham and Midland Motor Omnibus Co., Ltd.* v. *London and North Western Rail. Co.*, [1913] 3 K.B. 850; 83 L.J.K.B. 474; 109 L.T. 64; 57 Sol. Jo. 752, C.A.; 18 Digest (Repl.) 53, *409*.

(4) *Anderson* v. *Bank of British Columbia* (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 24 W.R. 624, 724; 3 Char. Pr. Cas. 212, C.A.; 18 Digest (Repl.) 102, *863*.

(5) *Southwark Water Co.* v. *Quick* (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 26 W.R. 341, C.A.; 18 Digest (Repl.) 91, *752*.

Appeal by the plaintiff from two orders of FINLAY, J., at chambers.

The plaintiff, John Charles Ankin, brought an action against the defendant company claiming damages for personal injury sustained by him while a passenger on the defendants' railway in consequence of the negligence of the defendants, their servants or agents. A return of the accident was made by the defendants on Dec. 3, 1928, in the form prescribed by s. 6 of the Regulation of Railways Act, 1871, the Railway Employment (Prevention of Accidents) Act, 1900, s. 13 (2), and the Ministry of Transport Act, 1919, s. 2. The plaintiff's solicitors thereupon sought to obtain an order for the production of a copy of the return by means of discovery. The defendants objected to produce the copy upon the ground that it was the copy of a confidential document made in the discharge of their duty to the Crown and that it was privileged, and on Nov. 5, 1929, they communicated with the Minister of Transport in regard to the matter. In the reply dated Nov. 11, 1929, the secretary of the Minister said:

"I am directed by the Minister of Transport to state that in his view the notices of accidents furnished to him by railway companies in pursuance of s. 6 of the Regulation of Railways Act, 1871, are furnished for his own information and guidance in the performance of his duties, and that their utility in this respect might be prejudiced if they were compiled by railway companies with the knowledge that any information contained in them might be used by individual members of the public for the purpose of prosecuting their private claims against the railway companies concerned. In these circumstances it is the practice of the Minister to decline, in the public interest, to comply with any request which he may receive for permission to inspect or to obtain copies of such notices."

By the Regulation of Railways Act, 1871:

"Section 6: Where in or about any railway or any of the works or buildings connected with such railway, or any building or place, whether open or enclosed, occupied by the company working such railway, any of the following accidents take place in the course of working any railway: (that is to say) (1) Any accident attended with loss of life or personal injury to any person whomsoever; (2) Any collision where one of the trains is a passenger train; (3) Any passenger train or any part of a passenger train accidentally leaving the rails; (4) Any accident of a kind not comprised in the foregoing descriptions, but which is of such a kind as to have caused or to be likely to cause loss of life or personal injury, and which may be specified in that behalf by any order to be made from time to time by the [Minister of Transport], the company working such railway . . . shall send notice of such accident and of the loss of life or personal injury (if any) occasioned thereby to the [Minister of Transport]. Such notice shall be in such form and shall contain such particulars as the [Minister of Transport] may from time to time direct. . . . Every company who fails to comply with the provisions of this section shall be liable for each offence to a penalty not exceeding £20."

By the Ministry of Transport Act, 1919:

"Section 2: It shall be the duty of the Minister in the exercise and performance of any powers and duties transferred to, or conferred or imposed upon him, by or in pursuance of this Act, to take steps to carry out the purposes aforesaid and there shall, as from such date or dates as His Majesty in Council may by Order determine, be transferred to the Minister all powers and duties of any Government department in relation to (a) railways. . . ."

FINLAY, J., held that the company ought not to be ordered to produce a copy of the documents, and the plaintiff appealed.

Privilege was also claimed by the defendants for other documents on the ground that they were

A "confidential communications, at the instance and request and for the use of the defendants' solicitor, between the officials of the defendant company and between such officials and third persons, after the action was threatened or anticipated, for the purpose of obtaining for and furnishing to the defendants' solicitor evidence, and information as to the evidence, which will be obtained, and otherwise for the use of the said solicitor to enable him to defend this
B action and advise the defendants."

The Master refused to make an order for inspection of these documents, and his order was affirmed by FINLAY, J. The plaintiff appealed.

Malcolm Hilbery, K.C., and *C. S. Rewcastle* for the plaintiff.
du Parcq, K.C., and *S. Cope Morgan*, for the defendants, were not called on to
C argue.

SCRUTTON, L.J.—Two questions come before us as to the discovery of certain documents. The one which was argued first relates to a report which the railway company is by statute required to make to the Ministry of Transport. As to that, the railway company have a copy of that report in their possession, and I think
D they ought to have put it in their original affidavit of documents with a statement why they declined to produce it, or why they claimed privilege for it. I should advise them to follow that course in future. The ground on which in a subsequent affidavit they do claim protection for it is this. They wrote a letter to the Ministry of Transport stating that an order was being asked for from the court for the production of the copy of the return, and they said this:

E "It is the view of my clients that a return of this nature made under statutory requirements is in the nature of a confidential document for the use of the Minister only, and in order to enable me to deal with the matter before that Master in chambers, I shall be much obliged if you will inform me whether you concur with this view."

F The Minister replied, and it has been decided that for the purposes of these proceedings it is not necessary for the Minister to make an affidavit or appear personally if he states his view. The reply made on his behalf was:

"I am directed by the Minister of Transport to state that in his view the notices of accidents furnished to him by railway companies in pursuance of s. 6 of the Regulation of Railways Act, 1871, are furnished for his own infor-
G mation and guidance in the performance of his duties, and that their utility in this respect might be prejudiced if they were compiled by railway companies with the knowledge that any information contained in them might be used by individual members of the public for the purpose of prosecuting their private claims against the railway companies concerned. In these circumstances it is the practice of the Minister to decline, in the public interest, to comply with
H any request which he may receive for permission to inspect or to obtain copies of such notices."

I read that to mean: (i) In the public interest I decline to produce. (ii) The reason why I decline to produce is that, in my view, in the case of this class of documents it is contrary to the public interest that they should be shown to any-
I body but the Department, or with the consent of the Department. The practice of the English courts is to accept the statement of the Minister that production is contrary to the public interest, even though the court may strongly suspect that it is not. The court puts the responsibility on the Minister. I have been informed by the highest Scottish authority that the practice in Scotland is different—that in Scotland the judge himself looks at the document, and if, having heard the reason why the Minister says it is contrary to the public interest, he does not agree with it, he orders the document to be produced. The fact that that practice exists in Scotland, and that, as I was informed, it has not produced any disasters to the

State, may be a matter for those who frame any Bill dealing with Crown proceedings to consider, but there is no doubt that it is not the law in England. In England if the Minister says: "It is contrary to the public interest to produce this document," the court accepts it and puts the responsibility upon the Minister; and it appears to me that, if it is contrary to the public interest to produce the document, it must be equally contrary to the public interest to produce a copy of it which the person who sends it has kept for his own information. For these reasons I agree with the view taken by FINLAY, J.

Woolley v. *North London Rail. Co.* (1) was cited to us, but in that case there was no claim by the Minister that the production of the document was contrary to the public interest, and, therefore, it was unlike this case. The question as between a particular document and a class of documents is dealt with in the passage, to which SLESSER, L.J., has referred, in the judgment of LORD LYNDHURST in the early case of *Smith* v. *East India Co.* (2), where LORD LYNDHURST expressly says that the claim as to public interest may be considered in respect of a whole class of documents, and, if the production of the class is contrary to public interest, the court does not go in detail into each individual document to see the exact degree in which the public interest will be prejudiced by the production of that particular document. So much for the first question.

As to the second question, there has been a certain amount of very unsatisfactory procedure in this case. The original affidavit of discovery claimed protection on the ground of privilege for three classes of documents. Apparently classes A and B contain 49 documents, and application was made that all of them should be produced and inspected. However, counsel for the plaintiff agrees that class A, as is obvious on the face of it, should not have been included in the claim. Class A is: "Professional communications of a confidential character between the defendants and their solicitor for the purpose of obtaining or giving legal advice and assistance." Those, of course, are obviously privileged, and should not have been included in the claim to produce. The relevant matter is class B: "Confidential communications, at the instance and request and for the use of the defendants' solicitor, between the officials of the defendant company and between such officials and third persons, after this action was threatened or anticipated, for the purpose of obtaining for and furnishing to the defendants' solicitor evidence, and information as to the evidence, which will be obtained, and otherwise for the use of the said solicitor to enable him to defend this action . . ." As I read that statement, it is a statement of two facts—first, that these communications were obtained at the instance and request of the solicitor; and if that is a fact I think counsel for the plaintiff agrees that the claim to have them inspected is hopeless; secondly, that they were for the use of the defendants' solicitor, and if that is a fact again the claim to open the privilege is hopeless. The plaintiff's advisers then filed a controversial affidavit. If that was intended as an answer to this affidavit it is hopelessly irregular, because it has long been settled that, as regards an affidavit claiming privilege, (i) one cannot cross-examine the person who made it to show that it is untrue; (ii) one cannot put in an affidavit in opposition to prove that it is untrue. One can only look at the affidavit itself and its words, and if it is ambiguously and ingeniously framed so as not to make clear what it means one may either say that there is no sufficient claim of privilege, or obtain an order for another affidavit to be made dealing precisely with the facts; but one cannot indulge in a controversy between affidavits, or in a cross-examination of the person who makes the affidavit to see whether he really believes what he has sworn. There is a procedure by which one can say to him on affidavit: "You have, or have had, a certain document, or class of documents, in your possession. You have not accounted for them in your affidavit. I challenge you as to whether you have not had in your possession a certain class of document." That is not a procedure to deal with privilege. Privilege is dealt with on the language of the original affidavit or any subsequent affidavit.

In answer, while under protest to that affidavit of the plaintiff which says, in substance, "I do not believe you," a second affidavit was made, and that second affidavit expressed itself in this way. First of all, it very properly submitted that the contentious affidavit could not be used. Secondly, it proceeded to argue that it was not necessary to claim privilege on the ground that the document was prepared solely for the information and use of the legal advisers of the defendants, which is quite right on the authorities. Thirdly, it states this fact which lords justices have stated, as, for instance, HAMILTON, L.J., in *Birmingham and Midland Motor Omnibus Co., Ltd.* v. *London and North Western Rail. Co.* (3) ([1913] 3 K.B. 850):

> "It is a matter of experience and common knowledge that proceedings are to be anticipated and are generally threatened and/or pending in the event of any such accident as that alleged by the plaintiff herein and it is necessary and expedient that reports should be procured as materials upon which professional advice may be taken and such reports are therefore obtained at the instance and request and for the use of the defendants' legal advisers, and the documents referred to in para. 2 (b) are of the character and for the purposes aforesaid."

I do not read that as meaning: "I say that they were obtained at the request of the solicitor, because it would be desirable to get them." That would not justify a statement that they were obtained at the request of the solicitor. Request means request, and must be taken to mean request. A gentleman who swears they were obtained at the request of the solicitor must be taken to swear that the solicitor did request him to obtain those documents; and being, therefore, an affidavit swearing that they were obtained at the request of the solicitor, and also swearing that they were obtained not solely but, among other purposes, for the use of the legal advisers, it appears to me that, on the authorities which, since *Anderson* v. *Bank of British Columbia* (4) and *Southwark Water Co.* v. *Quick* (5), have made the distinction fairly clear, the claim for privilege is satisfactorily made out and is not liable to be controverted by cross-examination or hostile affidavit.

As I understand *Anderson's Case* (4), when a shipowner gets a report from his captain and when a claim arises and he sends it on to a solicitor, that is not sufficient to protect it. It was originally obtained not for the solicitor, but it was sent to the solicitor when the claim arose. *Southwark Water Co.* v. *Quick* (5), on the other hand, is a case where, from the first, it was anticipated that there would be an action, and the reports were obtained in order to submit them to a solicitor. If, in addition, they were submitted because a solicitor requested that this should always be done, the case becomes clear. That principle, I think, has been thoroughly well established since those two cases were decided, and, in my view, the appeal should be dismissed, with costs.

SLESSER, L.J.—I agree, and would make only one observation. With regard to the first question in this case, on which the learned judge reversed the decision of the Master, the appeal turns on the question of the privilege of a report made under the Regulation of Railways Act, 1871, which provides by s. 6 that where any accident is attended with loss of life or personal injury to any person whomsoever, a return shall be made to the Ministry of Transport containing such particulars, and in such form, as the Ministry may direct. The Act contemplates that after the Ministry have received such return they may, if they think fit, by s. 7 of the Act of 1871, direct an inquiry to be held into the cause of any accident of which notice is, for the time being, required. In this case a notice was sent in compliance with the statute and with the order made thereunder, and subsequently, on the plaintiff's solicitors seeking to obtain an order for the production of the copy of the return by means of discovery, the Minister of Transport intimated that it was his practice to decline, in the public interest, to comply "with any request which he may receive for permission to inspect or to obtain copies of such notices." I make such observations as I have to make upon this part of the case because I think the learned

Master has misconceived the effect of *Woolley* v. *North London Rail. Co.* (1), which he seems to have thought bound him to find that here there was no privilege, or so I assume. A

Woolley v. *North London Rail. Co.* (1), it is true, was a case where the court allowed the inspection of a copy of a letter written by the defendants' general manager to the secretary of the Board of Trade in pursuance of the Railway Regulation Act, 1840, s. 3, regarding the accident. That section provided that a notice must be sent in the case of an accident to the Board of Trade, as under the statute of 1871, but when *Woolley* v. *North London Rail. Co.* (1) is closely examined it is clear that the ground, based on public policy, which is here urged for the privilege claimed—because the disclosure would, in the opinion of the Minister, not be in the public interest—was not before the court at all. The learned judges, in the reasons which they give for allowing some of the particulars asked for, and disallowing others, do not deal with this point, and, as a matter of fact, in *Woolley's Case* (1) there was no intimation, no letter, and no evidence that the Board of Trade did object in the public interest, as the Minister has objected in the public interest in the present case, to the production of the document. Therefore, I cannot read *Woolley* v. *North London Rail. Co.* (1) as being any authority which justifies the plaintiff in saying that there is any right in him to have the production of the document. I mention that because, as I say, I cannot help thinking from an observation which the learned judge has made that the learned judge also has not had in mind sufficiently the fact that *Woolley's Case* (1) is not dealing with the refusal of a Minister in the public interest to permit the production of a document. The learned judge says: B C D

> "With regard to the company's appeal I have felt more difficulty especially having regard to *Woolley* v. *North London Rail. Co.* (1). In this particular case the document does not seem to be of importance, but no doubt a question of principle is raised. It seems to me that the letter from the Minister of Nov. 11, 1929, makes it reasonably certain that the Minister, if subpœnaed to produce this document, would on public grounds object to doing so." E

I only point out on that, that, in my opinion, it is not a question of the relative importance of the two cases, but of the fact that in *Woolley's Case* (1) the issue which is here before this court on this appeal, namely, that the Minister has stated that, in his opinion, it is not in the public interest that this document should be produced, which is here conclusive, was never before the court, and there was never any such evidence in *Woolley's Case* (1). F G

With the departure of *Woolley's Case* (1) the last justification for this application disappears, in particular, in view of the reason which the Minister has condescended to give, because I do not think, under the authorities, it is necessary for him to give any reason beyond stating it is in the public interest. The reason he has given in the first paragraph of his letter, that, in his view, the notices of accidents

> "are furnished for his own information and guidance in the performance of his duties and that their utility in this respect might be prejudiced if they were compiled by railway companies with the knowledge that any information contained in them might be used by individual members of the public for the purpose of prosecuting their private claims against the railway companies concerned," H

seems almost exactly covered by the observation of Lord Lyndhurst in *Smith* v. *East India Co.* (2), where he says, speaking of the East India Co., also a great statutory corporation largely controlled and regulated by statute and performing public services, and in that respect not very different from a railway company: I

> "It is quite obvious that public policy requires, and, looking to the Act of Parliament, it is quite clear that the legislature intended, that the most unreserved communication should take place between the East India Co. and the Board of Control, that it should be subject to no restraints or limitations; but

it is also quite obvious that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament, and without injury to the public interests."

It seems to me, therefore, that in this case, both on the particular merits and on the general principle, the court will not interfere when the Minister has said that the communication is in the public interest, and the appeal should be dismissed. With regard to the second question, I agree with my Lord and have nothing to add.

Appeal dismissed.

Solicitors: *Mills, Lockyer, Church & Evill; I. B. Pritchard.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BLACKWELL AND ANOTHER *v.* BLACKWELL AND OTHERS

[HOUSE OF LORDS (Viscount Hailsham, L.C., and Viscount Sumner, Lord Buckmaster, Lord Carson and Lord Warrington), October 30, November 1, 2, 1928, January 28, 1929]

[Reported [1929] A.C. 318; 98 L.J.Ch. 251; 140 L.T. 444; 45 T.L.R. 208; 73 Sol. Jo. 92]

Will—Evidence—Secret trust—Parol evidence to prove terms of trust.

The testator at the time of his death had a child by a woman who was not his wife, and he wished to make provision for these persons without disclosing in a testamentary document their names and the particulars of the provision made. He, therefore, obtained the consent of five persons to act as trustees of a secret trust, and executed a codicil to his will by which codicil he bequeathed to the trustees £12,000 free of all duties upon trust to be invested by them at their discretion and to apply the income thereof for the purposes indicated by him to them with full power at any time to pay over the capital sum of £8,000, part thereof, to such person or persons indicated by him as they should think fit, and to pay the balance of £4,000 to the trustees of his will to be held by them as part of his residuary estate and upon the same trusts as were therein declared. The codicil having been executed, one of the trustees wrote out a memorandum of the instructions given by the testator to the effect that the income of the £12,000 was to be paid to E.B., the woman in question, or applied at their discretion for the benefit of herself and D.B., her son, and that at any time the trustees might pay over £8,000 of the capital to her or the son or both, in which event the balance of £4,000 was to go back to the testator's trustees as part of his residuary estate. No other indication as to the disposition of the trust was given by the testator, who died in June, 1925, without having altered the codicil. His will was proved by the executors in the usual manner. In an action by the widow of the testator and her son against the testator's legal personal representatives, the five trustees, E.B., and D.B., asking a declaration that no valid trusts of the sum of £12,000 had been

declared, and that the same formed part of the residuary estate, the trustees gave evidence as to what had passed between them and the testator. A

Held: where a gift in a will be made to a person or persons on trusts not disclosed by the will but communicated to the donee and accepted by him parol evidence is admissible to prove that the donee received from the testator a communication of the trusts to be attached to the gift and to be binding on him (the donee) and that he accepted the gift on those trusts, except in so far as such evidence would contradict the will; the evidence given by the trustees in the present case did not contradict the will; and, therefore, it was admissible. B

Re Fleetwood, Sidgreaves v. *Brewer* (1) (1880), 15 Ch.D. 594, approved.

Notes. Considered: *Re Keen, Evershed* v. *Griffiths*, [1937] 1 All E.R. 452; *Re Cooper Le Neve Foster* v. *National Provincial Bank, Ltd.*, [1939] 3 All E.R. 586; *Re Edward's Will Trusts, Dalgleish* v. *Leighton*, [1947] 2 All E.R. 521. Applied: *Re Young, Young* v. *Young*, [1950] 2 All E.R. 1245. Referred to: *Re Gardner's Will Trusts, Boucher* v. *Horn*, [1936] 3 All E.R. 938; *Re Jones, Jones* v. *Jones*, [1942] Ch. 328; *Re Spence, Quick* v. *Ackner*, [1949] W.N. 237. C

As to secret trusts, see 33 HALSBURY'S LAWS (2nd Edn.) 104–107; and as to evidence of secret trusts in wills, see ibid., vol. 34, 183–185. For cases see 43 DIGEST 596–602. D

Cases referred to:

(1) *Re Fleetwood, Sidgreaves* v. *Brewer* (1880), 15 Ch.D. 594; 49 L.J.Ch. 514; 29 W.R. 45; 43 Digest 598, *463*.

(2) *McCormick* v. *Grogan* (1869), L.R. 4 H.L. 82; 17 W.R. 961, H.L.; 43 Digest 600, *480*. E

(3) *Crook* v. *Brooking* (1688), 2 Vern. 50; affirmed (1689), 2 Vern. 106; 23 E.R. 679; 43 Digest 598, *461*.

(4) *Pring* v. *Pring* (1689), 2 Vern. 99; 23 E.R. 673; 43 Digest 597, *453*.

(5) *Smith* v. *Attersoll* (1826), 1 Russ. 266; 38 E.R. 103; 43 Digest 598, *462*.

(6) *Podmore* v. *Gunning* (1836), 7 Sim. 644; Donnelly 74; 5 L.J.Ch. 266; 47 E.R. 235; 43 Digest 600, *478*. F

(7) *Johnson* v. *Ball* (1851), 5 De G. & Sm. 85; 18 L.T.O.S. 182; 16 Jur. 538; 64 E.R. 1029; 43 Digest 598, *464*.

(8) *Le Page* v. *Gardom* (1915), 84 L.J.Ch. 749; 113 L.T. 475; 59 Sol. Jo. 599, H.L.; 43 Digest 596, *451*.

(9) *Re Gardner, Huey* v. *Cunnington*, [1920] 2 Ch. 523; 89 L.J.Ch. 649; 124 L.T. 49; 36 T.L.R. 784; 64 Sol. Jo. 650, C.A.; 43 Digest 598, *465*. G

(10) *Re Huxtable, Huxtable* v. *Crawford*, [1902] 1 Ch. 214; 71 L.J.Ch. 168; 85 L.T. 516; 50 W.R. 185, D.C.; reversed in part, [1902] 2 Ch. 793; 71 L.J.Ch. 876; 87 L.T. 415; 51 W.R. 282, C.A.; 8 Digest (Repl.) 407, *995*.

(11) *Bourne* v. *Keane*, [1919] A.C. 815; 89 L.J.Ch. 17; 121 L.T. 426; 35 T.L.R. 560; 63 Sol. Jo. 606, H.L.; 8 Digest (Repl.) 336, *172*. H

(12) *West* v. *Shuttleworth* (1835), 2 My. & K. 684; 4 L.J.Ch. 115; 39 E.R. 1106; 8 Digest (Repl.) 336, *182*.

(13) *Jones* v. *Badley* (1863), 3 Ch. App. 362; 9 L.T. 106; 16 W.R. 713, C.A.; 43 Digest 600, *479*.

(14) *Re Pitt Rivers, Scott* v. *Pitt Rivers*, [1902] 1 Ch. 403; 71 L.J.Ch. 225; 86 L.T. 6; 66 J.P. 275; 50 W.R. 342; 18 T.L.R. 272; 46 Sol. Jo. 246, C.A.; 8 Digest (Repl.) 386, *791*. I

(15) *Jones* v. *Nabbs* (1718), 1 Eq. Cas Abr. 404; Gilb. Ch. 146; 25 E.R. 102; 43 Digest 584, *325*.

(16) *Re Boyes, Boyes* v. *Carritt* (1884), 26 Ch.D. 531; 53 L.J.Ch. 654; 50 L.T. 581; 32 W.R. 630; 43 Digest 601, *487*.

(17) *Riordan* v. *Banon* (1876), 10 I.R.Eq. 469; 43 Digest 599, *q*.

(18) *Re Hetley, Hetley* v. *Hetley*, [1902] 2 Ch. 866; 71 L.J.Ch. 769; 87 L.T. 265; 51 W.R. 202; 43 Digest 592, *415*.

(19) *Moss* v. *Cooper* (1861), 1 John. & H. 352; 4 L.T. 790; 70 E.R. 782; 43 Digest 601, *484.*

(20) *Cullen* v. *A.-G. for Ireland* (1866), 14 W.R. 869; 21 Digest 65, *q.*

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and RUSSELL, L.JJ) ([1928] Ch. 614), affirming a decision of EVE, J.

At the hearing of the action EVE, J., admitted parol evidence to prove the terms of the trust, and, on appeal, the Court of Appeal held that he was right in doing so. The testator's widow and son appealed. The facts appear in the headnote and their Lordships' judgments.

Sir Thomas Hughes, K.C., and *J. M. Easton* for the appellants.

C. A. Bennett, K.C., and *John Bennett* for the respondents (the trustees and the testator's personal representatives).

Cur. adv. vult.

Jan. 28. The following opinions were read.

LORD BUCKMASTER.—The **LORD CHANCELLOR** desires me to say that he agrees with this opinion that I am about to read.

The question raised on this appeal is one which in various forms has for over two hundred years been the subject of vexed controversy. It may be stated by asking to what extent is it possible to give effect to testamentary intentions that are at variance with the provisions, first of the Statute of Frauds, and later of the Wills Act. That some deviation from the strict letter of these statutes has been permitted and has now become settled law is not disputed.

If a testator in his will makes a gift to a named legatee who at the time of making the will has promised he will hold the benefit of the gift for certain defined and lawful purposes, the court will enforce against the legatee the trust in promised obedience to which he received the gift: *McCormick* v. *Grogan* (2). This, however, does not directly govern the present case as the following facts will show. The testator at the time of his death had a son aged sixteen years, the child of a woman, also living, who was not his wife. He was ill for many weeks before he died and was much concerned as to how he should make provision for this woman and her child without disclosing all the circumstances in his will. He expressed this view to the respondents, Barnett and Wettern, who were his personal friends, and they agreed to act as trustees. The testator, therefore, caused the respondent W. P. Cowley, who had for some time acted as his solicitor, to be summoned. He arrived on Feb. 13 and saw the testator alone, who gave him instructions to the above effect. What took place between them is best described in the words of Mr. Barnett, who said: "He was urgently desirous of effecting at once, or as soon as possible, what he had talked about to me for the preceding two years or so. He mentioned the two beneficiaries, the mother and the son, and the sum of £12,000, and he also mentioned that it was his desire, if we would accept service, for my friend Wettern and myself, Mark Oliver, and Harrison, to act as trustees in a secret trust which he had proposed to effect, the legal side of which would be carried out by Mr. Percy Cowley, of the Isle of Man. I agreed to act as a trustee." These instructions he incorporated in a fourth codicil to the will. At his instance a Mr. Oliver was added to the trustees, and the codicil was then signed. It is in the following terms:

> "This is a codicil to the last will of me, John Duncan Blackwell. I give and bequeath to my friends, Mark Oliver, Arthur Ernest Harrison, Fred Wettern, Edward Watson Barnett, and William Percy Cowley the sum of £12,000 free of all duties upon trust to invest the same as they in their uncontrolled discretion shall think fit and to apply the income and interest arising therefrom yearly and every year for the purposes indicated by me to them with full power at any time to pay over the capital sum of £8,000 to such person or persons indicated by me as they think fit, and to pay the balance of £4,000 to my trustees as part of my residuary estate, and upon the same trusts as are declared in my will and previous codicils."

Mr. Cowley then made a memorandum of the terms of the trust which has been accepted by EVE, J., and the Court of Appeal as accurate. It is as follows :

> "Re MR. J. D. BLACKWELL.—Memorandum of verbal instructions given to me at execution of codicil 13/2/25.—Income of £12,000 to be paid to Mrs. Edith Burrows, 4, Wilbury Crescent, Hove, Sussex, or applied at discretion of trustees for benefit of herself and her son, Dennis Burrows. At any time trustees may pay over £8,000 of capital either to her or Dennis Burrows or both of them. In such event £4,000 is to go back to testator's trustees on same trusts as his residuary estate.—W. PERCY COWLEY."

The testator died on June 3, 1925, and his will and four codicils were duly proved. The trustees named in the fourth codicil are ready and willing to carry out the trust evidenced by the memorandum, but the testator's widow and her son object that the trusts fail and contend that the trustees hold the £12,000 as part of the residue. It is first argued that Mr. Cowley's memory is faulty so that his recollection cannot be accepted as to the actual terms of the trust, and further that, if the terms in the memorandum are the true record, they are too vague to be enforced. It is, in my opinion, unnecessary to add anything on these points to the judgment of EVE, J., and the Court of Appeal. There can be no reasonable doubt about the accuracy of the memorandum, and none about its efficacy if it can be admitted in evidence.

The real difficulty lies in considering whether the fact that in the will itself it is made plain that the gift is fiduciary destroys the principle upon which verbal evidence has been admitted to show the nature of a gift purporting to be absolute and beneficial. The argument in favour of the appellants on this point cannot be put more forcibly than in LEWIN ON TRUSTS (10th Edn.), p. 65, and its strength lies in this—that while in a beneficial gift the imposition of a trust does not contradict the terms of the will, but merely adds to them, where the gift is made on trust and no beneficiaries are specified the trust operates either for the residuary legatees or the next-of-kin and heir at law, so that the admission of verbal evidence showing the trusts contradicts the will. It must be observed, however, that this reasoning in strictness applies to a case where land is devised to trustees on trust and nothing more is said so that on the will there is a complete trust for the heir at law, but that is not the case here, where the intention to benefit persons outside the will is manifest, and further a will is in fact contradicted when a gift complete made to a beneficiary without the hint of a trust is converted into a fiduciary gift for the benefit of someone never mentioned in the will. It is also urged that the underlying principle admitting extraneous evidence is that the legatee cannot profit by his own fraud, a principle that does not apply where, on the face of the will, his interest is fiduciary.

This principle is easily understood and may be also stated by saying that he cannot defraud beneficiaries for whom he has consented to act by keeping the money for himself. Apart, however, from the personal benefit accruing to the trustee, the real beneficiaries are equally defrauded in both cases, and the faith on which the testator relied is equally betrayed. Further, if the trustee was the heir or one of the next-of-kin or a residuary legatee, the fraud would be just the same. Counsel for the appellants seemed at one time to argue that in such a case and to such an extent as to defeat the beneficial interest of the trustee outside evidence might be admitted, but it is difficult to see on what principle of reasoning the evidence can be admitted in the one case and rejected in the other when in both cases the fact of the trust appears in the will itself. Again, in the case where no trusts are mentioned the legatee might defeat the whole purpose by renouncing the legacy and the breach of trust would not in that case enure to his own benefit, but I entertain no doubt that the court, having once admitted the evidence of the trust, would interfere to prevent its defeat. If this be so the personal benefit of the legatee cannot be the sole determining factor in considering the admissibility of the evidence. It is, I think, more accurate to say that a testator having been

induced to make a gift on trust in his will in reliance on the clear promise by the trustee that such trust will be executed in favour of certain named persons, the trustee is not at liberty to suppress the evidence of the trust and thus destroy the whole object of its creation, in fraud of the beneficiaries.

I now turn to the authorities to ascertain how far this question has been the subject of decision. These authorities are of ancient lineage and the first striking fact is that in no single instance has any case been quoted that in terms supports the appellants' view, but there are numerous cases—some of long standing—against their contention. The strongest statement in their favour is to be found in *McCormick* v. *Grogan* (2), where LORD HATHERLEY, L.C., said:

> "But this doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform."

In that case, however, the present point was not argued, and as pointed out by HALL, V.-C., in the later case of *Re Fleetwood, Sidgreaves* v. *Brewer* (1), the earlier authorities were not cited.

In the first case of *Crook* v. *Brooking* (3), decided by JEFFREYS, L.C., in 1688, the testator devised £1,500 to two people, Simon and Joseph, to be disposed of by them on a secret trust that he had revealed to Simon. Simon, who knew the trusts, after the death of the testator revealed them to Joseph, the trusts being that, if the testator's daughter died in the lifetime of her husband, the £1,500 should go to the children of another daughter as the first daughter should direct. The first daughter did die in her husband's lifetime and the children of the second daughter claimed as beneficiaries under the verbal trust. This is a perfectly clear case of a trust being revealed upon the face of the will, the terms of which were communicated to one of the executors. It was held that the trust was well and sufficiently declared, although the actual method of distribution among the beneficiaries was uncertain. The Lords Commissioners approved this decision, as is found in the report (2 Vern. at p. 107). In *Pring* v. *Pring* (4), in the following year, a man gave properties to his executors, directed that they should be sold in trust, and the testator's wife brought a bill declaring that the trust was in her favour. It was decided that, as the will had declared that the executors are only in trust and not declaring for whom, the person may be averred and the wife's claim was, accordingly, admitted.

These cases were followed in *Smith* v. *Attersoll* (5), where, again, the gift was to executors in trust for purposes explained outside the will, and to the same effect was *Podmore* v. *Gunning* (6), though in that case the outside trust was not proved. These cases are before the Wills Act, but the principle applicable is the same, as wills were, by the Statute of Frauds, obliged to be in writing, though, if of personalty, an attested signature was not required. After the Wills Act the cases proceed in the same channel. In *Johnson* v. *Ball* (7) a testator determined to settle upon his mistress and illegitimate children a policy of insurance for £2,000, and by his will of Feb. 21, 1844, he gave to two named trustees a policy to hold the same upon the uses appointed by letter "signed by them and myself," and he signed a declaration of the trusts by a subsequent document dated Aug. 4, 1845. The Vice-Chancellor held that the trusts could not be carried out, but the reasons for his judgment are most instructive. The learned judge points out that the letter referred to in the will had no existence at the time when the will was made, and that, supposing it referred to a letter afterwards signed, it was impossible to give effect to it as a declaration of the trusts since it would admit the document as part of the will and it was unattested. The learned Vice-Chancellor adds (5 De G. & Sm. at p. 91):

"Cases in which there is no trust appearing on the will, and where the court establishes a trust on the confession of the legatee, have no application to the present; nor, as it appears to me, have those cases cited in the argument, in which the will refers to a trust created by the testator by communication with the legatee antecedently to or contemporaneously with the will."

It is clear, therefore, that this authority does not affect the present case, and it points to a case where the actual trusts were left over after the date of the will to be subsequently determined by the testator. It does not even cover the case where the trusts being already determined, they were subsequently communicated.

I omit the detailed examination of other cases, for they are all carefully considered and dealt with by HALL, V.-C., in *Re Fleetwood, Sidgreaves* v. *Brewer* (1), an authority which indisputably covers the present case if it be accurately decided. In that case the testatrix left to a named person all her personalty, "to be applied as I have requested him to do." The request was made out and the named trustee jotted down in the presence of the testatrix the names of the persons and the amounts which the testatrix desired to give and, after this, the codicil was executed. The point raised was the same as in the present case, namely, that when the trusteeship appears upon the instrument the trust must be for the next-of-kin or residuary legatees and that the Wills Act prevented effect being given to a trust to be effected by parol evidence. The learned Vice-Chancellor went through all the cases, including *McCormick* v. *Grogan* (2), and decided that the trusts should be executed. That decision has never been definitely disapproved in any decided case, for the statements in *Le Page* v. *Gardom* (8) and *Re Gardner, Huey* v. *Cunnington* (9) are mere dicta in cases where the point raised here was not material, and, in my opinion, it was in fact followed in *Re Huxtable, Huxtable* v. *Crawford* (10). In that case a testatrix bequeathed a sum of £4,000 for the charitable purposes "agreed upon between us." The testatrix had, in fact, verbally communicated to the legatee her intention to leave him the sum of £4,000, the income of which he was to apply during his life for the relief of sick and necessitous persons being members of the Church of England, and that he was to dispose of the principal as his own property. FARWELL, J., admitted the evidence, including that which conferred upon the trustee power of disposing of the principal after his death. The Court of Appeal held that the evidence was admissible as to the trusts of the £4,000 which, upon the face of the will, was wholly given for charitable purposes, but was not admissible for the purpose of providing for the £4,000 after the death of the trustee, since the will had given the whole £4,000 and such evidence would contradict the will. All the learned lords justices agreed that the affidavit of the trustee was admissible for the purpose of showing what were the charitable purposes, but for no further purpose. There is nothing in the judgments that shows that this decision was affected by the fact that the gift was a charitable gift, nor on principle can I see that such distinction could be maintained, for if a general charitable purpose only were disclosed by the will, a scheme might be prepared for carrying it into effect and unless evidence were admitted the testatrix's specific instructions could have been disregarded; but they were not, they were distinctly carried out.

I agree with the Court of Appeal in thinking that this also is an authority in support of the doctrine laid down in *Re Fleetwood, Sidgreaves* v. *Brewer* (1). In these circumstances, even if the antecedent decisions had been less definite, it would require a very clear conviction that *Re Fleetwood, Sidgreaves* v. *Brewer* (1) was wrongly decided to render it right and proper that it should now be overruled. *Bourne* v. *Keane* (11) was referred to for the purpose of showing that this House had overruled an authority of *West* v. *Shuttleworth* (12) which declared a gift of money for the purpose of saying masses to be illegal notwithstanding the fact that it had remained for seventy years. The circumstances were, however, entirely different from those in the present case, for the effect of that decision was to place a fetter upon the disposition of estate and there is a great difference between

removing a restriction which ought never to have been imposed and curtailing a liberty which has been long enjoyed. It is impossible to know the extent to which during the period of nearly fifty years the decision in *Re Fleetwood*, *Sidgreaves* v. *Brewer* (1) has been used by people similarly circumstanced to the testator in this case, and, in these circumstances, it would not be right in the absence of very special circumstances after this lapse of time to declare that such dispositions were bad. In my opinion, however, *Re Fleetwood*, *Sidgreaves* v. *Brewer* (1) was not wrongly decided. It was decided in accordance with the series of authorities by which the law was established and which it is now too late to question or to overrule.

VISCOUNT SUMNER.—I am satisfied that *Re Fleetwood*, *Sidgreaves* v. *Brewer* (1), which is not distinguishable from the present case on the facts, was affirmed by the Court of Appeal in *Re Huxtable*, *Huxtable* v. *Crawford* (10), and that professional opinion generally has accepted these decisions as correct. In argument, however, counsel for the appellants treated it as almost self-evident that they conflicted with s. 9 of the Wills Act, 1837, and counsel for the respondents, while making no admission, elected to rely mainly on the time that has passed and the probable volume of rights that have arisen, since these cases were decided, and in consequence of them. I do not think that this question ought to turn merely on the dates of the decisions and the extent of their adoption in practice. It is a grave thing to affirm a doctrine that violates the prescriptions of a statute and especially such a statute as the Wills Act, even though the error is of long standing. In view of this, and also in deference to the reservations of opinion expressed by Lord Dunedin and Lord Parker in *Le Page* v. *Gardom* (8) and Warrington, L.J., in *Re Gardner*, *Huey* v. *Cunnington* (9), I venture to examine this aspect of the matter.

In itself the doctrine of equity, by which parol evidence is admissible to prove what is called "fraud" in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with any of the Acts under which from time to time the legislature has regulated the right of testamentary disposition. A court of conscience finds a man in the position of an absolute legal owner of a sum of money, which has been bequeathed to him under a valid will, and it declares that, on proof of certain facts relating to the motives and actions of the testator, it will not allow the legal owner to exercise his legal right to do what he will with his own. This seems to be a perfectly normal exercise of general equitable jurisdiction. The facts commonly, but not necessarily, involve some immoral and selfish conduct on the part of the legal owner. The necessary elements on which the question turns are intention, communication, and acquiescence. The testator intends his absolute gift to be employed as he and not as the donee desires; he tells the proposed donee of this intention and, either by express promise or by the tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out. The special circumstance, that the gift is by bequest, only makes this rule a special case of the exercise of a general jurisdiction, but in its application to a bequest the doctrine must in principle rest on the assumption that the will has first operated according to its terms. It is because there is no one to whom the law can give relief in the premises, that relief, if any, must be sought in equity. So far, and in the bare case of a legacy absolute on the face of it, I do not see how the statute law relating to the form of a valid will is concerned at all, and the expressions in which the doctrine has been habitually described seem to bear this out. For the prevention of fraud equity fastens on the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it makes him do what the will in itself has nothing to do with; it lets him take what the will gives him and then makes him apply it as the court of conscience directs, and it does so in order to give effect to wishes of the testator, which would not otherwise be effectual. To this, two circumstances must be added, to bring the

present case to the test of the general doctrine, first, that the will states on its face that the legacy is given on trust, but does not state what the trusts are, and further contains a residuary bequest, and, second, that the legatees are acting with perfect honesty, seek no advantage to themselves, and only desire, if the court will permit them, to do what in other circumstances the court would have fastened it on their conscience to perform.

Since the current of decisions down to *Re Fleetwood*, *Sidgreaves* v. *Brewer* (1) and *Re Huxtable*, *Huxtable* v. *Crawford* (10) has established that the principles of equity apply equally when these circumstances are present as in cases where they are not, the material question is whether and how the Wills Act affects this case. It seems to me that, apart from legislation, the application of the principle of equity, which was made in *Fleetwood's* (1) and *Huxtable's* (10) cases, was logical and was justified by the same considerations as in the cases of fraud and absolute gifts. Why should equity forbid an honest trustee to give effect to his promise, made to a deceased testator, and compel him to pay another legatee, about whom it is quite certain that the testator did not mean to make him the object of this bounty? In both cases the testator's wishes are incompletely expressed in his will. Why should equity, over a mere matter of words, give effect to them in one case and frustrate them in the other? No doubt, the words "in trust" prevent the legatee from taking beneficially, whether they have simply been declared in conversation or written in the will, but the fraud, when the trustee, so called in the will, is also the residuary legatee, is the same as when he is only declared a trustee by word of mouth accepted by him. I recoil from interfering with decisions of long standing which reject this anomaly unless constrained by statute.

The answer is put in the phrase, "this is making the testator's will for him," instead, that is, of limiting him to the will made in statutory form. What then of the legislation? Great authorities seem to have expressed an opinion, that this equitable principle, as a whole, conflicts with s. 9 of the Wills Act. Lord Cairns in 1868 says that when a devisee seeks to apply what has been devised to him otherwise than in accordance with the testator's intentions, communicated by him and accepted,

> "It is in effect a case of trust, and in such case the court will not allow the devisee to set up the Statute of Frauds, or, rather, the Statute of Wills. But in this the court does not violate the spirit of the statutes, but—for the same end, namely, prevention of fraud—it engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it":

Jones v. *Badley* (13) (L.R. 3 Ch. at p. 364). In the following year in *McCormick* v. *Grogan* (2) Lord Hatherley says that this doctrine, that equity interferes to prevent a breach of an undertaking given to a testator, is in itself a doctrine which involves a wide departure from legislative policy in the Statute of Frauds, but is established with reference to the jurisdiction of courts of equity to interpose in all cases of fraud and Lord Westbury says:

> "It is a jurisdiction by which a court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. The court of equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the court of equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes on him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills."

I venture to think that when, on the strength of these or similar general statements of the doctrine, it has been said that in this connection equity has "given the go-by" to the Wills Act (*Re Pitt Rivers, Scott* v. *Pitt Rivers* (14)), less than justice has been done to equity and these great masters of it. When LORD CAIRNS speaks of equity not letting the devisee set up the statute it would seem that a fortiori equity would not set up the statute for itself to prevent the devisee from doing what it would have itself compelled him to do, if he had been negligent or dishonest in his trust, and when he speaks, in a figure, of "engrafting" the trusts on the devise surely he is saying in condensed words, that evidence, which could not be admitted to fill in what the testator's will leaves out, may yet be admissible to inform the court what duty, onerous or not, it must bind on the conscience of the devisee, taking him as being with regard to legal title such a devisee as the will has made him according to its terms. This exactly conforms to LORD WESTBURY'S phrases "converts" into a trustee one, who was not such under the will, and "imposes a personal obligation" on an individual, who under the Wills Act would get a title, not in itself so fettered.

In the authorities it has been common to classify these cases according as the terms of the will make the gift in question absolute or fiduciary. If it is by force of the words of the will that the residuary legatee takes what is given in trust without any specification of the trust, then parol evidence to show what that trust is would contradict the written will. Accordingly, the crucial point is whether or not it is the will itself that gives this fund to the residuary legatee in such a case. Section 9 of the Wills Act prescribes the form in which any disposition in a will must be testified, if it is to be valid, but it does not deal with the construction of wills, or the application of the general law of trusts to interests created by wills. It is one thing to say that in itself the trust cannot be given effect to, not being expressed in the will, but it is quite another to say that, when for this reason the trust fails, the will gives the fund to the legatee in trust for the residuary legatee, as if the document, signed and witnessed, had said so in words. The question appears to be whether the resulting trust in favour of the named residuary legatee in such a case arises as part of the will or only as the result of the application of equitable doctrines to a portion of the testator's estate, which in the circumstances of the will has not been consistently disposed of.

The Wills Act is an amending Act, of which it may be said in no merely theoretical sense that the legislature was acquainted with the existing state of the law, as enacted and decided, to which it proceeded to apply amendments, for two Royal Commissions—the Real Property Commission of 1828 and the Ecclesiastical Commission of 1830—after inquiring inter alia into the subject of wills of real and personal property, had reported before the Wills Act came before Parliament as a Bill. The extent to which parol evidence was admissible under existing practice for various purposes and the evils thereout arising were known. The equitable doctrine which is now before your Lordships was on record ever since *Pring* v. *Pring* (4). In *Smith* v. *Attersoll* (5) it had been contended, as the appellants contend now, that the admission of evidence dehors the will was forbidden by statute, and its admission against the trustees to show the terms of their trust was supported by the Master of the Rolls on the doctrine of *Jones* v. *Nabbs* (15), that the Statute of Frauds was an Act to prevent frauds and perjuries, and that, where no question of fraud or perjury arose since the trustees admitted their trust, evidence could be referred to. The Wills Act made no attempt to correct this quaint way of regarding a statute. So far as s. 9 is concerned it simply increased and defined the formalities already required by law. Similarly, there had long been litigation between executors and next-of-kin on the question how far a specific bequest to an executor adeemed his general right to take surplus personalty undisposed of, and on this, intricate conflicts of evidence frequently took place and a separate statute, the Executors Act, 1830, had been passed to cover it by expressly providing how such surplus should go. No similar remedy is attempted by the

Statute of Wills for the mischiefs that might arise from admitting evidence in a case like the present. Accordingly, I think the conclusion is confirmed which the frame of s. 9 of the Wills Act seems to me to carry on its face, that the legislation did not purport to interfere with the exercise of a general equitable jurisdiction, even in connection with secret dispositions of a testator, except in so far as reinforcement of the formalities required for a valid will might indirectly limit it. The effect, therefore, of a bequest being made in terms on trust, without any statement in the will to show what the trust is, remains to be decided by the law as laid down by the courts before and since the Act and does not depend on the Act itself.

The limits, beyond which the rules as to unspecified trusts must not be carried, have often been discussed. A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime: *Johnson* v. *Ball* (7); *Re Boyes, Boyes* v. *Carritt* (16); *Riordan* v. *Banon* (17); *Re Hetley, Hetley* v. *Hetley* (18). To hold otherwise would be to enable the testator to "give the go-by" to the requirements of the Wills Act, because he did not choose to comply with them. It is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trusts, as applied in this instance to trustees, who happen also to be legatees. If I am right in thinking that there is no contradiction of the Wills Act in applying the same rule, whether the trustee is or is not so described in the will, and the whole topic is detached from the enforcement of the Wills Act itself, then, whether the decisions in equity are or are not open to doubt in themselves I think that, in view of the subject-matter of these decisions, and the length of time during which they have been acquiesced in, your Lordships may well in accordance with precedent refuse to overrule them lest titles should be rendered insecure and settlements, entered into in reliance on their authority, should now be disturbed. It is to be remembered that the rule as to trusts not expressed in a will is not limited to relations such as the testator in this case was concerned to provide for, but may have been applied in many other connections. I pretend to no means of knowledge of my own but it seems to me probable that effect has been given to these cases to a substantial extent, and, therefore, that, to avoid possible injustice, your Lordships should refuse to interfere with them now. Accordingly, in my opinion, the appeal fails on all grounds.

LORD WARRINGTON.—The testator, John Duncan Louis Blackwell, on Feb. 13, 1925, made a fourth codicil to his will in the following terms so far as it is material to the question raised by this appeal:

> "I give and bequeath to my friends Mark Oliver, Arthur Ernest Harrison, Fred Wettern, Edward Watson Barnett, William Percy Cowley, the sum of £12,000 free of all duties upon trust to invest the same as they in their uncontrolled discretion shall think fit, and to apply the income and interest arising therefrom yearly and every year for the purpose indicated by me to them with full power at any time to pay over the capital sum of £8,000 to such person or persons indicated by me as they think fit and to pay the balance of £4,000 to my trustees as part of my residuary estate and upon the same trusts as are declared in my will and previous codicils."

The testator died on June 3, 1925. As to the other facts, it is only necessary to state that the evidence, if admissible, established (i) the names of the persons intended to be benefited and the purposes for which the capital and income of the fund were to be applied, and (ii) that all the five trustees—four of them before and one after the execution of the codicil—accepted the trust and either expressly or by necessary implication promised the testator to carry it into effect.

A It has long been settled that if a gift be made to a person or persons in terms absolutely but in fact upon a trust communicated to the legatee and accepted by him the legatee would be bound to give effect to the trust, on the principle that the gift may be presumed to have been made on the faith of his acceptance of the trust, and a refusal after the death of the testator to give effect to it would be a B fraud on the part of the legatee. Of course, in these cases the trust is proved by parol evidence, and such evidence is clearly admissible. It is also settled that in such cases it is immaterial whether the trust is communicated and accepted before or after the execution of the will, inasmuch as in the latter case the testator, if it had not been accepted, might have revoked the will. Further, in *Moss* v. *Cooper* (19), Wood, V.-C., said (1 John. & H. at p. 367):

C "If, on faith of a promise by A., a gift is made in favour of A. and B., the promise is fastened on to the gift of both, for B. cannot profit by A.'s fraud."

I think the principle on which this doctrine is founded is that the parol evidence is not adduced for the purpose of altering or affecting the will itself, the legatee still takes under the will, but is under a personal obligation the breach of which would D be a fraud on the testator: *Cullen* v. *A.-G. for Ireland* (20).

The question is whether the same principle applies where as in the present case the fact that the gift is upon trust is mentioned in the will though the terms of the trust can only be established by parol. Eve, J., and the Court of Appeal (Lord Hanworth, M.R., and Lawrence and Russell, L.JJ.) have answered the question in the affirmative, basing their decisions on the judgment of Hall, V.-C., in *Re* E *Fleetwood*, *Sidgreaves* v. *Brewer* (1), the Court of Appeal also expressing the view that that judgment was followed by the Court of Appeal in *Re Huxtable*, *Huxtable* v. *Crawford* (10). I confess to having felt considerable doubt during the argument whether to apply the principle in such a case as the present would not be to give validity to a parol will in spite of the provisions, first, of the Statute of Frauds, and, secondly, of the Wills Act. Subsequent reflection, however, and a careful F perusal of the judgment of Hall, V.-C., in *Re Fleetwood*, *Sidgreaves* v. *Brewer* (1), wherein the earlier authorities under both statutes are cited and discussed, have satisfied me that that case, and, in consequence, the present case in the courts below, were rightly decided. I think the solution is to be found by bearing in mind that what is enforced is not a trust imposed by the will, but one arising from the acceptance by the legatee of a trust, communicated to him by the testator, on the G faith of which acceptance the will was made or left unrevoked as the case might be. If the evidence had merely established who were the persons and what were the purposes indicated, it would, in my opinion, have been inadmissible, as to admit it would be to allow the making of a will by parol. It is the fact of the acceptance of the personal obligation which is the essential feature, and the rest of the evidence is merely for the purpose of ascertaining the nature of that obligation.

H It was contended for the appellant who claims as residuary legatee to be entitled to the fund should the trust not be established that the fraud for the avoidance of which the trust is enforced must be the personal fraud of the legatee, but I think the answer is that, if it would be a fraud on the part of the legatees to refuse to carry out the trust, the residuary legatees cannot take advantage of and thus make themselves parties to such fraud. On this point I agree with the view expressed I by Wood, V.-C., in *Moss* v. *Cooper* (19) and by Hall, V.-C., in *Re Fleetwood*, *Sidgreaves* v. *Brewer* (1). The authorities prior to *Re Fleetwood*, *Sidgreaves* v. *Brewer* (1), some of them dating as far back at 1688 and 1689, were carefully analysed by Hall, V.-C., in his judgment, and I see no necessity for referring to them again. They were conflicting, and it was quite open to the learned judge to follow those which supported his own view. I think also that *Re Huxtable*, *Huxtable* v. *Crawford* (10) could not have been decided as it was unless the court had approved of the decision in *Re Fleetwood*, *Sidgreaves* v. *Brewer* (1). For these reasons I think that this appeal should be dismissed with costs.

LORD BUCKMASTER.—**LORD CARSON** desires me to say that he agrees with the views that have been already expressed.

Appeal dismissed.

Solicitors: *Rooke & Sons*, for *T. & G. S. Brownson*, Hyde and Manchester; *Simmons & Simmons*, for *Graham-Hooper & Betteridge*, Brighton; *March, Pearson & Green*, Manchester.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

Re LAMB. VIPOND AND ANOTHER *v.* LAMB

[Chancery Division (Eve, J.), January 11, 17, 1929]

[Reported [1929] 1 Ch. 722; 98 L.J.Ch. 305; 141 L.T. 60; 45 T.L.R. 190; 73 Sol. Jo. 77]

Administration of Estate—"Property of deceased undisposed of by will"—Gift lapsed through legatee's death.

"Property of the deceased undisposed of by will" in para. 1 of Part II of Sched. I to the Administration of Estates Act, 1925, is not confined to property to dispose of which no attempt has been made by the will, but includes a gift which has lapsed by reason of the legatee's death in the lifetime of the testator.

Notes. Distinguished: *Re Petty, Holliday* v. *Petty*, post, p. 493. Followed: *Re Atkinson, Webster* v. *Walter*, post, p. 491. Doubted and distinguished: *Re Kempthorne, Charles* v. *Kempthorne*, post, p. 495. Not followed: *Re Cruse, Gass* v. *Ingham*, [1930] W.N. 206. Approved: *Re Tong, Hilton* v. *Bradbury*, [1930] All E.R.Rep. 262. Followed: *Re Sanger, Taylor* v. *North*, [1938] 4 All E.R. 417. Referred to: *Re Harland-Peck, Hercy* v. *Mayglothing*, [1940] 2 All E.R. 347; *Re James, Lloyds Bank, Ltd.* v. *Atkins*, [1947] 1 All E.R. 402.

As to the order of the application of assets in an administration, see 16 Halsbury's Laws (3rd Edn.) 344 et seq.; and for cases see 23 Digest (Repl.) 539 et seq. For Administration of Estates Act, 1925, see 9 Halsbury's Statutes (2nd Edn.) 718.

Case referred to:

(1) *Trethewy* v. *Helyar* (1876), 4 Ch.D. 53; 46 L.J.Ch. 125; 23 Digest (Repl.) 534, *5990*.

Adjourned Summons.

The testator made his will on July 28, 1923, and thereby appointed the plaintiff and I. L. Whitaker executors and trustees thereof. He devised the Luckens estate at Stapleton to his brother T. Lamb for life, and then to a cousin, another T. Lamb, for his life, and, after making certain pecuniary and charitable bequests, he directed that his residuary estate should be equally divided between his said brother and cousin and two nephews, W. and A. Beesley. He died on March 16, 1928, his brother having predeceased him, whereby one-fourth of the residue passed to the next-of-kin as undisposed of. This summons was then taken out asking whether, in view of s. 34 (3) of the Administration of Estates Act, 1925, and Part II, Sched. I, the funeral and testamentary expenses, debts, and legacies should be paid out of the lapsed share in priority to the other shares, or rateably with them or how otherwise.

Waite for the plaintiffs.

C. D. Myles for the residuary legatees.

Allan Ellis, for the next-of-kin, referred to *Trethewy* v. *Helyar* (1).

Cur. adv. vult.

Jan. 17. **EVE, J.**—By his will dated July 28, 1923, the testator appointed the plaintiffs to be his executors and trustees, and, after directing that all his just debts, funeral, and testamentary expenses should be paid by them as soon as possible after his decease, and devising the Luckens estate at Stapleton in Cumberland to his brother, Thomas Lamb, for life, with remainders over, and bequeathing several pecuniary legacies, directed that the rest, residue, and remainder of his estate, real and personal whatsoever and wheresoever, should be equally divided between his said brother, his cousin, and his two nephews therein mentioned. He died on March 16, 1928. Thomas Lamb, the brother, predeceased him, with the result that one-fourth share of the residuary estate is undisposed of, and by this summons the plaintiffs raise the question whether the funeral, testamentary, and administration expenses, and the testator's debts, and the pecuniary legacies bequeathed by his will are payable primarily out of the lapsed share of residue, or how otherwise. The answer is to be found in s. 34 (3) of the Administration of Estates Act, 1925, and Part II of Sched. I to the Act.

The section, so far as is relevant to this case, provides:

> "Where the estate of a deceased person is solvent his real and personal estate shall, subject to . . . the provisions . . . contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of Sched. I to this Act."

Part II divides the assets into seven categories, and the first two in order of application are:

> "1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.
>
> 2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid."

It was argued on behalf of the next-of-kin that "property of the deceased undisposed of by will" must be confined to property which the testator had made no attempt to dispose of by the will, and ought not to be read as including a share of residue which has lapsed by reason of the legatee's death in the lifetime of the testator, also that the legislature ought not to be presumed to have intended to effect so material a change in the pre-existing practice by the passages to which I have referred. But the language is plain and unambiguous—a lapsed share of residue is properly described as property undisposed of by will, and the change is not more drastic than others brought about by other parts of the Act. Moreover, it is to be borne in mind that the order of application may be varied by the will. In the present case I can see nothing to exclude the application of the statutory order of application, and I must hold that it is applicable.

Solicitors: *Gregory, Rowcliffe & Co.*, for *Wright, Brown & Strong*, Carlisle.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

HILL *v.* BOOTH

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), October 28, 29, 1929]

[Reported [1930] 1 K.B. 381; 99 L.J.K.B. 49; 142 L.T. 80; 46 T.L.R. 50; 73 Sol. Jo. 782]

B

Landlord and Tenant—Lease—Premium—Re-entry on non-payment of instalment —All unpaid premium payable on re-entry—Purchase of freehold by lessee— Merger of provisions relating to premium.

By a lease dated July 21, 1926, and made between the plaintiff as lessor and the defendant as lessee the plaintiff demised a property to the defendant for a term of twenty-one years with an option to the defendant to purchase the property at any time within the first seven years of the lease. The lease expressed the consideration for which it was granted in the following words: "In consideration of the sum of £1,000, of which the sum of £200 is paid on the execution hereof . . . and the remainder thereof is to be paid in manner hereinafter provided, and of the rent hereinafter reserved and of the covenants on the part of the lessee and conditions hereinafter contained the lessor doth hereby demise . . ." By cl. 19 the lessor was given a power of re-entry "if the rent hereby reserved, or any instalment of the premium hereby agreed to be paid, shall be in arrear or unpaid for twenty-one days." Clause 1 prescribed certain dates for the payment of instalments of the £800 balance of the premium and provided that "in the event of the term hereby granted being determined by re-entry . . . all the premium unpaid at the date of such re-entry shall become immediately due and payable." In October, 1926, the defendant purchased the freehold of the property. On a claim by the plaintiff for the balance of the premium then owing the defendant contended that as from the date on which he acquired the freehold all the provisions of the lease were annulled, and, therefore, he was not liable.

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Held: (i) the premium of £1,000 was payable once and for all for the granting of the lease, and the defendant remained liable to pay it; (ii) it was not a "covenant or provision" of the lease which, under s. 141 (1) of the Law of Property Act, 1925, went with the reversionary estate in the land, since that section only passed covenants or provisions having reference to the subject-matter of the lease, which was the property demised and not the granting of the lease itself; and, therefore, the plaintiff was entitled to recover.

F

Per GREER, L.J.: Section 76 (1) of and Sched. II to the Act (which provide for a covenant of freedom from incumbrances to be implied in a conveyance) would have the effect of destroying the proviso for re-entry, but would not destroy the personal obligation to pay the balance of the premium. Nor would that personal obligation be a "claim" or "demand" within s. 63 (1) which the conveyance would be effectual to pass.

G

H

Notes. Considered: *Regor Estates, Ltd.* v. *Wright*, [1951] 1 All E.R. 219. Referred to: *Re Hunters Lease, Giles* v. *Hutchings*, [1942] 1 All E.R. 27.

As to payments recoverable under a lease which are not rent, see 23 HALSBURY'S LAWS (3rd Edn.) 537, 538; and for cases see cases there cited and 31 DIGEST (Repl.) 151–152. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

I

Appeal from an order of ACTON, J.

The plaintiff claimed to recover from the defendant the sum of £800, being the balance alleged to be due and payable by the defendant to the plaintiff of a premium of £1,000 under the covenant to pay the same contained in a lease dated July 21, 1926, and made between the plaintiff and the defendant, whereby certain premises known as the Coliseum Theatre and Assembly Rooms at Gorleston-on-Sea were demised by the plaintiff to the defendant for a term of twenty-one years from June 24, 1926, at the rent and subject to the covenants and conditions therein

appearing. It was, inter alia, a term of the lease in question that for a period of twenty-one years from June 24, 1926, and in consideration for the monetary payment (of which the sum of £800 claimed was a portion) to be paid thereunder by the defendant the defendant was to hold the property in question together with all fixtures, fittings, and furniture specified in the schedule to the lease. By cl. 18 of the lease provision was made for the purchase, within the first seven years of the lease, by the defendant of the demised property. The defendant denied that he owed the plaintiff the sum of £800, or any part thereof. He said that on Oct. 12, 1926, by a deed of conveyance made between the plaintiff, of the first part, Barclays Bank, Ltd., of the second part, and the defendant, of the third part, the property referred to in the statement of claim, in respect of which the lease in question was made, was conveyed to the defendant in fee simple on the payment by him of £8,350. The defendant contended that on the making of that deed of conveyance the lease of July 21 and all obligations thereunder were finally determined. On May 17, 1927, the plaintiff brought an action against the defendant in which he succeeded in recovering from the defendant such of the fittings and furniture as were not attached to the freehold of the property. At the date of the deed of conveyance of Oct, 12, 1926, none of the sum of £800 claimed in the action had become due under the terms of the lease. The defendant counter-claimed a declaration that as from Oct. 12, 1926, the lease was annulled.

ACTON, J., in giving judgment for the plaintiff, said: I have asked if there are any authorities which will help me in arriving at the meaning of the word "premium," but I am told by counsel on both sides that search does not appear to reveal any such case. Putting the meaning upon the word "premium" which, in my view, is the meaning which it bears in a document such as this lease, I think that it is used there in what I may call the popular sense of the word "premium," that is, something which was paid, entirely apart from rent or other payments which may be dependent upon the lease, as the sum which the intending purchaser is prepared to give merely for the sake of being granted a lease with all its benefits and advantages. That, the defendant got, and the fact that that ceased in a few months to be of any benefit to him as a lease was due entirely to his own voluntary act in acquiring the freehold in this property. I think, if it be material to consider these matters, that the person who should have had it made quite clear what the position was with regard to this premium was the defendant, and, if he finds himself, as he now does, in a difficulty with regard to the unpaid balance of the premium, he has nobody to blame for it but himself. It is not a very satisfactory matter that a sum of money such as this should have been left entirely without being dealt with in any shape or form, when the conveyance from the bank came to be executed.

The defendant appealed.

H. B. Vaisey, K.C., and *S. Cope Morgan* for the defendant.

E. W. Cave, K.C., and *Graham Mould* for the plaintiff.

SCRUTTON, L.J.—This is a curious point. I have no doubt whatsoever about the merits, but certain technicalities have given rise to some little difficulty in deciding the matter.

The plaintiff owned a theatre at Gorleston called the Coliseum. He was indebted to Barclays Bank in about £8,000, and in February, 1925, he mortgaged the lands, buildings, and hereditaments at Gorleston to Barclays Bank, appointing them his attorneys "in case of the right or power of sale arising to sell" the buildings. He then executed a lease of the premises at Gorleston to the defendant. The lease was for twenty-one years with an option to purchase for a sum of £13,000 within the first seven years. The lease witnessed that

> "in consideration of the sum of £1,000, of which the sum of £200 is paid on the execution hereof and the remainder thereof is to be paid in manner hereinafter provided, and of the rent hereinafter reserved, and of the covenants on

the part of the lessee, and conditions hereinafter contained, the lessor doth hereby demise unto the lessee . . ." A

The matters leased were the land and the buildings, together with all fixtures, fittings, and furniture specified in the schedule. Some of the fixtures and fittings were landlord's fixtures, and some of the furniture was not attached to the premises at all, but were mere chattels. The first clause in the lease refers to the sum of £1,000 mentioned as the first consideration and describes it as premium: B

"The lessee will pay that portion, namely, £800, of the premium of £1,000 hereby reserved which is not paid on the execution hereof,"

and then it gives certain dates at which the £800 is to be paid by instalments, and winds up,

"Provided that in the event of the term hereby granted being determined by re-entry under the proviso hereinafter contained, all the premium unpaid at the date of such re-entry shall become immediately due and payable." C

A later clause in the lease—cl. 19—gives a power of re-entry

"if the rent hereby reserved, or any instalment of the premium hereby agreed to be paid, shall be in arrear or unpaid for twenty-one days." D

In October, 1926, Barclays Bank used their powers as mortgagee and as attorney of the plaintiff, the mortgagor, to sell the land, buildings, and furniture, fixtures, and fittings to the defendant. Then the plaintiff requested the defendant to pay him the balance of the premium, to which, putting it very shortly, the defendant replied: "I have bought the reversion, and the lease is merged in the reversion, and my covenant to pay the premium has gone." There is only one thing to be E added as having some effect on the construction, which is that the express clause in the lease giving an option to purchase for the sum of £13,000 provides that, if the option is exercised at £13,000, that £13,000 is to be less the whole or such part of the premium as shall at the date of the completion have been paid. They have expressly provided, therefore, in the case of the purchase under the option, what was to happen about the thing which they persisted in calling "premium." F

Ordinarily, if one pays a premium to have a lease granted and the lease is granted, one must pay the premium, and it does not matter what happens to the lease afterwards. The premium is for the granting of the lease, and counsel for the defendant admits that, if the transaction was simply "I will pay you a premium of £1,000 for the granting of a lease," it would not matter in the slightest if the lease afterwards became merged in the freehold by the reversion having been sold G to the lessee, but he says that the circumstance of the clauses about the payment of the premium being put into the lease and that a power of re-entry on the premises which is given in the lease for non-payment of the premium make all the difference, and that the effect of the lessee's obtaining the reversion is merger which will destroy the covenant to pay the premium. ACTON, J., decided that that contention is erroneous, and appeal is now made by the present owner of the free- H hold of the land and buildings to this court.

I am bound to say I am influenced considerably by the fact that this is described as "premium," and that the ordinary business meaning of "premium" is a payment for the granting of the lease which has to be paid if the lease is granted, irrespective of what happens to the lease afterwards, and irrespective of the fact that the lessee afterwards purchases the reversion. Why the lease was drafted in this odd way, I and why it is described, as it is in the lease, as "reserved," I do not understand. It is not a reservation in any way as I understand it. "Reservation" technically in these matters is the grant of the subject-matter conveyed of something not previously existing as a rent or an easement. This, in my view, is not a grant out of the subject-matter, it is not a grant out of the land and buildings which are leased, nor does it reserve an interest in the land or buildings; it is a separate personal covenant to pay a premium because the lease is being granted. I asked counsel for the defendant, who has argued this case with his usual clearness, what

would happen if the consideration for demising the premises had included a personal covenant by the lessee to buy his butcher's meat for ten years from a butcher lessor, and after a few moments' careful consideration he said it was a very difficult question. It did not seem to me to be a very difficult question. It seems to me that, like a premium, it would be a personal promise in consideration of the lease being granted, and if the lease was granted the fact that it afterwards merged would not make any difference to the personal promise. Again, there seems to be a similar point which has actually arisen in this case. While the mortgage to the bank was only on land and buildings or land and fittings, the lease included a number of chattels, furniture for the theatre, which are not fixtures. There was a clause in the lease to hand back that furniture on the determination of the lease, and when the lease of the land and buildings merged, which was all that was mortgaged to the bank, a claim was made for the furniture by the plaintiff on the covenant to return it to him. Before ROCHE, J., that claim succeeded, so that the determination of the lease by merger did not destroy the covenant in the lease to return the furniture to the lessor on the determination of the lease. Giving the best consideration I can to this matter, the covenant to pay what is called "premium" on three occasions—and having, in my mind, the ordinary meaning of "premium," namely, a sum paid for the granting of a lease with option to purchase—still remained, and could be sued on unless in some way it had been transferred to the mortgagee, who had transferred it to the person to whom he sold the land and buildings.

For these reasons it appears to me that the view taken by ACTON, J., was right. He does not say anything in his judgment about s. 141 of the Law of Property Act, 1925, which counsel for the defendant pressed upon us, and which reads in this way:

> "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land."

As I understand it, counsel's argument was that the reversion in the land passing by the mortgage to Barclays Bank, and passing by the conveyance from the bank to the defendant, the defendant gets with it the benefit of every covenant or provision having reference to the subject-matter thereof in the lease; consequently it passes the obligation to pay the premium, and consequently I suppose he would say it passes the obligation to return the furniture. That event has been decided by ROCHE, J., and the reason why, in my view, s. 141 does not apply to the case is that it only passes covenants and provisions having reference to the subject-matter of the lease, and the subject-matter of the lease is land and buildings, and possibly furniture, certainly land and buildings, and is not the granting of the lease itself which, in my view, is what the £1,000 is paid for. I, therefore, can find no difficulty in regard to s. 141. I only mention it because it is not mentioned by the learned judge, and because it was the main proposition in the argument of the leading counsel for the defendant. For these reasons, in my view, the appeal must be dismissed, with costs.

GREER, L.J.—I agree. In July, 1926, the plaintiff, who was the owner of a building called the Coliseum at Gorleston-on-Sea, executed a lease of that building and the land on which it was to the defendant. He did that in consideration, first of all, of a sum of £1,000, which is stated in the lease to be a premium, and in consideration of the rent and covenants contained in the lease. The property had been mortgaged by the lessor, and shortly after the lease began the mortgagee sold the property, as he was entitled to do, to the defendant, and the defendant rightly says that, having acquired the freehold, he is freed from all the obligations of the lease relating to the enjoyment of the property from time to time—he is free of the

rent, and he is free of all the covenants in regard to how the property shall be dealt with as between himself and the lessor. But he also claims that he is freed from the obligation to pay the balance of the premium. ACTON, J., has held that he is not free from his obligation to pay the balance of the premium, and I agree with the judgment of ACTON, J.

It is necessary to consider shortly, because the matter is not entirely free from difficulty, the terms of the lease. The lease provides:

> "Witnesseth that in consideration of the sum of £1,000 . . . and of the rent hereinafter reserved and of the covenants on the part of the lessee and conditions hereinafter contained the lessor doth hereby demise to the lessee"

the parcels described in the lease. It is obvious that a clear distinction is drawn by the very words of the lease between the sum of £1,000 and the rent which issues from time to time out of the premises. When one comes to deal with the part of the lease which says what the leased land is to yield, it says this: "Yielding and paying therefore the yearly rent of £1,100 by quarterly payments," but it does not say that the land leased is to yield the instalments of the premium, and, in my judgment, the learned judge was right in holding that the effect of the deed is to make the premium of £1,000 a sum which is payable once and for all for the granting of the lease, the rent being separately provided for, being payable from time to time by quarterly payments. In my judgment, the consideration for the £1,000, which is the price that the lessee is to pay for getting a lease at a lower rent than he would otherwise get, is given by the landlord once and for all when he executes the lease and in return for that he is entitled to his £1,000, not merely to the first instalment of it. The fact that it is paid by instalments makes no difference, in my view, to the proper description of the sum of £1,000 as a premium payable for the granting of the lease. That view is confirmed by cl. 1, which unfortunately uses the word "reserved," which is not, strictly speaking, applicable to the payment of a premium. It provides that when the lease is determined by re-entry, the balance of the premium is to be payable at once, confirming the view that, if the lease comes to an end in any other way, the premium would have to be paid as provided, but if the lease comes to an end by re-entry, the balance of the premium shall be paid at once. But that is immaterial in this case because the time for payment of all the instalments had expired at the date of the issue of the writ in this action.

The only doubt that has arisen in my mind with regard to the contentions in the appeal has arisen upon the proviso for re-entry. The proviso provides for a re-entry not merely when there is a non-payment of the rent, but also for a re-entry on the non-payment of the instalments of premium. So far as the proviso is concerned, that seems to me to make the right of re-entry an encumbrance upon the land; the right of forfeiture and the right of re-entering, as it seems to me, are quite rightly described as encumbrances on the land, and I think under the provisions which are now contained in the Act of 1925 that right of re-entry has gone. The non-payment of the premium would not justify the lessor in entering upon the land, the freehold of which is now vested in the defendant. But that does not affect the separate obligation to pay the £1,000 premium or the liability of the defendant under the covenants contained in the lease, a document which may contain provisions with regard to a term which shall be determined and another term which will not be determined until the conditions created by the lease are in fact determined.

It is necessary to say just a word or two about the sections of the Act of Parliament that have been relied upon. The first one is s. 141, which provides that

> "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed . . . shall be annexed and incident to and shall go with the reversionary estate in the land."

A I agree with my Lord that, as that did not cover the terms of the lease with regard to the furniture, so also it does not cover or include terms relating to the payment of the premium merely because they happen to have been put in the same document as the lease which creates the tenancy. Section 76 (1) of the Act, which was also relied on, implies in a conveyance, by reference to Sched. II to the Act, the covenant for freedom from encumbrances, and it seems to me that that would B have the effect of destroying the proviso for re-entry, but it would not have any effect in the way of destroying the personal obligation under the covenant to pay the unpaid part of the premium. Section 63 provides:

> "Every conveyance is effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed."

C I do not think the personal obligation under the covenant to pay the instalments of premium was a "claim and demand . . . in, to, or on the property conveyed," but there are other matters like covenants to repair, covenants to pay the rent and covenants which expressly relate to the thing that is the subject-matter of the lease, namely, the land and the buildings, and which do not relate to the original D consideration for the granting of the lease at all.

SLESSER, L.J.—I agree. The learned judge, in his judgment, says:

> "I think that Mr. Cave's view is the view which ought to prevail, and that when the lease speaks of a premium it means, as indeed is apparent from the other contents of the lease itself, something entirely distinct from rent, and E not on the same footing at all, but a sum which the intending lessee is prepared to give as a premium for a foregift for the privilege of obtaining a twenty-one years' lease upon certain terms as to rent and otherwise."

In my opinion, that exactly and aptly expresses the position of the premium in this case, and, if that be right, as I think it is, it follows that a great deal of the argument to which we have listened is irrelevant to what we have to decide. That F view that the premium is a consideration for which the lease itself is granted, as appears clear on the face of the lease itself, is made even more clear by the fact that in the event of re-entry for non-payment of rent or premium, while only a proportionate part of the rent has to be paid up to the date of re-entry, it is expressly provided in cl. 1 that all instalments of premium remaining unpaid at the date of re-entry shall become due and payable. There are other provisions to G which my Lords have referred which make it equally clear that the premium of £1,000 which is to be paid by instalments is not rent, or anything like rent, within the meaning of the lease. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Torr & Co.*, for *Ferrier & Ferrier*, Great Yarmouth; *Bullen, Debenham, Harston & Bennett.*

H

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

MANCHESTER CORPORATION *v.* FARNWORTH

[House of Lords (Viscount Dunedin, Viscount Sumner and Lord Blanesburgh), July 8, 9, 11, 12, 15, 16, November 28, 1929]

[Reported [1930] A.C. 171; 99 L.J.K.B. 83; 142 L.T. 145; 46 T.L.R. 85; 73 Sol. Jo. 818; 27 L.G.R. 709]

B

Nuisance—Exercise of statutory powers—Nuisance inevitable result of authorised act—Test of inevitability—Burden of proof—"Reasonable ground" for nuisance—Test of reasonableness.

When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain commonsense appreciation, which cannot be rigidly defined, of practical feasibility in view of the situation and of expense. In making reasonableness the measure of what must be done before the production of a nuisance can be excused, the law means reasonable according to all the circumstances, and reasonable not only in the interest of the undertakers, but also in that of the sufferers. The legislature, in authorising a big concern, must not be taken to be chary of requiring that much care is to be taken.

C

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Per Viscount Sumner: If, in a plant to which the legislature has given a general sanction without prescribing any particular design, coal is burnt so as to emit into the lower strata of the atmosphere sulphur dioxide in such conditions as are likely to cause considerable mischief, I think that, in proportion as the [undertakers] are free to use such a mischief-working process, their obligation to find some correlative means of protecting their neighbours becomes more exacting. The nature and degree of the plaintiff's suffering and the cost, trouble and inconvenience to the [undertakers] of saving him from it are elements on the two sides of the case, which must be considered in deciding what is reasonable, but I cannot see that either on principle or authority it is a sufficient answer to a criticism, otherwise sound, to say that, if so, [the product of the plant] would cost the [undertakers] more. I do not know by what authority, short of the express direction of the legislature, the interests of the public are summarily to override the rights of the individual.

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Circumstances in which **held** that the defendant corporation had not shown that a generating station such as the legislature contemplated when passing a private Act authorising the corporation to erect and work such a station could not have been erected and used without causing a nuisance, and had, further, failed to show that they had used all reasonable diligence and taken all reasonable steps and precautions to prevent their operations from being a nuisance to their neighbours.

H

Decision of the Court of Appeal, [1929] 1 K.B. 533, affirmed.

Notes. Considered: *Marriage* v. *East Norfolk Rivers Catchment Board*, [1949] 2 All E.R. 1021; *Pride of Derby and Derbyshire Angling Association, Ltd.* v. *British Celanese, Ltd.*, [1952] 1 All E.R. 1326. Referred to: *Markland* v. *Manchester Corpn.*, [1934] 1 K.B. 566; *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co.* [1935] All E.R.Rep. 196; *Provender Millers (Winchester), Ltd.* v. *Southampton County Council*, [1939] 4 All E.R. 157; *Parker* v. *London and North-Eastern Rail. Co.* (1946), 175 L.T. 137; *Sellwood* v. *London, Midland and Scottish Rail. Co.* (1946), 175 L.T. 366.

I

As to nuisance by the exercise of statutory powers, see 24 Halsbury's Laws (2nd Edn.) 31 et seq.; and for cases see 36 Digest (Repl.) 257 et seq. For Electric Lighting (Clauses) Act, 1899, see 8 Halsbury's Statutes (2nd Edn.) 848.

Cases referred to:

(1) *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 36 Digest (Repl.) 6, *8.*

(2) *R.* v. *Pease* (1832), 4 B. & Ad. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366; 38 Digest 46, *275.*

(3) *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430, H.L.; 38 Digest 25, *137.*

(4) *London, Brighton and South Coast Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; 55 L.J.Ch. 354; 54 L.T. 250; 50 J.P. 388; 34 W.R. 657, H.L.; 36 Digest (Repl.) 324, *690.*

(5) *Hammersmith and City Rail. Co.* v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest 24, *132.*

(6) *Shotts Iron Co.* v. *Inglis* (1882), 7 App. Cas. 518, H.L.; 36 Digest 266, *167.*

(7) *Newberry* v. *Bristol Tramways and Carriage Co., Ltd.* (1912), 107 L.T. 801; 29 T.L.R. 177; 57 Sol. Jo. 172; 11 L.G.R. 69, C.A.; 8 Digest (Repl.) 76, *508.*

(8) *National Telephone Co., Ltd.* v. *Baker*, [1893] 2 Ch. 186; 62 L.J.Ch. 699; 68 L.T. 283; 57 J.P. 373; 9 T.L.R. 246; 3 R. 318; 36 Digest (Repl.) 296, *417.*

(9) *Fremantle* v. *London and North Western Rail. Co., Bliss* v. *London and North Western Rail. Co.* (1861), 10 C.B.N.S. 89; 31 L.J.C.P. 12; 5 L.T. 556; 9 W.R. 611; 142 E.R. 383; 38 Digest 349, *557.*

(10) *Port Glasgow and Newark Sailcloth Co.* v. *Caledonian Rail. Co.* (1892), 19 R. (Ct. of Sess.) 608; 29 Sc.L.R. 577; affirmed (1893), 9 T.L.R. 300; 20 R. (Ct. of Sess.) 35; 30 Sc.L.R. 587, H.L.; 36 Digest (Repl.) 141, *740.*

(11) *Quebec Railway, Light, Heat and Power Co., Ltd.* v. *Vandry*, [1920] A.C. 662; 89 L.J.P.C. 99; 123 L.T. 1; 36 T.L.R. 296; 20 Digest 212, *d.*

(12) *Metropolitan Asylum District Managers* v. *Hill* (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 29 W.R. 617, H.L.; 36 Digest (Repl.) 346, *868.*

Appeal from an order of the Court of Appeal (SCRUTTON and SANKEY, L.JJ.; LAWRENCE, L.J., dissenting).

The plaintiff, Arthur Farnworth, a farmer, of Bromyhurst Farm, Barton-upon-Irwell, brought an action at Manchester Assizes claiming an injunction to restrain the Manchester Corporation from so working their district electrical power station situate at Barton-upon-Irwell as to emit fumes heavily charged with sulphur and sulphur compounds to the damage of property in the occupation of the plaintiff and interfering with his comfort and health. The defendant corporation admitted that a nuisance was created, but contended that, as the station was of a kind which Parliament had authorised, the plaintiff could not succeed in his claim. The Court of Appeal held, per SCRUTTON, L.J., that the Manchester Corporation Act, 1914, a private Act, was a Special Act within the meaning of the Electric Lighting (Clauses) Act, 1899, the private Act had not expressly varied or excepted the operation of the scheduled clauses of the Act of 1899, especially the nuisance clause (cl. 81), and, therefore, the fact that a generating station on the land was authorised by Parliament, even if it was worked without negligence, did not, when there was a nuisance clause in the Act or Order, relieve the undertakers from paying compensation for damage done by the station amounting to a nuisance. LAWRENCE and SANKEY, L.JJ., held that the corporation's private Act was not a Special Act within the meaning of the Act of 1899; but SCRUTTON and SANKEY, L.JJ. (LAWRENCE, L.J., dissenting), held that the corporation had not carried on and worked the generating station without negligence, and, therefore, the plaintiff was entitled to damages and an injunction. The corporation appealed.

Cyril Atkinson, K.C., Tyldesley Jones, K.C., and *S. G. Turner* for the corporation.

J. E. Singleton, K.C., and *N. J. Laski* for the plaintiff. A

The House took time for consideration.

Nov. 28. The following opinions were read.

VISCOUNT DUNEDIN.—This case has given rise to much difference of judicial opinion. Its decision is not only of great moment to both the parties concerned, but its aspects bring up a question of the widest public importance, and it would B be well indeed if it could be brought home, not merely to those interested in the development of the law, but to those who in the future are in the position which enables them to settle and control the position of great electrical stations. I shall begin by stating the undoubted facts as succinctly as I can.

The town authorities of Manchester, in order to supply electricity to its inhabitants, procured in 1890 an electric lighting Provisional Order, duly confirmed by C Act of Parliament (53 & 54 Vict., c. 197), in that year, which enabled them to supply electricity in a defined area in the city of Manchester. This area was afterwards extended by subsequent Orders which it is unnecessary to specify, as they are all in the same position so far as regards the material consideration, to wit, that each and all contain a clause similar to cl. 70 of the original order:

> "Nothing in this order shall exonerate the undertakers from any indictment D action or other proceeding for nuisance in the event of any nuisance being caused by them."

In 1914 the Manchester Corporation Act was passed. It was an omnibus Act, as may be seen from its title:

> "An Act to confer further powers upon the Lord Mayor aldermen and citizens E of the city of Manchester with reference to street works waterworks tramways main drainage works and the supply of electricity and otherwise for the better local government and improvement of the city to alter the wards thereof and for other purposes."

There was a description of the lands on which the generating station was to be constructed, extending to twelve-and-a-half acres, situate not in the city of Man- F chester but in a rural district a considerable distance from the city. There is a provision providing for the construction of electric lines from the generating station to the city, and then s. 36 provides as follows:

> "(1) The whole or any part of the areas for the supply of electricity by the corporation under the Manchester Electric Lighting Order, 1890, and any sub- G sequent Acts and Orders may be supplied with electrical energy from all or any of the generating stations of the corporation for the time being including those now existing and the station authorised by this part of this Act. (2) The corporation may by means of electric mains make connections between the existing generating stations or areas of supply of the corporation and the generating station authorised by this part of this Act. (3) The corporation H may also by means of electric mains make connections between any two or more areas which they are authorised to supply or between any such area and any generating station of the corporation. . . . (5) In relation to any such electric mains as aforesaid the corporation . . . (b) with respect to streets not within any area which they are authorised to supply shall have the powers and be subject to the provisions of the Electric Lighting Act, 1882, and of ss. 10 to I 20, 60 to 62, 69 to 73, 76, 77, and 79 to 82 of the schedule to the Electric Lighting (Clauses) Act, 1899, and those provisions so far as applicable but subject to the provisions of this section shall for the purposes of this section be incorporated with this Act and shall have effect and the corporation shall be deemed to be the undertakers."

The generating station was duly erected and began to work in 1924. The plaintiff in the present action is a farmer, whose farm is immediately contiguous to the station, and his farm at once began to suffer from the devastating effects of the

A fumes emitted from the chimneys of the generating station. He raised this action against the corporation, claiming damages and an injunction. For the present it is enough to say that after two witnesses had been examined, the corporation, who had in the original pleading denied the creation of a nuisance, admitted that a nuisance had been caused. To make clear the defence raised and the controversies arising thereon it is necessary to say a word on the general law.

B Up to 1899 procedure was taken by means of Provisional Orders and Confirmation Acts. The Provisional Orders, as a matter of fact, were wont to contain a nuisance clause similar to the clause above quoted in the Manchester Provisional Act. To obviate the necessity of continued repetition in all provisional orders, Parliament passed the Electric Lighting (Clauses) Act, 1899. It incorporates in one Act certain provisions usually contained in provisional orders made under the Acts C relating to electric lighting, and by s. 1 it is provided that the provisions contained in the schedule to the said Act shall be incorporated with and form part of every Provisional Order made by the Board of Trade after the commencement of that Act under the Electric Lighting Acts, save so far as they are expressly varied or excepted by the Order; and the said provision shall also, with the necessary modifications, and in particular with the substitution of the words "Special Act" for D "Special Order," be incorporated with any Special Act, save so far as they are expressly varied or excepted thereby. The said section defines the expression "Special Act" in the following terms:

> "The expression 'Special Act' means in this Act any Act passed after the commencement of this Act authorising the supply of electricity for any public or private purposes within any area."

E

Clause 81 of the schedule is in practically the same terms as cl. 70 of the Provisional Order above quoted.

The plaintiff says that the Act of 1914 is a Special Act, as defined in the Act of 1899, that, consequently, there is incorporated cl. 81, and that that ends the matter. The defendants deny that the Act of 1914 is a Special Act, as defined by the Act F of 1899. Upon the assumption that they are right in this connection, the defendants then say that the generating station is a thing specially authorised by Act of Parliament, that the emission of deleterious fumes is a necessity of the situation, and that, consequently, they are not liable for any nuisance created thereby. They rely on the old and well-known cases decided long ago as to the sparks from locomotives, of which *Vaughan* v. *Taff Vale Rail. Co.* (1) may be taken as an example. G To this the plaintiff replies that the onus of proving that the creation of nuisance is an inevitable consequence of the erection and working of the generating station lies on the defendants, and that they have not discharged that onus. The action depended before TALBOT, J., without a jury, and he found for the defendants on both points. Appeal being taken to the Court of Appeal, SCRUTTON, L.J., held that the Act of 1914 was a Special Act. LAWRENCE and SANKEY, L.JJ., held to the H contrary, agreeing with TALBOT, J., but on the second point SCRUTTON and SANKEY, L.JJ., LAWRENCE, L.J., dissenting, held that the defendants had not discharged the onus on them. Judgment was, therefore, given in favour of the plaintiff. The precise terms of the order pronounced will be dealt with subsequently.

I shall address myself first to the first point. Considering the difference of judicial opinion, no one can say that this is an easy point to determine. Not I without misgiving, especially in view of what I know to be the opinion of my noble friends who will follow me, I have finally and determinately come to the conclusion that I agree with the opinion of SCRUTTON, L.J., and that the Act of 1914 is a Special Act under the definition of s. 1 of the Act of 1899. The point is whether the Act of 1914 authorised "the supply of electricity . . . within any area." To suppose a generating station which was not also a station of supply would be an absurdity. One never wants to generate electricity merely in order to earth it, and so naturally one actually finds in s. 32 (1) of the Act of 1914 that the corporation may erect

"a station for generating electrical energy together with such buildings . . . or things of whatever description as may be necessary or convenient to enable the corporation to generate and supply electricity." A

Is it then "supply . . . within any area?" I think it follows both from the further provisions as to mains, &c., and from the necessities of the situation that it is, and that the area is the area in which under its existing provisional orders Manchester is entitled to supply. Just consider what a generating station is. It is not a place where electricity is on tap to the passer-by, like beer at a public-house. The current generated must be sent somewhere and that is arranged for by the provision as to the electric mains. There is a special provision (s. 36) as to where the current generated by the station is to be sent, to where the electric mains are to go. It is to the city of Manchester, and the city of Manchester is in the electrical area which the station is meant to supply, and within which the supply is provided. The terminus a quo is the station itself, the terminus ad quem is the electrical supply area of the city of Manchester. B C

To my mind these considerations are convincing, but I must not omit to deal with the arguments which have prevailed with other minds, and there are several. It is said that, inasmuch as in regard to electrical mains there is a special provision (s. 36 (5)) for incorporation of the sections of the Electric Lighting (Clauses) Act, 1899, that shows that its provisions are not considered as otherwise applied; also it is said that the sections as to the special protection of Trafford Park (ss. 37 and 38) point the same way. I do not think these arguments conclusive. They only point, I think, to this, that certain authorities and persons were afraid of the Act and sought and obtained special protection. Then it is said that there would be redundancy between the incorporated clauses and the clauses already in the provisional orders. To a great extent they are the same. If any difference cropped up, I consider it would be easily solved by posteriora prioribus derogant. Then LAWRENCE, L.J., says ([1929] 1 K.B. at p. 554) that because the electricity from the generating station is developed at 33,000 volts it cannot possibly be supplied as such within an area. If that argument were sound, then in most places no electricity can be supplied at all, for it is certain that in most cases the voltage in the mains along the street is greater than can be used directly in the house, and there is a transformer for admission into every house. If the likelihood of the position can be looked at, what reason can there be for carefully providing against a nuisance if the generating station is within the area of supply where people get the benefit of the scheme and yet giving complete immunity for creating a nuisance against those who have no interest in the supply and derive no benefit therefrom. I am, therefore, on the balance of considerations, led to the view that the nuisance clause here applies. That would, of course, end the case, but it is necessary, as this view does not commend itself to your Lordships, that I should consider the second point also. D E F G

I do not find this point free from difficulty, but I concur with what I understand your Lordships' view to be. I do so, however, on what I cannot help feeling is a narrow ground, and that ground is, that it has been clearly proved that those responsible for the design and working of this station never considered, when designing it, the effect it would have on the neighbourhood, and never asked or obtained outside advice from those skilled in such matters. I have had the advantage of reading the opinion which will be delivered by VISCOUNT SUMNER, and I do not think it would serve any useful purpose to say in other words what he has there said. But I do wish to say something on the general question involved in the hope that, perhaps, my words may reach the ears of those who may in the future have the matter in hand either as legislators or as choosers of a station. First of all, I would like to accentuate the gravity of the nuisance caused by the pollution of the air through the enormous output. It is in evidence that on the average consumption of coal eleven tons of sulphur per day are burnt and sent out of the chimney into the air in the shape of sulphur dioxide. When the sulphur H I

dioxide meets with moisture the mischief begins. The practical effect of the mischief at this place is best summarised by the learned trial judge, who, when the defendants' counsel admitted nuisance, analysed the admission as follows: TALBOT, J.:

> "I should imagine, from the fact that Mr. Atkinson does not propose to contest the question of fact, that I am justified in assuming that the indication of your case is correct, and that it is a substantial nuisance, that is to say, there is a substantial diminution in the productivity of this farm and a substantial interference with the amenities, comfort, and so on of the people who live there. . . . I should assume that witnesses say that things will not grow in their gardens and their fields as they used to do, and it is a serious interference with their comfort and possibly their health to some extent."

The serious character of the nuisance naturally makes one reflect on the magnitude of the nuisance which would be caused by stations far bigger than this one, and that such stations are likely to be established in the near future is certain.

That brings me to say a word or two on what I conceive to be the well-settled law on such matters. The cases are numerous; I may mention *R.* v. *Pease* (2), *Vaughan* v. *Taff Vale Rail. Co.* (1), *Geddis* v. *Bann Reservoir Proprietors* (3), *London, Brighton and South Coast Rail. Co.* v. *Truman* (4), *Hammersmith and City Rail. Co.* v. *Brand* (5). I mention these to show that I have carefully considered the question, but I think it would be of no real service to analyse exactly what was decided in each actual case. I believe their whole effect may be expressed in a very few sentences. When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain commonsense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense. It is true that in this case we can hold so far that by their callous indifference in planning the construction of the station to all but its own efficiency, the defendants have not discharged the onus incumbent on them. Their own employees stoutly denied the possibility of remedy, and, if time is given them, as it must be, before injunction is granted, it may be easy for them to get many scientific men to say they know of no remedy, and so by a sort of vis inertiæ practically to throw the onus of finding a remedy on the plaintiff. It is for this reason that I deeply regret that the majority of judicial minds have not agreed with SCRUTTON, L.J., and myself. Had the defendants been under a nuisance clause, they would have really exerted themselves to find a remedy; as it is, they are more than likely to sit with their hands folded, and other municipalities, seeing the law, will avoid Provisional Orders when arranging for a generating station outside their own boundaries and trust to getting authority in an omnibus Act as here, which, according to decision, will not be a Special Act which would contain a nuisance clause along with it. It is for these reasons that I do hope this case may attract public attention, for assuredly the dangers it discloses are a matter of great importance to thousands of people.

The order of the Court of Appeal which is in the terms dictated by SCRUTTON, L.J., at the close of his judgment in that court appears, so far as the unqualified injunction embodied in it is concerned, to be based upon the view expressed by him that the defendants were, in law, under a nuisance clause. As your lordships do not, as I understand, share that view it will be necessary that the terms of the final injunction should be modified, and there are one or two other minor matters in regard to which the ultimate order may with advantage be adjusted. Although, therefore, on the above footing the appeal will still be dismissed, I suggest to your Lordships that its dismissal should be accompanied by the following declaration of

the House as to the final terms of the order to be made by the King's Bench Division to which the cause will be referred. "Declare by way of modification of the judgment of the Court of Appeal dated Dec. 13, 1928: (i) That the damages to be recoverable against the defendants should be such as have been sustained by the plaintiff up to the date when the injunction by the order awarded shall have ceased to be suspended or shall have been dissolved whichever event shall first happen. (ii) That immediately after the injunction there should be inserted in the order the following clauses: 'With liberty reserved to the defendants to apply to a judge of the King's Bench Division to dissolve the said injunction (a) on their establishing, if it be not admitted by the plaintiff, that they have exhausted all reasonable modes of preventing mischief to the plaintiff, and (b) on their submitting in the future conduct of their power station to adopt and use the most effective of these modes until they have replaced them by other reasonable but more effective modes of prevention which may thereafter be discovered, and which will thereafter be adopted and used.' (iii) That the first suspension of the injunction should continue for one year from the date of the order of this House in lieu of one year from the date of the order of the Court of Appeal." I move, your Lordships, that with these modifications of that order this appeal therefrom be dismissed, and that the cause be referred to the King's Bench Division to act in accordance with your Lordships' declaration. The respondent will have the costs of the appeal to this House.

VISCOUNT SUMNER.—This was an action for a common law nuisance, which the corporation seek to justify. The nuisance itself being admitted by the corporation, their liability depends (i) on the construction of their private Act of 1914, and (ii) on proof that they have taken all due and reasonable steps to prevent the nuisance. The first question must ultimately turn on the construction of s. 36 of the private Act, the Manchester Corporation Act, 1914. The area of supply permitted to the corporation as undertakers of an electricity concern and the purposes of that supply, as well as the authority to furnish it, were all fully dealt with in its Electric Lighting Order, 1890, under which business was carried on. The further powers given in 1914, though stated in the title to be, among others, powers "with reference to . . . the supply of electricity," were mainly powers "with reference to" generating the electricity for that supply. Section 32 (1) (a) gave authority to

> "construct maintain alter improve enlarge extend renew work and use [upon the site of twelve-and-a-quarter acres, as described] a station for generating electrical energy together with such buildings . . . or things of whatever description as may be necessary or convenient to enable the corporation to generate and supply electricity,"

and s. 36 (1) provided that

> "the whole or any part of the areas for the supply by the corporation under the Manchester Electric Lighting Order, 1890, . . . may be supplied with electrical energy from all or any of the generating stations of the corporation for the time being."

I think this in effect says: "You may get current to be supplied by you in your existing supply areas either from your old generating stations or from this new one outside the city boundary at Barton-on-Irwell, as you please."

Then what if they cause a nuisance in fact? It would be no bad thing if the legislature, when granting powers such as these, were to make it a rule to insert a proviso subjecting the exercise of them either to the condition that all due and reasonable care and precautions against causing a nuisance must be taken or to the condition that no nuisance shall in fact be caused by the exercise of them, and this in express and uniform terms. As it is, the "nuisance clause," contained in the Electric Lighting (Clauses) Act, 1899 (cl. 81 of schedule), is only attracted to this Act of 1914 if it is a "Special Act," as defined in the Act of 1899 (see s. 1), and, among other things, authorises the supply of electricity to consumers, for public or private purposes, as there defined, by named undertakers, and I am not

satisfied that any of these conditions is fulfilled by a mere provision for furnishing the area of supply with electrical energy from Barton as well as from existing stations. Section 36 (1) of the Act of 1914 says nothing about the persons whom the corporation will cater for, or the purposes for which their current will be consumed, and an authority to supply areas, already named and provided for in 1890, would have been surplusage in 1914. Subsections (4) and (5) of s. 36 support this view, since sub-s. (4) is a provision for a named and additional supply for consumption at the corporation's own sewage works at Davyhulme, and sub-s. (5) is an incorporation of some of the provisions of the Electric Lighting (Clauses) Act, 1899, and, in particular, of No. 81, "the nuisance clause," for the specific purposes of this section, and in relation to electric lighting mains and other things, but not generally. This goes to the root of the matter, for the first question is: "What did the legislature authorise?" If the sections can be read as directing the use of such a plant as was originally erected or even as relieving the corporation from liability for nuisance on proof that all due care has been used, the case becomes one of quite a simple proof. I think the condition of freedom from liability is proof of due care, but not that any particular plant or user can be implied from the general terms employed. The corporation are right in saying that the Manchester Corporation Act, 1914, is not a "Special Act" within s. 1 of the Electric Lighting (Clauses) Act, 1899, but in effect varies or excepts the operation of the scheduled clauses of that Act. What is required of them is to use all due and reasonable means and precautions to avoid a nuisance. The burden of proving that they have done so is on them. The plaintiff and his agricultural expert clearly described the damage done. The station lies to the E.N.E. of the farm, which, as the prevalent winds are from the west, is a relatively favourable position; but they speak of blue grey fumes dropping towards the ground, scorching hedges and fruit trees, rendering grass unpalatable to cattle and making land useless for pasture. In some cases the land itself is permanently injured and one field was for all practical purposes derelict. "Q. 75.—Fumes containing sulphur, if deposited on the soil by means of rain, of course will tend to remove compounds of lime and other bases from the soil; therefore, the removal of bases is quite apparent by a determination of the acidity of the soil, that is to say, the acidity will increase in proportion as the bases are removed. Q. 77.—In a number of cases the soil acidity has increased to an abnormal extent." In May, 1924, the corporation's own chief chemist, reporting to the electricity department on samples of vegetation from fields near the station, says that they

> "had light brown patches on them, as though they had been affected by frost. The patches on several of the blades gave a distinctly acid reaction, whereas the green portions were neutral. This suggests that, during a night dew or immediately after rain, drops of water on the blade had absorbed acid from the atmosphere with the result that the vegetable matter has become bleached in parts. The fumes from the boiler stacks contain sulphur dioxide, which is a powerful bleaching agent in the presence of water."

As to the nuisance itself, there is no doubt about the cause of the mischief and the way in which it operates. Even your Lordships' House has been familiar with it for nearly fifty years: *Shotts Iron Co.* v. *Inglis* (6), (7 App. Cas. at p. 522). Although from this elaborate plant ordinary black smoke is hardly produced at all, the sulphur content of the coal cannot be consumed so as to increase the heat liberated. It is economically a waste product not worth the cost or trouble of recovering, so it goes up the chimney and at the top the corporation is rid of it. If it pollutes the atmosphere, others suffer. Thus the cost of the process, like its thermal efficiency, is kept at the optimum. This is not really inevitable, but it is the way in which the station is worked, and, as many people may perhaps think, ought to be worked. The ordinary south Lancashire soft coal contains some 2·2 per cent. of sulphur, and this is the coal that the defendants use. Still coal is to be bought which is practically sulphur free. During the coal strike of 1925 the

corporation of Manchester imported and used such coal from the United States. To use such fuel regularly would certainly be very costly, and it would be difficult, and, perhaps, impossible, to get enough of it. It was no part of the plaintiff's case that the use of ordinary Lancashire coal was in itself negligent, but all the same the station causes a nuisance, not because the legislature has so willed it, but because the Manchester Corporation makes its profit by working it in this way. It is not a mere question of weighing the expense involved on the corporation's side against the money lost on the plaintiff's, and, furthermore, the more nearly the use of coal containing sulphur is shown to be unavoidable, the more imperatively necessary is the use of some means of eliminating or neutralising the sulphur, and the harder is it to show that no remedy can be found. Counsel for the plaintiff, having been dispensed from giving further proof of a nuisance in fact, called his expert evidence and closed his case instead of asking leave, as he might have done, to call it in reply, and thus a turn was given to the case, which almost amounts to a reversal of the burden of proof. The plaintiff's witnesses having pointed out when the mischief originated, and having suggested more or less concrete remedies, the corporation's witnesses simply repelled these suggestions, partly by alleging inconvenience or expense, partly by throwing cold water on them. I will take them seriatim.

Mr. Rideout was cross-examined with the object of showing that the discharge of the sulphur cannot be helped, as follows: "Q.—There is sulphur in all coal, is there not?—Not necessarily. Q.—There is in all coal that is used for commercial purposes?—A certain amount. Q.—And this necessarily goes up the chimney?—Not necessarily. Q.—You do not suggest there is any way of getting rid of it, do you?—I suggest that it is not necessary for the whole of the sulphur, which is in the coal, to go up the chimney in the form of sulphurous compounds. Q.—But some comes out of every chimney?—Some comes out." Thereupon the cross-examining counsel changed the subject and the witness was not brought back to it. Afterwards, when the corporation's witness, Mr. H. C. Lamb, was giving evidence, he was, according to the shorthand note, asked in cross-examination: "Q.—Did you consult any other electrical engineer apart from the one who came a fortnight ago and the one who came a few days ago?—No. Q.—Or have you consulted any chemist at all?—With the object of removing the sulphur dioxide gas from the fumes, yes. Q.—Have you consulted any chemist in connection with these complaints. TALBOT, J.—As to whether there was anything you could do to get rid of this nuisance, which we now know was undoubtedly caused to the neighbourhood?—No." During the argument before your Lordships this passage was read. Thereupon counsel for the corporation interposed and informed your Lordships that Mr. Lamb was in court and denied that he had given this answer. According to him the note should have run: "Q.—Or have you consulted any chemist at all?—With the object of removing the sulphur dioxide gas from the fumes? Q.—Yes.—No." Prior to this two other statements had been made, which I must refer to. Mr. Lamb had been asked in cross-examination: "I take it you will agree with me that it is possible to generate electricity without causing a nuisance?"; and had replied: "It all depends upon what is meant by a nuisance. It is not possible to generate electricity or to create power by burning coal without sending sulphur dioxide into the air," and when the next witness, Mr. C. B. Taite, was called the corporation's leading counsel said to him in chief: "It is not suggested that there is any known means of getting rid of this sulphur. It is bound to come out of the chimneys?—Quite. Q.—I think that is common ground. At any rate, that is your view?—That is my view."

I think there was a misapprehension, natural enough on the part of the counsel but not so much so in men of science. As was explained on both sides, the action which takes place is as follows. The sulphur quits the chimney tops as a hot gas, sulphur dioxide, which is lighter than the atmosphere. If in that state the gas meets with rain or with a considerable amount of humidity in the atmosphere: "The rain does not carry it away with it. It washes some of the sulphur dioxide

out of the chimney gas but it does not carry the chimney gas itself in any direction. It will be carried down in solution in the raindrops. After it has been raining this gets carried down and then the sun comes out and you get your patching." It seems to me, not as a matter of physical science, but of obvious logic, that, as the pernicious fumes are at first inside the chimney and only when outside do the mischief, it would be proper to find out whether the gas could not be dealt with when it is still inside, so as to prevent the sulphur from passing outside. This is, I gather, what Mr. Rideout referred to, when he said that it was not necessary for the whole of the sulphur in the coal to be ejected at the chimney mouth, the amount of mischief that it takes to produce an actionable nuisance being of course a matter of degree, and this positive evidence distinguishes *Newberry* v. *Bristol Tramways and Carriage Co., Ltd.* (7), where the contention that something could and should be done rested partly on the appeal of counsel, partly on the convictions of the jury, but was not founded on the evidence of any competent person. All that Mr. Lamb and Mr. Taite say is that the sulphur cannot be got rid of altogether, and that electricity cannot be generated without sending any sulphur dioxide into the air at all, which, of course, is not an answer to Mr. Rideout's suggestion, but (however unconsciously) is an evasion of it. As to the correction which Mr. Lamb makes of the note of his evidence, it is not very convincing and certainly is very belated, but either way it leaves the corporation in their difficulty. If they consulted a chemist, they have not ventured to call him or to produce his report. If they did not, though the question of getting rid of some and possibly enough of the suphur dioxide before the gas is emitted from the chimney is one which at any rate presents itself, they have dismissed it for reasons of their own without taking the opinion of any chemist on its practicability or effect. When Dr. Travers, the plaintiff's second expert, was called, he directed his criticisms to the chimneys of the generating station. He said that they were too many, too crowded and too short, and he explained the effect which these factors have in massing the fumes within a short distance of their point of escape and the consequent precipitation of the sulphur compound on to the adjacent fields. He further pointed out that the slow mechanical draught, adopted for the purpose of fuel economy, increased the difficulty of disposing of the fumes innocuously, and, therefore, made it all the more necessary to adopt his suggested improvements in connection with the chimneys. I may summarise his explanation without setting out his technical arguments. To get rid of the fumes without causing a nuisance, they should be emitted at as great a height and with as much velocity as is reasonably practicable. By distributing them over so much wider an area of atmosphere and increasing so much the depth of the atmosphere to be passed through before they can reach the ground, the mischief may be attenuated and nuisance to individuals kept below what the law takes notice of; by brisker ejection even at a lower height wide and prompt distribution is obtained, which dilutes the gases and makes them harmless. If then the emitting chimneys are so clustered together as to counteract this distribution or so numerous as to retard it, they are in these respects faulty. In his view the heated gases, as they rise up steel chimneys such as these are, increase the atmospheric temperature and consequently induce an upward current round the outside of the chimney, which, when they reach the chimney mouth, assists to lift them rapidly to a height greater than that of the chimney itself and so is of value in attaining loftier distribution. This effect ceases at about 200 ft.; a higher chimney has to eject its fumes by the draught created inside itself, but in practice so valuable has emission at great heights been considered to be that, in the United States and in Saxony, chimneys of smelters are carried to 300 ft. to obviate the deleterious effect of the fumes upon persons and property in the immediate neighbourhood. On the other hand, an increase in the number of the chimneys of a factory tends to defeat this induction and placing them near together distracts and confuses the effect of the current; hence in theory the fewer there are the better.

Whatever may be thought of the prospects of improvement which these suggestions hold out, they are at least intelligible and coherent, and deserved more

attention than they got from defendants and their experts. In substance their answers came to this. The plant was designed to work with many chimneys and was so constructed. To lead all the flues to one chimney, if ever practicable in view of the great size of the flues required, is not practicable now. The design was for a row of chimneys, placed at distances determined by the spacing of the furnaces and boilers and limited in height by the weight which the members of the structure were designed to bear. The plant was not designed for a draught that would eject the fumes with force. They were deliberately led by mechanical draught slowly and gently up to the orifices with a view to keeping down the expenditure of energy, and, therefore, the cost of fuel. These things were originally the best of their kind and cannot now be altered. Raising the chimneys had been tried, but was fruitless, and, besides, they could not be carried any higher. As to the practice abroad of building very lofty chimneys, the witnesses knew nothing about it, and as to the effect of induced currents and more forcible ejection, so far as they understood the suggestion, they did not think they would do. Of the four witnesses called, two had never seen the plant till a few days before the trial, and then only for short periods, a third was in large part responsible for the boilers and furnaces, and the fourth was in practical charge, and was identified with the working complained of. That they were the first-rate practical men no one doubts, and I am not to be understood as impugning their good faith, but, as was almost inevitable in their position, their minds had never been brought to bear on the problem as the law states it. I do not think, nor do I suppose that Dr. Travers thought, that the corporation should have scrapped their mechanical draught apparatus, pulled down their cluster of chimneys and constructed one giant shaft to serve all their furnaces, any more than I think that they can be required to use only non-sulphuric coal. The significance of these matters is quite different. If, in a plant, to which the legislature has given a general sanction without prescribing any particular design, coal is burnt so as to emit into the lower strata of the atmosphere sulphur dioxide in such conditions as are likely to cause considerable mischief, I think that, in proportion as the undertakers are free to use such a mischief-working process, their obligation to find some correlative means of protecting their neighbours becomes more exacting. The nature and degree of the plaintiff's suffering and the cost, trouble and inconvenience to the defendant corporation of saving him from it are elements on the two sides of the case, which must be considered in deciding what is reasonable, but I cannot see that either on principle or on authority it is a sufficient answer to a criticism, otherwise sound, to say that, if so, Manchester's electricity would cost it more. Yet this was more than suggested in argument, and one witness, Mr. Taite, was led to say so in terms: "Q.—If you did increase your draught, you would be burning more coal for the same result?—Yes, that is so, and you would cause considerable damage to your plant. Q.—And eject more sulphur, incidentally, from your chimney?—In proportion to the coal burnt. Q.—If you use more coal for the desired result and you have to get a certain number of units to meet the demand, the more coal you use to produce that result the more sulphur goes into the air?—Yes, that is so. Q.—Therefore it is to the interests of the public that as little coal should be used as possible?—That is so. Q.—That means efficiency in every direction?—Yes. Q.—That is just the problem?—Yes." I do not know by what authority, short of the express direction of the legislature, the interests of the public are thus summarily to override the rights of the individual.

The conclusion to which a close examination of the evidence has forced me is that the defendant corporation have not shown that a generating station, such as the legislature contemplated in 1914, whatever that may have been, could not have been erected then and cannot be used now without causing a nuisance, but that they have failed to show that they have used all reasonable diligence and taken all reasonable steps and precautions to prevent their operations from being a nuisance to their neighbours, and this for two reasons. (i) At the time of the erection their responsible officers never directed their minds to the prevention of the nuisance,

which it was quite obvious might occur, but (ii) they were under the impression that, for all practical purposes, so long as their plant was efficiently and successfully conducted, the neighbours must endure the consequent injuries with such stoicism as they could muster. The proof of this is writ large in their answers generally, but there are three or four passages so simple and so surprising, that I will ask permission to quote them. The first comes from Mr. Lamb: "Q.—Is it part of the necessary result, so far as your experience in Manchester goes, that, if you put down a generating station it must do damage to the farm of somebody half a mile to a mile away?—I should imagine that is so. Q.—I would like to know whether or not, when you designed this station, if you did design it, you anticipated any trouble whatever to the plaintiff's farm?—No. This was a good site for a power station, and this land we knew was intended eventually for industrial purposes, and, therefore, no reason occurred to us why a power station should not be put in that situation." Again: "Q.—Have you ever experienced this sort of trouble in any other generating station?—No. Q.—No?—By which I mean we never had any complaints regarding any of our other generating stations. Q.—Had you suffered annoyance in any way from sulphur fumes made or had anyone complained?—No, we had no complaints. Q.—Had you in mind, in any way whatever, damage which might be done by sulphur fumes before you erected this station?—No. TALBOT, J.—You say, as I understand, that, if you had to start with a clean slate, you would first of all design it as well as possible, as it is admitted these works are for the purpose of generation?—Yes. Q.—Then, if you were asked or if it were said to you: 'Well, but you know this is a place where we are bound to get complaints if sulphur fumes are generated and contaminate the surrounding country; you must avoid that,' you say there is no way you know of by which you would avoid it?—There is nothing that I know of, my Lord. Mr. Atkinson.—I suppose you have discussed it with other people, too?—I have. Q.—You have taken advice as well and you cannot learn of anything?—We should take a good deal more advice, if we were beginning to build a new power station, no doubt." I think it is quite plain that at the outset these officials did not concern themselves about nuisance at all. There may be some practical excuse for this. Those, who know Manchester, know well how many chimneys have long poured into the atmosphere the waste products of the combustion of soft coal and admittedly plenty of factory chimneys are visible from Barton. The law in this country is not unkind to those who commit nuisances in the way of their trade. The complainant must prove his case, and it is no light matter, when so many are all doing the same thing, to show that his particular injury is the defendant's doing. Sulphur compounds, when they fall on the slate roofs and brick walls of factories and on spoil banks or mill lodges do not, perhaps, do them much injury, and mere personal annoyance is not often worth the cost of an action, when the plaintiff is a mere inhabitant while the defendant is the corporation of Manchester. The officials of the corporation, of course, knew that the fumes would be injurious, but they did not think it worth while to go to meet trouble.

The plant was completed and began to work in 1924. The consumption of coal was from the first prodigious and for the last accounting year before the trial amounted to 560 tons of coal, containing 11 tons of sulphur, for every twenty-four hours. A considerable increase of this will be involved in the corporation's plans as the enlarged plant comes into use. From the first complaints began to come in, some from the sanitary inspector of the local authority, some from private persons, of whom the plaintiff was one, but not the first. The first reply was curious. The defendants wrote on April 4, 1924:

> "We have never met with trouble of the character before at any of our power stations, although the conditions from the point of view of humidity of atmosphere are far worse than they are at Barton."

I do not think that anything was or could have been made at the trial of this point about the dry climate of Barton-on-Irwell. In order to account for what happened

it was further suggested that at Barton-on-Irwell there must be some local peculiarity. A hill was, I think, mentioned, though where the hills are at Barton-on-Irwell the evidence did not disclose. The direction of the wind was also a cause of some speculation, which, however, died out, when it was remarked that, whatever is the prevalent wind, if any, when the wind was his way, as it often was, the plaintiff was bound to get the sulphur and suffer by it. Another complainant was told (May 17, 1924):

> "We have never experienced any similar complaints regarding fumes from the chimneys of the corporation's power station at Stuart Street, and I am at a loss to understand why it should be so at Barton. The matter is being most carefully investigated with a view to ascertaining the cause and finding a remedy, if the chimney is at fault"

and when the Farmers' Union had written to complain on behalf of several of their members, who were farming near the power station, the corporation stated on June 19, 1924, that "steps are being taken to mitigate the effect of the fumes on surrounding crops." These steps consisted in twice lengthening the chimneys, evidently in the belief that a remedy might be found here, and Messrs. Babcock and Wilcox, their boiler makers, agreed that it was an experiment that should be tried. The first lengthening did not end the complaints, but there were not so many after it as before, and, as it was "hoped to avoid any further complaints by raising the level at which the gases were discharged," the chimneys were lengthened again. To the question: "In so far as the raising of the chimneys is concerned, your difficulty is now that you dare not put more on because of the structure?" Mr. Lamb replied: "That is so," but, although £3,600 is given as the cost of twice lengthening the chimneys, no evidence is forthcoming as to the possibility or the cost of strengthening the roof, so as to enable the chimneys to be raised again. Mr. Lamb said that complaints had not ceased with the lengthening, and that, accordingly, he thought that raising the chimneys further would not cure the nuisance. I think that here the wish was father to the thought.

It appears to me that the defendants must definitely be taken to have believed in 1924 and 1925, that the length of the chimneys was in fault and that raising them might prove to be the way out. They must have thought the probability considerable or they would not have repeated the operation. Why is it that they now say that further raising would not have improved matters? On this there are two respects, in which I think there was misapprehension at the trial. Mr. Lamb, being asked: "Had you consulted any other electrical engineer before building these works?" replied: "Is your point with regard to eliminating the sulphur fumes from the gases? We know nothing from our general knowledge of any system ever devised for getting the sulphur fumes out of the gases." Again, on the question of raising the chimneys, TALBOT, J., says:

> "You have to look at these things as a practical matter. You cannot possibly overtake the increased consumption by raising the chimneys; you would have a thing like the Tower of Babel before you had done. . . . The intention of Parliament in 1914 undoubtedly was to have a station, which would ultimately supply a very large area in very large quantity and they must have contemplated an enormous consumption of coal at this one place."

As to the first respect, I think that the witness directed his mind to the wrong point. The suggested obligation of using reasonable care to avoid the nuisance is not the same thing as actual elimination of all the sulphur content, a thing which may be very difficult. If enough can be removed to prevent the residue doing substantial mischief, the duty is discharged, and, if raising the chimneys, by diffusion of the fumes over a larger and higher area, helps to attenuate the sulphur gases, its discharge is made all the easier. As to the second, no doubt the legislature contemplated a large generating station, and, if the power to extend or enlarge it were exercised, further large generating buildings and plant, but I do not

see how this negatives designing the chimneys in such a way as to mitigate the discharge of sulphur and keep it from becoming a nuisance from time to time. No particular plan, or type or system is specified. All that is to be done is to be subject to the use of reasonable care and skill to prevent a nuisance, and if the increase of the number of chimneys involves a proportionate increase in the coal consumption, the exercise of the power to multiply chimneys may also impose an obligation to heighten or otherwise modify the chimneys accordingly. I find it hard to read into the very wide and very general terms, in which the legislature authorised the erection and use of a power house at Barton, anything which finally stereotypes the plant when erected and exonerates the undertakers from all further attempts to mitigate the sulphur nuisance.

It was further contended that the corporation were not obliged to keep their apparatus always up to the latest improvements, or to become inventors themselves (for which *Vaughan* v. *Taff Vale Rail. Co.* (1) and *National Telephone Co., Ltd.* v. *Baker* (8) were cited), nor were they prevented from abandoning tall chimneys with strong natural draught in favour of shorter chimneys with slower mechanical draught, if experience showed that higher efficiency would thus be obtained. I do not think that *Vaughan's Case* (1) is in point here. There the railway company had already in use an efficient spark arrester of an approved pattern, and, accordingly, were not in default merely because another contrivance newer and somewhat better had come on the market. Here the corporation have never employed any apparatus to limit the amount of sulphur discharged or even thought of the matter at all. It is not even a case where the undertakers thought that their plant was so much superior to any former plant in this respect that precautions were needless, though even here a jury would have been free to say that their complacency was mistaken: *Fremantle* v. *London and North Western Rail. Co.* (9). They did, as part of the original plant, supply "baffles" to arrest the grit from going up into the air, a device first put into use at Barton which cost a good deal of money, but they not only have not installed, but they do not seem to have tried to find, anything that might limit the discharge of the sulphur. Nor is it a question of barring the defendants from taking advantage of scientific progress by discarding older precautions in order to promote efficiency while observing other precautions in substance equally effective and the best of their kind in use: *Port Glasgow and Newark Sailcloth Co.* v. *Caledonian Rail. Co.* (10), 19 R. (Ct. of Sess.) at p. 614. What is meant by saying that undertakers are not to be inventors? They are not bound, either themselves or by others, to invent in the sense of making some unreasonably difficult discovery, but anyone, who knows, in the case of a new plant, anything of practical engineering, knows also how common it is to call on experts to devise some new means of guarding against a known danger or of facilitating a known result, and such things are devised to order, though they are not dignified by the name of inventions or protected on the ground of patentable novelty. As it is, the defendants have never put themselves in a position to say that a nuisance by sulphur is necessarily incidental to the emission of the fumes nor that prevention is only possible by some extraordinary means or at the price of defeating the enterprise which the statute authorises: *Quebec Railway, Light, Heat and Power Co., Ltd.* v. *Vandry* (11). They stopped short of the first and never approached the second. It must be remembered that, in making reasonableness the measure of what must be done before the production of a nuisance can be excused, the law, as it always does, means reasonable according to all the circumstances, and reasonable not only in the interest of the undertakers, but also in that of the sufferers. The legislature, in authorising a very big concern, must not be taken to be chary of requiring that much care is to be taken. Great powers often involve great responsibilities and before the corporation can be said to have proved that they have done all that they reasonably can, I think that they ought to have done a good deal more than they have done to find out what can usefully and reasonably be done. Of course, the absence of any original precaution to prevent a nuisance and the meagre extent of the corporation's inquiries outside their own staff and tradesmen are not

substantive wrongs in themselves. If by good luck the corporation should be able to prove that no such precaution was possible, even if they had sought it at the time, and that none can be found now, then their shortcomings in both respects would not prejudice them. The significance is very different. To people who have neglected such ordinary inquiry, in a matter in which it is more in their interest to fail than to succeed, I do not attach much credence when they say that it was all no good. The witnesses called, however honest, were tinged with inevitable pessimism, and in the face of the plaintiff's evidence I cannot believe, merely because they say so, that the accessible resources of civilisation have been exhausted. If it be so, I cannot help thinking that the legislature may have to re-consider the propriety of granting to undertakers in this field clauses and powers of the present type.

It is important to remember that the first question, namely, whether the defendants can justify their nuisance, is by no means the same as the question whether the injunction itself should be modified or discharged. How high the task of justification may be put will appear from LORD WATSON's well-known words in *Metropolitan Asylum District Managers* v. *Hill* (12) (6 App. Cas. at p. 212):

> "I do not think that the legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorised a certain use of a specific building in a specific position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the legislature, lies upon the persons seeking to justify the nuisance."

I have not sought to adopt for the purpose of this case the most extreme expressions to be found in the books, finding it enough to rely on reasonableness and the duty to take all reasonable care and precautions, but in any case the authority to erect and work the plant and the obligation in both respects to use reasonable care and precautions are correlative, and erection cannot be so severed from use and maintenance as to entitle the undertakers to go on permanently using a plant with all its original imperfections unremedied, merely on the ground that original faults in construction must be deemed to be irremediable in subsequent use. Reasonableness applies not merely to construction but to improvement. It is not necessary to discuss the extent to which a plant, if good of its kind when first put up, may be maintained unaltered by virtue of this Act though science progresses and beneficial alterations become feasible in practice, for here the plant in respect of sulphur nuisance is not shown to have been good of its kind, and, therefore, the question of altering it is not a closed one. It becomes a question among other things of expense, but it is an open question still. Again, even though possible alterations and improvements may not be such that a mandatory injunction could go for their adoption or that the corporation could be restrained from using the plant without them, they may still be liable in damages for nuisance caused by the deficiencies in the plant, which might have been averted by reasonable care in the first instance. The remedy for the lack of such care is not necessarily injunction or nothing, for this would be turning the discretion of the court in a matter of remedy into an authority from the legislature to dispense with the implied condition to use reasonable care. I agree with the motion proposed from the Woolsack.

LORD BLANESBURGH.—Like my noble friend opposite, I have reached the conclusion that the Manchester Corporation Act, 1914, is not a "Special Act" within the meaning of the Electric Lighting Clauses Act, 1899. Except, accordingly, to the extent to which it is in terms incorporated, the "nuisance clause," 81, in the schedule to the Clauses Act has no place in the Act of 1914. This means that the plaintiff in his present contest with the corporation has neither the

A nuisance clause nor any other like protection to rely upon. It means also that so soon as the corporation are in a position to establish that in the working of their power station at Barton they are acting without negligence in the sense in which in such a connection that phrase is used, they are relieved of all further liability to the plaintiff for nuisance, however great and complete may be the continuing damage to his crops and farm lands occasioned by the working of their station. B With the noble viscount on the Woolsack I think this result unfortunate. Very readily would I decide, if I felt at liberty so to do, that the loss resulting to the plaintiff from the corporation's operations should without any qualification be borne by the corporation. That loss is truly as much part of the cost of generating their electrical energy as is, for example, the cost of the coal whose consumption is the original source of all the mischief. In a question between the plaintiff, on the one C hand, and the corporation, on the other, I can discover no sound principle why this loss should not be theirs. The plaintiff's lands are outside of the area of supply. He is not himself resident within it. He derives no benefit from, has no concern in, responsibility for or control direct or indirect over their electrical undertaking or its working. Why, then, should the final burden of such damage as has been proved in these proceedings rest upon him and not upon those causing it, and D through them upon those benefiting by or interested in the undertaking of which this power station forms a part? It is, indeed, difficult to say.

Very readily, therefore, if I felt myself entitled so to do, would I extend to the plaintiff unqualified protection in this matter. And all the more willingly, seeing that, as a result of a careful perusal of the Act of 1914 and a consideration of the situation at its date, I am forced to conclude that the Act, while doubtless giving E effect to the proposals of the corporation in the terms in which these were made, embodies no conscious legislative appreciation of the consequences, probably then quite unforeseen, which have resulted from their acceptance. I do not blame the corporation. They were not without warrant in asking that their proposed power station should be untrammelled by any nuisance clause. In 1898 a joint committee of both Houses of Parliament had reported in favour of compulsory powers being F granted to undertakers for the acquisition of land for generating stations and had recommended that where the site of a generating station was acquired under such powers the undertakers need not be subjected to any further liability than that which, according to Lord Blackburn in *Geddis* v. *Bann Reservoir Proprietors* (3) (3 App. Cas. at p. 456), is imposed by the common law in the case of persons exercising statutory powers and duties—a liability the nature of which I have G already paraphrased. And there were instances on record of private Acts in which that recommendation had been accepted. The corporation, therefore, might quite well ask that it should be accepted again.

But what were the circumstances here? The three existing stations of the corporation, each within the area of supply, had, all of them, presumably for the protection of property also within that area, been made subject to the clause, and H it seems of all things most unlikely that Parliament, if the consequences had been fully envisaged, would have sanctioned, as on my view of the statute it has sanctioned, a scheme whereby the corporation are enabled to scrap their existing stations to concentrate the generation of all energy—to an extent limited only by the area of the site they were empowered to acquire—in a new power station outside their area, and from that station to damage the property of persons entire strangers I to Manchester and its undertakings untrammelled by the nuisance clause altogether. It is not as if, in this private Act, Parliament had confined the plaintiff and others in his position to a remedy in damages, so that the working of the power station might not at their instance be liable to be stopped by injunction. Much may be urged in favour of such an adjustment in an area predominantly manufacturing or industrial of such competing rights and interests as those with which we are here concerned. But in this Act, as I am constrained to read it, Parliament has gone much further. Upon complying with conditions of carefulness which need not shield the plaintiff's crops from complete destruction, the Act leaves him without

any relief or remedy either in damages or by injunction for the loss he has sustained. A

I have said enough to show how readily I would have concurred in the view of the Act taken by the noble Viscount on the Woolsack had it appeared to me to be open. But I can see no answer to the many effective reasons for the opposite construction which at the trial have been given by TALBOT, J., in the Court of Appeal by LAWRENCE, L.J., and SANKEY, L.J., and in this House by my noble friend opposite. To my mind these reasons or most of them appeal with a force B not to be resisted. I would only weaken them by repetition, and I confine myself to making one addition to the list of them, trivial perhaps in itself, but strongly confirmatory as I think of the conclusion induced by the others. Clause 60 of the schedule to the Electric Lighting (Clauses) Act, 1899, is, like cl. 81, one of the sections of that Act which by s. 36 (5) (b) of the Act of 1914 is incorporated for the purposes of that section. Section 60 of the Act of 1899 referred to requires the C undertakers to make a map of their whole area of supply with the details applicable to that whole area and to all the existing mains, service lines, and other underground works and street boxes as thereby prescribed. By s. 36 (7) of this Act of 1914, however, the only map which, in obedience to cl. 60, the corporation is required to make is to be a map or maps of so much of the districts traversed by any main laid down under the powers of s. 36 as may be necessary to show the D course of such main. And no more. To my mind, this provision is eloquent to show that there has been no other incorporation in the Act of 1914 of s. 60 for any purpose whatever. And I can see in this respect no distinction at all between cl. 60 and cl. 81 of the Act of 1899, the nuisance clause. There is, I feel constrained to hold, no general incorporation of either section.

But, serious as is the position to which this view of the Act of 1914 relegates the E plaintiff, it has not yet, in my judgment, become so serious for him as TALBOT, J., and LAWRENCE, L.J., thought. On the evidence of the corporation TALBOT, J., gave judgment for them, and LAWRENCE, L.J., would have done likewise. I take a different view of their position. The corporation, in my judgment, have not, so far, established that in the conduct of their station there is on their part that absence of negligence which can alone relieve even them from liability to the plain- F tiff. With the judgment of my noble friend opposite on this matter, I am in entire agreement. I think with him that the burden which lies upon the corporation to satisfy the court that their generating station cannot be carried on without subjecting the plaintiff to the admitted nuisance of which he complains has not so far been discharged. In my judgment, the consequences in this case and in others where generating stations of great size are free of the nuisance clause would be G momentous both for neighbouring owners of property and for the public health if on such evidence as has so far been adduced by the corporation undertakers were, without redress, to be permitted to poison the air with their fumes. I cannot doubt that as a result of this litigation widespread attention will be directed to this increasingly important public question. This case will have served a useful public purpose if, as its result, undertakers, when in the future they approach Parliament H with proposals similar to those embodied in the 1914 Act, are required to show cause before their Bill is allowed to pass why a nuisance clause or some other adequate protection for those who may be injuriously affected by the working of these great power stations is not to be inserted therein. I agree that the variations already announced from the Woolsack should be made in the order of the Court of Appeal. As so amended that order should, I think, be allowed to stand, and this I appeal, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for Town Clerk, Manchester; *Ellis & Fairbairn.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. *v.* TUTTLE

[Court of Criminal Appeal (Avory, Roche and Humphreys, JJ.), March 11, 1929]

[Reported 140 L.T. 701; 45 T.L.R. 357; 21 Cr. App. Rep. 85; 28 Cox, C.C. 610]

Criminal Law—Indictment—Amendment—"Defective"—Wrong statute pleaded —Amendment by substituting earlier enactment in similar terms—Evidence —"Act disclosed in consequence of compulsory process of any court"—Disclosure in affidavit filed in defence—Statement or admission in compulsory examination in bankruptcy—Statement in preliminary examination in bankruptcy—Indictments Act, 1915 (5 & 6 *Geo.* 5, *c.* 90), *s.* 5 (1)—*Larceny Act*, 1861 (24 & 25 *Vict.*, *c.* 96), *s.* 85—*Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 43 (3).

The appellant, who was a trustee under a will, was charged with having in March, 1916, fraudulently converted to his own use certain shares deposited with him by a co-trustee. In an affidavit filed by the accused in defence to proceedings for an account commenced against him by the co-trustee in the Chancery Division, the appellant swore that he had, with the approval of his co-trustee, invested the capital in his own business. Subsequently, in his preliminary examination in bankruptcy, he made admissions to the Official Receiver in regard to the disposition of the capital by him. He was indicted for fraudulent conversion as a trustee under s. 21 of the Larceny Act, 1916, but the judge, on his notice being brought to the fact that that Act was not in force at the time when the offence was alleged to have been committed, allowed the indictment to be amended by the substitution for the later statute of s. 80 of the Larceny Act, 1861, which defines the offence of conversion by a trustee in substantially the same terms as s. 21 of the Act of 1916.

Held: (i) the indictment was defective within the meaning of s. 5 (1) of the Indictments Act, 1915, by reason of the wrong statute having been inserted, but in view of the fact that the offence under the 1861 Act was defined in almost the same words as those used in the Act of 1916, the appellant could not have been prejudiced by the amendment, nor could injustice have been done to any defence that he might have had, and, therefore, the amendment was rightly allowed; (ii) the appellant was not protected from prosecution by s. 85 of the Larceny Act, 1861, in regard to acts disclosed by his affidavit in the Chancery proceedings, since what he disclosed in that affidavit was not "in consequence of any compulsory process of a court of equity" but was made voluntarily by him in answer to the allegations made against him; (iii) the admissions in the preliminary examination in bankruptcy were not admissions made "in a compulsory examination or deposition before a court on the hearing of a matter in bankruptcy" within s. 43 (3) of the Larceny Act, 1916, and so were admissible in evidence against the appellant; and, therefore, he was liable to be convicted under s. 80 of the Act of 1861.

Notes. Considered: *Meek* v. *Powell*, [1952] 1 All E.R. 347. Distinguished: *R.* v. *Maywhort*, [1955] 2 All E.R. 752.

As to amendment of indictments, see 10 Halsbury's Laws (3rd Edn.) 383; and as to the admissibility in evidence of confessions and statements made by the accused, see ibid. 469 et seq. For cases see 14 Digest (Repl.) 265 et seq., 463 et seq., and 15 Digest (Repl.) 1114. For Larceny Act, 1916, see 5 Halsbury's Statutes (2nd Edn.) 1011.

Cases referred to:

(1) *R.* v. *Noel*, [1914] 3 K.B. 848; 84 L.J.K.B. 142; 112 L.T. 47; 24 Cox, C.C. 486; 10 Cr. App. Rep. 255, C.C.A.; 14 Digest (Repl.) 465, *4491*.

(2) *R.* v. *Pike*, [1902] 1 K.B. 552; 71 L.J.K.B. 287; 86 L.T. 205; 66 J.P. 296; 50 W.R. 672; 18 T.L.R. 285; 46 Sol. Jo. 268; 20 Cox, C.C. 164; 9 Mans. 121, C.C.R.; 14 Digest (Repl.) 464, *4484*.

Appeal against conviction and application for leave to appeal against sentence. A

The appellant, Walter Edward Tuttle, was convicted at the Norfolk Assizes before TALBOT, J., of fraudulent conversion as a trustee, and was sentenced to four years' penal servitude. Under the will of a Mr. Fowler, who died on May 25, 1915, the appellant had been appointed executor and trustee jointly with the widow, Mrs. Fowler. Part of the deceased's estate consisted of shares in a building society, and these were realised by the appellant on March 9, 1916, for a sum of B £630 odd. For some time the appellant paid Mrs. Fowler £1 a week, which he represented to be interest on the above capital invested by him. Mrs. Fowler ultimately became dissatisfied with the disposition of the capital, and in 1925 commenced proceedings in the Chancery Division against the appellant for an account. In answer to the affidavit supporting the originating summons, the appellant filed an affidavit in reply, in which he swore: "After the estate of the C testator had been realised I discussed with the plaintiff the best method of investing the capital and she agreed that such capital should be left in my hands to be used by me in my business, I, on my part, undertaking to pay her the sum of £1 per week as interest thereon." An order was made by the court for certain accounts and inquiries, and the appellant was ordered to pay £1,000 into court. He paid £275, and in respect of the remainder was committed to gaol on a writ of attach- D ment, but subsequently he was discharged on proof of lack of means. On Feb. 22, 1928, he presented his own petition in bankruptcy, and on the same day, after a preliminary investigation before the Official Receiver, a receiving order was made against him. In the course of the preliminary investigation he stated: "Some years ago I made the will of a Mr. William Joseph Fowler. Under the same I was a co-trustee with the widow, Mrs. Mary Anne Fowler. The balance of the E estate to be held in trust was about £1,000, which I invested in my own business with no security . . ." On Feb. 29, 1928, the appellant made his statement of affairs. At the trial the indictment originally charged him with fraudulent conversion as a trustee, contrary to s. 21 of the Larceny Act, 1916. It was pointed out to the judge that, by s. 50 of that Act, the Act did not come into force till Jan. 1, 1917, which was later than the date when the offence was alleged to have F been committed. After hearing argument, the judge allowed the indictment to be amended by the substitution of s. 80 of the Larceny Act, 1861 [repealed by the Larceny Act, 1916], which defined the offence of fraudulent conversion by a trustee in substantially the same terms as those used in the later Act.

Gerald Howard for the appellant.

C. G. Moran, for the Crown, was not called upon to support the conviction. G

The judgment of the court was delivered by

AVORY, J.—The appellant was convicted at the assizes at Norwich of the offence of fraudulent appropriation by him of a sum of £630 15s. 2d., trust money which he had in his possession as trustee under the will of one William Joseph Fowler, H the appellant being joint trustee with the widow. A cheque for that amount came into his possession on March 9, 1916, and so far as the merits of the case were concerned there was no room for dispute that the appellant had appropriated the proceeds of that cheque to his own use and had concealed the misappropriation from the widow, his co-trustee, by representing to her that the money had been invested, and by paying to her the sum of £1 per week as though it were, as I represented, interest on the money which had been invested. For many years, certainly up to 1925, the appellant concealed from the widow, his co-trustee, notwithstanding her inquiries, what had been done with this money. In that year she, having taken advice, instituted proceedings in the Chancery Division by originating summons calling upon the appellant to account for his dealing with the trust estate. The result of those proceedings was that he did produce a sum of about £275. Upon his admission made in those proceedings that he had in fact received, or had become liable to account for, a total sum of £1,000, an order was made upon him

to produce the balance, and upon his failure to do so he was committed to prison, where we are told he remained in custody for a period of about two months.

Those being the facts, an indictment was presented against him at the assizes alleging upon its face that he had been guilty of fraudulent conversion as a trustee contrary to s. 21 of the Larceny Act, 1916. In the course of the proceedings, when it appeared that the alleged offence had been committed in March, 1916, the attention of the learned judge was called to the fact that by s. 50 of the Larceny Act, 1916, that Act did not come into force until Jan. 1, 1917. An objection being taken, the learned judge after argument ordered the indictment to be amended by substituting for s. 21 of the Larceny Act, 1916, s. 80 of the Larceny Act, 1861.

Before us to-day counsel for the appellant has taken, on behalf of the appellant, three points, which he submits are objections to this conviction. First of all, he says that there was no power in the learned judge to amend the indictment in the way in which he did amend it; the second point is that in s. 85 of the Larceny Act, 1861, there is a provision that no person shall be liable to be convicted of any of the misdemeanours in any of the sections mentioned (which include s. 80)

> "if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding which shall have been bonâ fide instituted by any person aggrieved."

Counsel contended that there was in this case a disclosure by the appellant within the meaning of that section which protects him from being subsequently prosecuted for that offence. The third point is that in s. 43 (3) of the Act of 1916 there is a provision that

> "a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence against that person,"

and it is suggested that there was in this case an improper admission of a statement or admission made by the appellant in a compulsory examination on the hearing of a matter in bankruptcy. These points require to be dealt with separately.

On the first point the power of the court—of the learned judge in this instance—to amend the indictment depends upon the provisions of s. 5 of the Indictments Act, 1915, which provides:

> "Where before trial or at any stage of the trial it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case the required amendment cannot be made without injustice."

The first question here is whether this indictment was defective within the meaning of that statute. We are clearly of opinion that the indictment alleging that this offence had been committed on March 9, 1916, and alleging that it was an offence against the Larceny Act, 1916, which did not come into force until Jan. 1, 1917, was defective on its face. It being so defective the only other question is whether the amendment which was made charging the offence to have been committed against a section of the Act which was in force on March 9, 1916, was an amendment which could be made without injustice to the accused. When it appears, as it does, that the offence under the earlier Act of 1861 was in substantially the same words as the offence under the Larceny Act, 1916, it is clear that the appellant could not have been prejudiced, and no injustice could have been done to any defence which he had by this amendment. It is not like the case, which was suggested during the argument, of an indictment being amended so as to charge a person with an offence different from that for which he has been committed for trial. Here the offence was precisely the same, namely, the fraudulent appropriation by him as a trustee of trust money.

The second point turns upon the provisions of s. 85 of the Larceny Act, 1861, which I have read; and the question there is whether the appellant had, previously to his being charged with this offence, disclosed on oath the act in respect of which he was being charged, and whether that disclosure was in consequence of any compulsory process of any court of law or equity in an action by a party aggrieved. What was relied upon for this purpose as a disclosure was an affidavit made by the appellant in answer to the originating summons in the Chancery Division, in which the appellant, so far from disclosing an act which rendered him liable to be charged with a criminal offence, was saying or suggesting that he had invested this money, with the approval of his co-trustee and the beneficiary, in his own business, and that with her approval he was paying her a sum of £1 per week as interest upon it, and that he had been unable, on account of the difficulty of preparing accounts, to ascertain precisely the amount of capital which was left in his hands, but that to the best of his knowledge and belief it was between £900 and £1,000, so that the £1 per week represented interest at more than 5 per cent. per annum. So far from that being, as I have said, a disclosure of an act done by him which rendered him liable to be prosecuted, it was a disclosure of a defence or answer to any such accusation. Quite apart from the question whether there was in fact any disclosure within the meaning of that section, it seems clear also that it was not a disclosure in consequence of any compulsory process of any court of law. It was a voluntary statement made by the accused on affidavit, in answer to the allegation which was made against him. There was no compulsion upon him to file any affidavit at all, and no compulsion upon him to make any statement at that stage, in regard to what had become of this money. If authority were needed on this point, *R.* v. *Noel* (1) seems to be conclusive. The effect of that decision is shortly stated in the headnote.

> "When an act done by a person is first disclosed by him without making any objection during cross-examination in a civil action, it is not disclosed by him 'in consequence of any compulsory process' of a court of law, within the meaning of s. 85 of the Larceny Act, 1861, and he is liable to be convicted of an offence under the Larceny Act, 1901, in respect of the act so disclosed."

If anything, the present case is a fortiori to that decision in *R.* v. *Noel* (1).

The third point, which has required a little more consideration, arises under s. 43 (3) of the Larceny Act, 1916, which provides that in any proceedings in respect of any offence against s. 21, among others, of this Act, which is the corresponding section to s. 80 of the Act of 1861,

> "a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of a matter in bankruptcy shall not be admissible in evidence against that person."

It is admitted that upon this trial evidence was admitted of certain answers made by the appellant in his bankruptcy in what is called a preliminary examination. The question arises whether those answers, or any of them, can be properly described as an admission made by him in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy. *R.* v. *Pike* (2) decides that

> "A statement of affairs prepared by a debtor in the course of his bankruptcy under s. 16 of the Bankruptcy Act, 1883, is admissible in evidence against him on a charge, under [the Larceny Act, 1861], s. 80, of misappropriation of money of which he was a trustee."

That was a decision of the Court for Crown Cases Reserved, consisting of five judges; and we have to consider whether it can be said that these answers or admissions made by the appellant in what is called the preliminary examination are admissions made in any compulsory examination before any court. The learned counsel, with all his research, has been quite unable to furnish us with any reason to show that those answers are made in a compulsory examination before a court

on the hearing of any matter in bankruptcy. In fact, looking at the Bankruptcy Act, 1914, there does not appear to be any ground for saying that that preliminary examination is of a compulsory character. It is not upon oath, and if, as was decided in *R.* v. *Pike* (2), a statement of affairs cannot be described as a compulsory examination or deposition within the meaning of that section, it follows a fortiori that this preliminary examination is not a compulsory one within the meaning of that section. Therefore, we have come to the conclusion that the evidence of what the appellant said in his answers in that preliminary examination was not improperly admitted; and so these objections in point of law to the conviction fail.

[The court, in the particular circumstances of the case, reduced the sentence to one of three years' penal servitude, to run from the date of conviction.]

Orders accordingly.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

BERTHIAUME *v.* DASTOUS

[PRIVY COUNCIL (Viscount Dunedin, Lord Darling, Lord Warrington, Duff, J., and Sir Lancelot Sanderson), June 24, July 16, 1929]

[Reported [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54]

Canada—Quebec—Marriage—Validity—Illegal in country of celebration—Legal in country of domicil—Putative marriage—Good faith of wife—Right to alimony—Civil Code of Quebec, arts. 156, 164.

If there is one question better settled than any other in international law it is that as regards marriage—putting aside the question of capacity—locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicil of one or other of the spouses. If the so-called marriage is no marriage in the place where it was celebrated, there is no marriage anywhere, although the ceremony or proceeding, if conducted in the place of the parties' domicil, would be considered a good marriage.

In 1923 the wife and the husband, who were both domiciled in the province of Quebec, went through a form of marriage in France before the curé of the parish without having undergone a previous civil ceremony of marriage. In 1926 the wife instituted divorce proceedings against the husband before a French court, and the judge held that the absence of a civil certificate of marriage was a bar to the proceedings. That decision was affirmed by the Court of Appeal in Paris. The wife then instituted proceedings in the Superior Court of Quebec, praying, inter alia, that the marriage celebrated in France be declared valid according to the law of Quebec, and, in the alternative, claiming a declaration that as the wife had contracted the marriage in good faith it was a putative marriage producing civil effects in her favour and giving her a right to, inter alia, alimony. By art. 156 of the Civil Code of Quebec: "Every marriage which has not been contracted openly, nor solemnised before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide

according to the circumstances." By art. 164: "If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage." A

Held: the law of France was peremptory—without a civil ceremony of marriage any religious ceremony was ineffective—and, therefore, under international law the marriage of the parties was void ab initio, and the saving clause at the end of art. 156 did not give the Quebec court power to override international law; but, in contracting the marriage, the wife had acted in good faith, and there subsisted to her, under art. 164, those civil rights which were consistent with the non-existence of a real marriage; the case would be remitted to the Superior Court of Quebec to deal with the civil effects of a marriage held null, but allowed to be putative, it being understood that the continuance of alimony to the wife was one of the civil effects, the amount of which it would be for the court in Quebec to determine. B C

Notes. Considered: *Nachimson* v. *Nachimson*, [1930] All E.R.Rep. 114. Applied: *Robert* (*otherwise De La Mere*) v. *Robert*, [1947] 2 All E.R. 22. Considered: *Apt* (*otherwise Magnus*) v. *Apt*, [1947] 2 All E.R. 677; *Pilinski* v. *Pilinska*, [1955] 1 All E.R. 631; *Taczanowska* (*otherwise Roth*) v. *Taczanowski* (*Krystek cited*), [1957] 2 All E.R. 563. Referred to: *R.* v. *Rahman*, [1949] 2 All E.R. 165; *Starkowski* v. *A.-G.*, [1953] 2 All E.R. 1272. D

As to the effect of international law on forms and ceremonies of marriage, see 7 Halsbury's Laws (3rd Edn.) 93, 94; and for cases see 11 Digest (Repl.) 462–465.

Cases referred to:

(1) *Dalrymple* v. *Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 665; on appeal (1814), 2 Hag. Con. 137, n; 22 Digest (Repl.) 618, *7112*. E

(2) *Scrimshire* v. *Scrimshire* (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, *955*.

(3) *Ruding* v. *Smith* (1821), 2 Hag. Con. 371; 1 State Tr.N.S. 1054; 161 E.R. 774; 11 Digest (Repl.) 465, *982*.

(4) *Johnstone* v. *Godet* (1813), Ferg. 8. F

Appeal by special leave from a judgment of the Court of King's Bench (Appeal Side) for the province of Quebec (Greenshields, Guerin, Letourneau and Hall, JJ., Bernier, J., dissenting), affirming a judgment of the Superior Court, district of Montreal, declaring valid a form of marriage between the respondent and the appellant before a parish priest in France, granting the respondent's application for separation from bed and board, directing payment to her of alimony by the appellant at the rate of $1,500 per month, and dissolving community of property. G

On Dec. 24, 1913, the appellant (the husband) and the respondent (the wife), who were both domiciled in the province of Quebec, went through a form of marriage at Paris before the vicar of Notre Dame d'Auteuil without having previously been married before an officer of civil status as required by the French law. Thereafter the appellant and the respondent lived together as man and wife H until 1926 without issue. The wife said that the marriage had been contracted in good faith by her, and that she was not aware that it was void according to French law. On April 22, 1926, the respondent instituted proceedings for divorce before the Civil Tribunal of the Siene in Paris, and the judge held that the proceedings could not go on inasmuch as the respondent had made no proof of a civil marriage. The Court of Appeal in Paris confirmed this decision, holding that the alleged I marriage was null because the only legal marriage in France was one celebrated before an officer of civil status. On May 19, 1927, the respondent instituted in the Superior Court of Quebec the action out of which the present appeal arose, praying (i) that the said marriage celebrated in Paris be declared valid according to the law of Quebec; (ii) that a separation from bed and board be granted her, with the usual conclusions for an alimentary pension and the liquidation of the community; (iii) that, subsidiarily, in the event of the marriage being held invalid, the court should declare that it was contracted in good faith by her, and that it should, in

consequence, produce civil effects in her favour. At the trial LORANGER, J., held, in exercise of the discretionary power conferred on him by art. 156 of the Quebec Civil Code, that the marriage was valid, and granted the consequential relief by ordering a separation from bed and board, an alimentary allowance, and a liquidation of the community of property between the consorts. He also stated that if he had not held the marriage valid he would have declared it putative. That judgment was affirmed on appeal by a majority. The husband appealed.

Lafleur, K.C., Geoffrey Lawrence, K.C., and *Faribault, K.C.*, for the appellant.
Geoffrion, K.C., and *Pritt, K.C.*, for the respondent.

Cur. adv. vult.

The opinion of their Lordships was delivered by

July 16. **VISCOUNT DUNEDIN.**—In 1913 the respondent, a French Canadian of the Roman Catholic faith, being then a girl of nineteen years of age who had just graduated from a convent in a small town in Montreal, went on a trip to Europe with her father. She there met the appellant, a member of a Quebec family and also of the Roman Catholic faith, who had been living in Paris for several years. He proposed marriage to her, and she accepted. The appellant asked the respondent to make the necessary arrangements, and she called on the curé of the parish where her fiancé had been residing, and where she was then temporarily residing. The curé informed her that there were certain civil formalities to be gone through and that he would celebrate the marriage. She asked her fiancé to attend to the civil formalities and he took her to the British Consulate where certain papers were signed and a certificate issued which was given to her fiancé. After that the parties proceeded to the church, the certificate was handed to the curé, who then proceeded to celebrate the marriage according to the form of the Roman Catholic Church. The parties lived together as husband and wife until the year 1926, when on returning from an absence from home the respondent discovered that the appellant had been guilty of infidelity and had introduced a mistress into their home. The respondent then applied to the court in Paris for a divorce. That court, before proceeding further, demanded the exhibition of a civil certificate of marriage. This the respondent was unable to produce. She discovered that the certificate which her fiancé had procured at the British Consulate was only a notice of intended marriage, and that the officiating curé had carelessly omitted to notice that it was not a certificate of marriage. As a matter of fact he had exposed himself to severe penalty by celebrating the religious ceremony without the production of a certificate. As no certificate of marriage could be produced—none such ever having been in existence—the court declined to proceed with the case for divorce. The respondent then raised another action in the French courts, craving a judgment "pour faire statuer le mariage," and craving alternatively that, if the marriage was declared void, it should be held that she had contracted it in good faith and was entitled to a declaration of civil effects in her favour. The appellant appeared and denied the jurisdiction, he having still retained his Canadian domicil. This plea was sustained, and the action dismissed. The respondent then raised the present action in the Superior Court of the Montreal district. The action sought a declaration of marriage, decree of separation, a dissolution of the communauté de biens—the marriage having been without a marriage contract, communauté de biens would ensue—and a judgment for alimony. Damages were also claimed, but that claim was departed from. Alternatively, a declaration was sought that, as the respondent had been in good faith, the marriage was a putative marriage, and in terms of art. 164 of the Civil Code produced civil effects. The case depended before LORANGER, J., who held the marriage valid, pronounced a decree of separation, dissolved the community of goods, and granted a decree against the appellant for an alimentary allowance of $1,500 a month. On appeal, the Court of King's Bench by a majority upheld the judgment. BERNIER, J., dissented, and held that the marriage was null, and that a null marriage could not be a putative marriage. The present appeal is from that judgment.

Their Lordships are unable to agree with the judgment under appeal. If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicil of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding, if conducted in the place of the parties' domicil, would be considered a good marriage. These propositions are too well fixed to need much quotation. They were laid down long ago in England in the well-known case of *Dalrymple* v. *Dalrymple* (1) and in *Scrimshire* v. *Scrimshire* (2), approved by LORD STOWELL in *Ruding* v. *Smith* (3) (2 Hag. Con. at p. 393). A question precisely the same as the present had been decided in Scotland in *Johnstone* v. *Godet* (4), mentioned by LORD FRASER in his work on HUSBAND AND WIFE, vol. 2, p. 1310, where the parties had undergone a ceremony of marriage in Martinique, where the Code Napoleon prevailed. This marriage, if it had taken place in Scotland, would have been good. But there was no civil ceremony, and the marriage was bad under the code; and it was held no marriage in Scotland. Of course, these results may be altered by positive, i.e., statute, law. A good illustration may be given in the legislation which was passed in order to cure what was thought to be abuse of Gretna Green marriages. Marriage in Scotland can be constituted by mere words of consent de presenti in the presence of witnesses, and English couples used to cross the border by Gretna to be married by interchange of consent in the presence of the blacksmith and his assistant. A statute was passed declaring a marriage constituted by consent de presenti null where the parties had not previously resided in Scotland for at least three weeks.

Now, in face of the facts set forth in the narrative above given, and these facts were found by all the judges of the courts below and are amply borne out by the evidence, it is clear that under international law there was no marriage in this case. The law of France is peremptory. There must be a civil ceremony of marriage and if that has not taken place any religious ceremony is an idle performance so far as the law is concerned. Learned counsel for the respondent could not controvert this statement of international law, and, therefore, he sought to show that the validity of the marriage was established upon positive law contained in the Civil Code of Quebec. The articles he relied on were the following:

"7. Acts and deeds made and passed out of Lower Canada are valid, if made according to the forms required by the law of the country where they were passed or made.

51. On proof that, in any parish or religious community no registers have been kept, or that they are lost, the births, marriages and deaths may be proved either by family registers and papers, or other writings, or by witnesses.

128. Marriage must be solemnised openly, by a competent officer recognised by law.

129. All priests, rectors, ministers, and other officers authorised by law to keep registers of acts of civil status, are competent to solemnise marriage. . . .

135. A marriage solemnised out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid, if solemnised according to the formalities of the place where it is performed, provided that the parties did not go there with the intention of evading the law.

156. Every marriage which has not been contracted openly, nor solemnised before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide according to the circumstances.

159. No one can claim the title of husband or wife and the civil effects of

marriage, unless he produces a certificate of the marriage, as inscribed in the registers of civil status, except in the case provided for by art. 51.

160. Possession of the status does not dispense those who pretend to be husband and wife, from producing the certificate of their marriage.

161. When the parties are in possession of the status and the certificate of their marriage is produced, they cannot demand the nullity of such act."

The last seven articles appear in chapter 2 of the code, the heading of which is "Of the formalities relating to the solemnising of marriages." It is out of the question to suppose that the legislature is dealing with anything except the formalities to be observed in the province of Quebec. It would be idle to provide formalities to be observed in all the parts of the world. This is clear enough from the heading, but it is made more clear by the phraseology implied in the articles. Take, for instance, art. 129. Who can "keep registers of civil status" except the persons that can be so authorised in the province of Quebec? The term is inapplicable to anyone elsewhere. Art. 130 with its reference to the early articles as to the publication of banns is also utterly inappropriate to a marriage except in the province of Quebec.

The article, however, on which the respondent laid greater stress and on which the judgment of the court below mainly proceeded is art. 156. This is in a fasciculus of articles headed "Of actions for annulling marriage." It is not in such a division that one would expect the power of dealing with the constitution of marriage said to be contracted abroad. The article runs:

"Every marriage which has not been contracted openly, nor solemnised before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide according to the circumstances."

The first sentence gives the right of challenge and doubtless every foreign marriage could come within its words, for no foreign marriage could have been solemnised by a competent officer, which obviously refers to such a person in Quebec. The words which are appealed to are the last words, and it is supposed to add to their weight the fact that in the Code Napoleon, on which the Quebec Code is obviously modelled, the first sentence appears, but the words at the end do not. Let it be observed what the argument comes to. International law being as set forth, it is to be held that this saving clause gives a power to the court to override that law as upheld in every other country of the civilised world, but it also if so interpreted would do more. It would enable the court to declare marriage to arise from a proceeding which under the law of no country was ever supposed to be marriage. Naturally, the good sense of the Quebec judges would prevent them from doing any such thing; but when construction is in question the results of construction must be looked at. The truth is, that their Lordships can only look on this as a most preposterous suggestion and they agree with the view that BERNIER, J., took on this matter.

The case of a foreign marriage is dealt with in terms by art. 135, and that expresses the doctrine of international law. As this is in the section dealing with the constitution of marriage it would have been quite out of place to express the converse of the doctrine, so that the brocard expressio unius et exclusio alterius cannot apply. Their Lordships have therefore no hesitation in declaring that the so-called marriage in this case was ab initio null.

There remains, however, the question arising in arts. 163 and 164. They are:

"163. A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children, if contracted in good faith.

164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage."

As regards good faith, all the judges held, and their Lordships agree with them, A
that there was perfect good faith on the respondent's part. She was a very young
girl, quite ignorant of law, and from her antecedents and religion probably quite
incapable of considering marriage as anything but a religious ceremony and ordi-
nance. It is true that she was told that some civil formalities were necessary, but
she had no exact knowledge of what that meant, and she would be amply satisfied
with the assurance that they had been gone through at the British Consulate, all B
the more that the certificate produced was accepted as good by the officiating priest.
Article 163 is only necessary for grammatical reasons; the real article touching this
case is art. 164. It applies to this case in terms and deals with civil rights.
Holding the views they did as to there being a real marriage, the majority of the
learned judges found it unnecessary to deal with art. 164, a case of what is generally
known as putative marriage. The doctrine of putative marriage was well known C
to the canon law, and has been adopted by many systems which have founded their
law on the canon law. In England the canon law on this subject has been
abandoned. In Scotland it is in viridi observantia. Scotland so far deserted
canon law at the Reformation as to make divorce a vinculo competent, but other-
wise its matrimonial system is founded on the canon law. BERNIER, J., who dis-
agreed with the other learned judges as to the question of marriage, dismisses this D
point with the curt observation that a putative marriage cannot be a marriage
which is null. This is, indeed, an extraordinary proposition. It is just when a
marriage is declared null that the doctrine of putative marriage becomes necessary.
Cases of the insistence of the so-called wife on her rights are more rare, but cases
of the assertion of legitimacy of children born of a marriage subsequently declared
null are numerous in every system which accepts the doctrine of putative marriage. E

Two arguments were then put forward by the learned counsel for the appellant
directed to the lady's right to alimony. First, he said that the civil rights referred
to were only those which existed up to the date when the marriage was declared
null. The simple answer is that the word is "produces," not "has produced,"
and the absurdity of such a doctrine when applied to the legitimacy of children,
who in the article are linked with the wife, is manifest. Secondly, he said that F
obviously all the civil rights of a wife which flow from marriage could not continue
to exist, e.g., the right to cohabit, and, therefore, the right of alimony could not
exist. It is, however, impossible to suggest on this view that any civil right still
exists. It is quite true, as said, that all civil rights appendant to real marriage are
not produced by a putative marriage. But the criterion is obvious, those only
subsist which are consistent with a real marriage not existing. Alimony is such a G
right. The duty of a husband to support his wife is quite apart from his duty to
cohabit with her. This is correctly shown in the form of a decree of separation
which deals with the mensa as separate from the thorus.

Their Lordships are, therefore, of the opinion that the respondent is entitled to
alimony. The argument of learned counsel turned so specially on the question of
alimony, that scant mention was made as to the communauté de biens. Their H
Lordships would have felt inclined to hold that inasmuch as nullity of marriage
was declared, it was equivalent to saying that no communauté de biens ever really
existed; to declare the dissolution of what never existed would be a pleonastic
proceeding. But the learned judges of the court below who decided that the
marriage was valid have had no opportunity of saying what are exactly the civil
rights of a putative marriage, and since the case was first heard their Lordships I
have had their attention directed to several cases which seemed to point to a settled
practice as to this, which their Lordships in such a matter would not willingly
disturb. They are, therefore, of opinion that the case should be remitted to the
Superior Court of Quebec to deal with the civil effects of a marriage held null, but
allowed to be putative, it being distinctly understood that their Lordships are
clearly of opinion that the continuance of alimony to the wife is one of the civil
effects, the amount of which it will be for the court of Quebec to determine, the
amount decreed for in the judgments recalled being continued in the meantime.

The costs of the appeal will be borne as between solicitor and client by the appellant, who will also fulfil the other articles of the conditions on which special leave to appeal was granted. Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the case remitted to the Superior Court accordingly.

Appeal allowed.

Solicitors: *Blake & Redden*; *Lawrence Jones & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

CASSIDY *v.* DAILY MIRROR NEWSPAPERS, LTD.

[COURT OF APPEAL (Scrutton, Greer and Russell, L.JJ.), April 17, 18, May 13, 1929]

[Reported [1929] 2 K.B. 331; 98 L.J.K.B. 595; 141 L.T. 404; 45 T.L.R. 485; 73 Sol. Jo. 348]

Libel—Defamatory words—Statement on face of it not defamatory—Defamatory inference drawn by persons aware of certain circumstances—Circumstances not known to publisher of words—Statement defamatory of person not mentioned therein.

Liability for libel depends, not on the intention of the defamer, but on the fact of defamation. A person is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not, and if he scatters two-edged and ambiguous statements broadcast without knowing or making inquiry about facts material to the statements he makes, and the inferences which may be drawn from them, he must be liable to persons who, knowing those facts, draw reasonable inferences from the words he publishes. A statement which on the face of it is not defamatory may become so when published to persons who know of certain circumstances, and it matters not that the publisher did not know the facts which enabled persons to whom the libel was published to draw an inference defamatory of the plaintiff. Words may be published with reference to such circumstances, and to such persons knowing the circumstances, as to involve an inference in regard to someone not in terms mentioned in the statement, which would not be involved by the publication of the same words either in different circumstances or to persons ignorant of the particular circumstances which occasion the inference.

Accordingly, where a newspaper published the photograph of a married man accompanied by the following words: "Mr. M.C., the racehorse owner, and Miss X., whose engagement has been announced," and the wife of M.C. alleged that the photograph and the accompanying words meant, and had been taken by friends of hers to mean, that M.C. was a single man and she had not been married to him, but had been living with him as his mistress,

Held (GREER, L.J., dissenting): the judge at the trial of her action was right in holding that the publication was capable of a defamatory meaning and the jury were justified in saying that it was defamatory, and, therefore, the plaintiff was entitled to recover.

Notes. By s. 4 of the Defamation Act, 1952, a person who has published a defamatory statement about another unintentionally and innocently may make an offer of amends which, if accepted, will prevent proceedings for libel being taken, and, if not accepted, can be pleaded in defence to an action by the party defamed.

Considered: *Ralston* v. *Ralston*, [1930] All E.R.Rep. 336; *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581; *Bruce* v. *Odhams Press, Ltd.*, [1936] 1 All E.R. 287. Applied: *Hough* v. *London Express Newspapers, Ltd.*, [1940] 3 All E.R. 31. Referred to: *British Russian Gazette and Trade Outlook, Ltd.* v. *Associated Newspapers, Ltd.*, *Talbot* v. *Associated Newspapers, Ltd.*, [1933] All E.R.Rep. 320; *Newstead* v. *London Express Newspapers, Ltd.*, [1939] 4 All E.R. 319; *Knuppfer* v. *London Express Newspapers, Ltd.*, [1942] 2 All E.R. 555.

As to what is a defamatory statement, see 24 HALSBURY'S LAWS (3rd Edn.) 17 et seq.; and for cases see 32 DIGEST 17 et seq. For Defamation Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 399.

Cases referred to:

(1) *Capital and Counties Bank* v. *Henty* (1880), 5 C.P.D. 514; 49 L.J.C.P. 830; 43 L.T. 651; 28 W.R. 851, C.A.; affirmed (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, *121*.

(2) *Simmons* v. *Mitchell* (1880), 6 App. Cas. 156; 50 L.J.P.C. 11; 43 L.T. 710; 45 J.P. 237; 29 W.R. 401, P.C.; 32 Digest 49, *577*.

(3) *Australian Newspaper Co.* v. *Bennett*, [1894] A.C. 284; 63 L.J.P.C. 105; 70 L.T. 597; 58 J.P. 604; 6 R. 484, P.C.; 32 Digest 62, *900*.

(4) *E. Hulton & Co.* v. *Jones*, [1909] 2 K.B. 444; 78 L.J.K.B. 937; 101 L.T. 330; 25 T.L.R. 597, C.A.; affirmed, [1910] A.C. 20; 79 L.J.K.B. 198; 101 L.T. 831; 26 T.L.R. 128; sub nom. *Jones* v. *E. Hulton & Co., Ltd.*, 54 Sol. Jo. 116, H.L.; 32 Digest 17, *77*.

(5) *Bourke* v. *Warren* (1826), 2 C. & P. 307, N.P.; 32 Digest 17, *75*.

(6) *Gibson* v. *Evans* (1889), 23 Q.B.D. 384; 58 L.J.Q.B. 612; 61 L.T. 388; 54 J.P. 104; 5 T.L.R. 589, D.C.; 18 Digest (Repl.) 184, *1598*.

(7) *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 32 Digest 72, *1010*.

Appeal against a verdict and judgment in an action tried before MCCARDIE, J., and a common jury.

The defendants, in the issue of the "Daily Mirror" of Feb. 21, 1928, published a photograph of a man and a young woman with the following explanatory matter:

> "To-day's Gossip. News and Views about Men, Women and Affairs in General. Mr. M. Corrigan, the racehorse owner, and Miss [X.], whose engagement has been announced."

The man shown in the photograph was Kettering Edward Cassidy, otherwise known as Michael Corrigan, and he was the husband of the plaintiff to whom he had been married in 1916. The photograph was taken at a race meeting where Cassidy posed in company with a lady for a photographer to whom he said that he was engaged to marry the lady and that the photographer might announce it. The plaintiff sued the defendants for damages for libel, alleging that the photograph and words bore a meaning defamatory of the plaintiff, namely, that she was not lawfully married to her husband, but had lived with him as his mistress, pretending to her friends to be a respectable married woman. The defendants denied that the words published bore the meaning alleged, and contended that the matter and words did not constitute a libel. They also said that the words in their natural and ordinary significance were true in substance and in fact. The learned judge, being of opinion that the photograph and words were capable of bearing a meaning defamatory of the plaintiff, left it to the jury to decide whether they were in fact defamatory of the plaintiff. The jury found that they did reasonably bear a defamatory meaning and returned a verdict for the plaintiff for £500. The defendants appealed on the following grounds: (i) that the judge should have withdrawn the case from the jury; (ii) that the judge misdirected the jury; and (iii) that the damages were excessive.

W. A. Jowitt, K.C., C. J. Conway, K.C., and *G. R. Blanco White* for the defendants.

Serjeant Sullivan, K.C., and *Martin O'Connor* for the plaintiff.

Cur. adv. vult.

May 13. The following judgments were read:

SCRUTTON, L.J.—The facts in this case are simple. A man named Cassidy, who for some reason also called himself Corrigan and described himself as a general in the Mexican Army, was married to a lady who also called herself Mrs. Cassidy or Mrs. Corrigan. Her husband occasionally came and stayed with her at her flat, and her acquaintances met him. Cassidy achieved some notoriety in racing circles and in indiscriminate relations with women, and at a race meeting he posed, in company with a lady, for a racing photographer, to whom he said that he was engaged to marry the lady and that the photographer might announce it. The photographer, without any further inquiry, sent the photograph to the "Daily Mirror" with an inscription: "Mr. M. Corrigan, the racehorse owner, and Miss [X.], whose engagement has been announced." I omit the lady's name. The "Daily Mirror" published the photograph and the inscription. This paper was read by the female acquaintances of Mrs. Cassidy or Mrs. Corrigan, who gave evidence that they understood from it that that lady was not married to Mr. M. Corrigan and had no legal right to take his name, and that they formed a bad opinion of her in consequence. Mrs. Cassidy, accordingly, brought an action for libel against the newspaper, setting out these words with an innuendo, meaning thereby that the plaintiff was an immoral woman who had cohabited with Corrigan without being married to him.

At the trial counsel for the defendants objected that the words were not capable of a defamatory meaning. MCCARDIE, J., held that they were; the jury found that they did reasonably bear a defamatory meaning, and awarded the plaintiff £500 damages. The damages were high, but the plaintiff called considerable evidence of social damage to reputation; and the defendants' solicitor suggested, when the plaintiff alleged she was married to Mr. Corrigan, that there must be some mistake, and even after she had produced her marriage certificate, did not admit the marriage. It is not possible to interfere with the damages, and some allegations of misdirection and wrongful admission of evidence came to nothing. The real questions involved were: (i) Was the alleged libel capable of a defamatory meaning? (ii) As the defendants did not know the facts which caused the friends of Mrs. Cassidy to whom they published the words to draw defamatory inferences from them about the plaintiff, were they liable for those inferences?

The alleged libel does not mention the plaintiff, but I think it is clear that words published about A. may indirectly be defamatory of B. For instance, "A. is illegitimate." To persons who know the parents, those words may be defamatory of the parents. Or again, "A. has given way to drink; it is unfortunately hereditary." To persons who know A.'s parents these words may be defamatory. "A. holds D.Litt. degree of the university at X., the only one awarded." To persons who know B., who habitually describes himself—and rightly so—as "D.Litt. of X.," these words may be capable of a defamatory meaning. Similarly, to say that A. is a single man or a bachelor may be capable of a defamatory meaning if published to persons who know a lady who passes as Mrs. A. and whom A. visits. As LORD BLACKBURN says in *Capital and Counties Bank* v. *Henty* (1) (7 App. Cas. at p. 771):

> "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances,"

or, as COTTON, L.J., says in the same case (5 C.P.D. at p. 536):

> "One must consider, not what the words are, but what conclusion could reasonably be drawn from it, as a man who issues such a document is answer-

able not only for the terms of it, but also for the conclusion and meaning which persons will reasonably draw from and put upon the document."

It was argued that the words were not capable of the meaning that Corrigan was a single man, for they might mean that Corrigan was intending to seduce a woman under promise of marriage, or that he was divorced and could marry. On this I would remark that it would be so unusual for a seducer publicly to make his untrue representations, that the jury might well reject this meaning. Also, that I do not agree with some dicta, that if words are capable of several meanings, some defamatory and some innocent, they should not be left to the jury. I agree with the view of SIR MONTAGUE SMITH in *Simmons* v. *Mitchell* (2), when he said (6 App. Cas. at p. 158):

"The judge must decide if the words are reasonably capable of two meanings; if he so decide, the jury must determine which of the two meanings was intended."

And by "intended" I understand that a man is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not, and that if he scatters two-edged and ambiguous statements broadcast, without knowing or making inquiry about facts material to the statements he makes, and the inferences which may be drawn from them, he must be liable to persons who, knowing those facts, draw reasonable inferences from the words he publishes. As LORD HERSCHELL said in *Australian Newspaper Co.* v. *Bennett* (3) ([1894] A.C. at p. 287):

"It is not disputed that, whilst it is for the court to determine whether the words used are capable of the meaning alleged in the innuendo, it is for the jury to determine whether that meaning was properly attached to them. It was therefore the province of the jury in the present case to determine whether the words used were written of the plaintiff, and whether they bore the defamatory sense alleged."

In my view, the words published were capable of the meaning: "Corrigan is a single man," and were published to people who knew the plaintiff professed to be married to Corrigan; it was for the jury to say whether those people could reasonably draw the inference that the so-called Mrs. Corrigan was in fact living in immoral cohabitation with Corrigan, and I do not think their finding should be interferred with.

But the second point taken was that the defendants could not be liable for the inference drawn because they did not know the facts which enabled some persons to whom the libel was published, to draw an inference defamatory of the plaintiff. This was rested on some dicta of BRETT, L.J., in *Henty's Case* (1) that the evidence which made apparently innocent statements defamatory must be "known both to the person who wrote the document and the person to whom it was published." This, I think, was originally obiter, and, since the decision in *Hulton & Co.* v. *Jones* (4), is no longer law. The statement in FARWELL, L.J.'s judgment in that case in the Court of Appeal ([1909] 2 K.B. at p. 478) is:

"The rule is well settled that the true intention of the writer of any document, whether it be contract, will, or libel, is that which is apparent from the natural and ordinary interpretation of the written words; and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who know the plaintiff and the circumstances."

The whole of the passages in that judgment on pp. 478 and 479 of [1909] 2 K.B. are worthy of attention. This judgment was approved by LORD GORELL and LORD ATKINSON in the House of Lords, and repeated by LORD SHAW. LORD SHAW says ([1910] A.C. at p. 26):

"My Lords, I demur to the observation so frequently made in the argument that these principles are novel. Sufficient expression is given to the same principles by ABBOTT, C.J., in *Bourke* v. *Warren* (5), in which that learned judge says:

> 'The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant.'

I think it is out of the question to suggest that that means 'meant in the mind of the writer,' or of the publisher; it must mean 'meant by the words employed.' The late COLERIDGE, C.J., dealt similarly with the point in *Gibson* v. *Evans* (6), when, in the course of the argument, he remarked (23 Q.B.D. at p. 386): 'It does not signify what the writer meant; the question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff.' "

In my view, since *Hulton & Co.* v. *Jones* (4) it is impossible for the person publishing a statement which, to those who know certain facts, is capable of a defamatory meaning in regard to A. to defend himself by saying, "I never heard of A. and did not mean to injure him." If he publishes words reasonably capable of being read as relating directly or indirectly to A. and to those who know the facts about A. capable of a defamatory meaning, he must take the consequences of the defamatory inferences reasonably drawn from his words.

It is said that this decision would seriously interfere with the reasonable conduct of newspapers. I do not agree. If newspapers, who have no more rights than private persons, publish statements which may be defamatory of other people, without inquiry as to their truth, in order to make their paper attractive, they must take the consequences if, on subsequent inquiry, their statements are found to be untrue or capable of defamatory and unjustifiable inferences. No one could contend that "M. Corrigan, General in the Mexican Army," was "A source in whom we have full confidence." To publish statements first and inquire into their truth afterwards may seem attractive and up to date. Only to publish after inquiry may be slow, but at any rate it would lead to accuracy and reliability. In my opinion, the appeal should be dismissed with costs.

GREER, L.J.—The plaintiff, Mrs. Mildred Anna Cassidy, the wife of Kettering Edward Cassidy, otherwise known as Michael Corrigan, brought this action to recover damages in respect of a picture and certain words appearing thereunder in an issue of the defendants' newspaper, the "Daily Mirror," dated Feb. 21, 1928. The picture consisted of a portrait of her husband and a lady, and underneath these words were printed: "Mr. M. Corrigan, the racehorse owner, and Miss X., whose engagement has been announced." Both the picture and the words are in themselves unobjectionable. They contain in their ordinary signification no defamatory statement about anybody, and it was necessary for the success of the plaintiff in the action that she should establish by innuendo that by the picture and the words the defendants said something which was defamatory of her. She therefore pleaded in her statement of claim that by the said words the defendants meant and intended and were understood to mean that the said Kettering Edward Cassidy, otherwise known as M. Corrigan, that is to say, the plaintiff's husband, had become engaged to be married to the said Miss X. So far the innuendo merely stated the ordinary meaning of the words in the alleged libel, but the innuendo went on to allege an extended meaning, to the effect that the said Kettering Edward Cassidy, otherwise known as M. Corrigan, was not a man bound in lawful wedlock to the plaintiff, that the plaintiff was not lawfully married to her husband, that the plaintiff was living in adultery with him, and that she was a dissolute and immoral woman and a despicable person who had imposed upon her friends

and acquaintances and upon such members of the public as knew her, by pretending to be a respectable married woman, whereas she had been living in concubinage with the said Kettering Edward Cassidy, otherwise known as M. Corrigan, for many years.

In order to succeed in her action the plaintiff was bound to show that, reasonably interpreted, the words used in the newspaper were intended to convey the meaning set out in the innuendo, being judged not by what was in the mind of the writer, but what appears from the words he has used. In my judgment, it was not enough for her to show that people who knew her jumped to the conclusion that she was living with Corrigan as his mistress. She was bound to show that, reasonably interpreted, the words of the alleged libel contained an allegation to that effect. She called as her witnesses three ladies who knew her as the wife of Cassidy and knew that her husband was the man who owned racehorses under the name of Corrigan. Each of these ladies knew that her husband, as they admitted in their evidence, was a blackguard who had treated her badly and had been unfaithful to her. They knew that she was living apart from Cassidy, but had seen him on several occasions visiting the shop where she was employed, and when they saw the paragraph in the "Daily Mirror" they appear to have jumped to the conclusion that she was a dishonest woman who had been deceiving them and had been living in concubinage with Cassidy. None of the ladies said that, reading the words of the alleged libel, they came to the conclusion that the reasonable meaning to be attributed to them was that Cassidy was not the plaintiff's husband. The learned judge left the case to the jury, and the jury found a verdict for the plaintiff for £500 damages. The defendants appeal, and this court is asked to say that the judge ought to have decided that there was no case to go to the jury, because the words in their ordinary meaning are not defamatory of the plaintiff, and, reasonably interpreted, they do not contain any such defamatory statements as are attributed to them by the innuendo.

In my judgment, this appeal ought to succeed. I think so for two reasons. First, it is not sufficient to establish liability for a witness to prove that by reason of some fact to which the libel refers he draws an unfavourable inference against the plaintiff. That is not sufficient to justify a verdict that the words in question are libellous. The jury must be satisfied by evidence that on a reasonable interpretation of the words used the innuendo is proved to be an implicit part of the statement made by the defendants. In his speech in *Nevill* v. *Fine Art and General Insurance Co.* (7) ([1897] A.C. at p. 73), LORD HALSBURY uses these words:

> "That stands, therefore, as it appears to me, a long way distant from what was done in *Henty's Case* (1), where a communication was made to the persons who had to make payments to the brewer in the particular case, and they were informed that the cheques of such and such a bank were not to be received in future. That undoubtedly, as LORD WATSON points out, might possibly or probably by some persons have been understood to convey some reflection upon the solvency of the particular bank upon which the cheques were drawn, but . . . because some persons may choose, not by reason of the language itself, but by reason of some fact to which it refers, to draw an unfavourable inference, it does not follow that therefore such matter is libellous."

Those observations appear to me to apply to the present case. The language of the alleged libel refers to the fact of the announcement of Mr. Corrigan's engagement, and some persons, that is to say, the ladies who gave evidence, have chosen, not by reason of the language of the alleged libel but by reason of a fact to which it refers, to draw an unfavourable inference against Mrs. Corrigan, but none of the three has stated that she interpreted the words as containing an allegation that Mrs. Corrigan was not the wife of Corrigan, and if they had done so I should myself have come to the conclusion that they put upon the words an interpretation which they could not reasonably bear.

A It has been suggested that if several inferences may be drawn by the persons to whom the alleged libel is published, and one of them is injurious to the reputation of the plaintiff, the one injurious imputation may reasonably be inferred to be the meaning of the words, and the case should be left to the jury. In my judgment, this view is not in accord with the decision of the majority of the House of Lords in *Henty's Case* (1). LORD SELBORNE, L.C., says (7 App. Cas. at p. 744):

B "In deciding on the question whether the words are capable of that meaning [that is, the meaning stated in the innuendo] he ought not, in my opinion, to take into account any mere conjectures which a person reading the document might possibly form as to some out of the various motives or reasons which might have actuated the writer, unless there is something in the document itself or in other facts properly in evidence which to a reasonable mind would C suggest, as implied in the publication, those particular motives or reasons."

This I take to mean that where there are several possible explanations of the words used, only one of which is defamatory, it is not open to the jury to find that to be the meaning of the words unless there is something in the documents or facts properly in evidence that would make it reasonable to attribute to the words a D defamatory meaning. LORD WATSON says (7 App. Cas. at p. 788):

"But besides the one injurious inference suggested by the appellants, there are many other inferences of an innocent character, which naturally might, and probably would, suggest themselves to any reader of the circular who was not induced to put a malignant construction upon it by some cause such as is not proved to have existed in the case of any one of the persons to whom it was E sent."

LORD BRAMWELL says (7 App. Cas. at p. 792):

"I will suppose I am wrong in thinking no inference of insolvency can be drawn from the circular and will now deal with the third, namely, that the inference to be drawn from the circular was that the defendants for some reason or reasons, of which the insolvency of the plaintiffs might be one, would not take F in payment cheques on the plaintiffs' branches. Is that actionable? I think not. The question seems to me one of entire novelty, strange as it may be, that such a question should now arise for the first time. I cannot think that an action lies in such a case. I think that the defamer is he who, of many inferences, chooses a defamatory one."

G The other reason why I think the decision of the learned judge was wrong is that, in my view, notwithstanding *Hulton & Co.* v. *Jones* (4), I think the law still is as it was laid down by LORD ESHER in *Henty's Case* (1). If intrinsic facts are relied upon for the purpose of converting that which would otherwise be an innocent statement of fact into a defamatory libel, the extrinsic facts must be known both to the person who framed the alleged libel and the persons to whom it was pub-H lished. In this case I take it as common ground that those who were responsible for the publication of the photograph and the words in question did not know that Corrigan was a married man. In the report of the decision of the Court of Appeal in *Henty's Case* (1), LORD ESHER, then BRETT, L.J., uses these words (5 C.P.D. at p. 539):

I "The first question for the jury is whether the document would be read in a defamatory sense by persons of ordinary reason in the position of those to whom it is published. If, in the opinion of the jury, it would not be so read according to the primâ facie meaning of the language, then there is a further question—if there is any evidence upon which it can be raised—whether there were facts known both to the persons who penned the alleged libel and to the persons to whom it was published, which would lead the latter reasonably to put upon the document the construction that, having a secondary defamatory sense, it was issued ironically, or otherwise than in the primary sense of the language. With regard to the second proposition, I think it is necessary that

> the facts should be known both to the person who indites the libel and to the persons to whom it is published, because if facts are known to the latter persons from which they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which, by the hypothesis, he could have no reason to suppose would injure anybody, the language used being such as, in its ordinary sense, would not be defamatory of anybody."

I cannot find in the speeches of the majority of the Lords who decided this case in the House of Lords any dissent from the view expressed in the Court of Appeal by LORD ESHER, though they deal with the case from a slightly different angle, but in the course of his speech LORD BLACKBURN seems to me to use words which indicate that he agreed with the opinion expressed by LORD ESHER. He says (7 App. Cas. at p. 771):

> "Independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation."

He uses the words slightly different from LORD ESHER, "which the person publishing knew, or ought to know," and I think one must apply LORD ESHER's words in the sense of that which they "knew or ought to have known." If it could be said in this case that those responsible for the publication in question knew or ought to have known that Corrigan was a man who had a wife living at the time, or was a man with whom there was a lady living and claiming to be his wife, it may be that the question whether the words were or were not defamatory ought to have been left to the jury, but there was no evidence from which it is reasonable to conclude that they knew or ought to have known that he was a married man. They were surely entitled to suppose that as he said he was engaged to marry the lady in question he was not in fact a married man, unless they knew to the contrary.

One or two illustrations may be given which indicate the danger of carrying the law of libel as far as it is argued in this case it should be carried. It is written of A.B. that he is ill-mannered and uneducated. It turns out, though the writer did not know it, that A.B. was in fact brought up by his uncle. Could it be said that the uncle could succeed in an action alleging that the words meant that he had badly brought up and educated A.B.? A writer might state that A.B. is an ignoramus. Unknown to the writer A.B. may have spent five years under the tuition of X.Y. at Eton. Could X.Y. allege that this was a libel upon him, the writer having been ignorant, and having no reason to suppose, that A.B. had been at Eton? Take another case. A., being under the mistaken impression that he saw Mr. B. walking away from a theatre with Miss C., says next morning to an acquaintance, "I saw B. and C. leaving the theatre together last night." Unknown to A., but to the knowledge of his acquaintance, C. had been murdered by the man with whom she left the theatre. Could A. be successfully sued by B. for saying he had murdered C.? If the case against the present defendants was rightly left to the jury, A. could be so sued. To me it seems quite certain that it would be the duty of the judge to rule that the words were incapable of being so interpreted.

The decision of the House of Lords in *Hulton & Co.* v. *Jones* (4), which was very much relied upon by the plaintiff, does not, in my opinion, afford sufficient authority for deciding the present case in favour of the plaintiff. In that case the words complained of appeared in form to relate to an existing individual who was named. The words, if applied to an existing person, were clearly defamatory, and the House of Lords, affirming the Court of Appeal, held that the mere fact that the writer did not intend to injure the plaintiff afforded no defence to the action. It seems clear that the writer took the risk of making defamatory statements about an individual by name when he ought to have known that it was possible that there might be a person bearing that name who would be understood to be meant by the words

which were used. LORD LOREBURN, in giving judgment, pointed out that a person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both, and that his remedy was to abstain from using defamatory words. In the present case no defamatory words were used about anybody, and the defendants are, in my judgment, entitled to succeed, not because in his own mind the writer did not intend to defame, but because, in fact, he has not used language which reasonable persons either have, or could have, interpreted as defamatory of the plaintiff. As FARWELL, L.J., pointed out in the Court of Appeal ([1909] 2 K.B. at p. 480):

> "So, the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description by which the plaintiff is recognised by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt and ridicule or not. In such a case it is no answer for the defendant to say that he did not intend the plaintiff because he had never heard of him; he intended to describe some living person; he can suggest no one else; and the plaintiff proves that he is believed by his acquaintances and friends to be the person aimed at, and has suffered damage thereby."

These words have no application where it cannot be said there is any reference by name, by description, or by necessary inference to the plaintiff in the words complained of.

For these reasons, in my judgment, the plaintiff gave no evidence which would support the meaning alleged by the innuendo, and the words, in their ordinary meaning, not being defamatory, the judge should have directed the jury to find a verdict for the defendants. I need hardly say that I have hesitated considerably before coming to a decision different from that which has commended itself to SCRUTTON, L.J., and RUSSELL, L.J., but I have, at any rate, the satisfaction of feeling that my interpretation of the law is more consistent with justice and fairness than the view which they have felt compelled by the authorities to adopt. It must be remembered that there is no special law for the purposes we are considering applicable to libels by newspapers. If the decision of my brethren in this case is right, it would be right to say that I could be successfully sued for damages for libel if, having been introduced to two apparently respectable people as persons engaged to be married, I repeated that statement in a letter to a friend, on the ground that my words meant that a lady totally unknown to me, who was in fact the wife of the man, was not his wife, and was living in immoral intercourse with him. It seems to me wholly unreasonable to hold that my words could be construed as meaning anything of the kind, and wholly unjust that I should be made to pay damages because some unduly suspicious person drew an inference from the fact I stated, which was derogatory to the woman in question, and I am afraid that for the future people will have to walk with wary steps through life and hesitate a long time before they accept the apparent bachelordom of any one they know as a real fact. The desire to find in the law rules which are consonant with reasonable notions of what is fair and just is sometimes an imperfect guide. I fail, however, to find in any of the decisions anything which compels me to come to the conclusion that the words used by the defendants in this case are reasonably capable of the meaning alleged in the innuendo. As I have indicated, this case, on its facts, in my judgment, differs entirely from *E. Hulton & Co.* v. *Jones* (4), where the words complained of were, on the fact of them, defamatory, and were such as would naturally be applied to a man, if one existed, who bore the name mentioned in the libel. In my opinion the judge should have ruled that there was no case to go to the jury, and the result of this appeal should be: appeal allowed with costs, and judgment entered for the defendants with costs.

RUSSELL, L.J.—The relevant facts in this appeal are few, and may be briefly stated. The defendants, in the issue of the "Daily Mirror" for Feb. 21, 1928, published a photograph of a man and a young woman with the following words beneath it: "Mr. M. Corrigan, the racehorse owner, and Miss [X.], whose engagement has been announced." The man shown in the photograph was the lawful husband of the plaintiff, to whom he had been married in 1916. The plaintiff sued the defendants for damages for libel, alleging that the photograph and words bore a meaning defamatory of the plaintiff, namely, that the plaintiff was not lawfully married to her husband, but had lived with him as his mistress, pretending to her friends to be a respectable married woman. The judge, being of opinion that the photograph and words were capable of bearing a meaning defamatory of the plaintiff, left it to the jury to decide whether they were in fact defamatory of the plaintiff. The jury returned a verdict for the plaintiff for £500. The defendants appeal on three grounds: (i) That the judge should have withdrawn the case from the jury; (ii) that the judge misdirected the jury; and (iii) that the damages were excessive. On the question of misdirection and excessive damages, there is no reason, in my opinion, for interfering with the verdict and judgment on either of those grounds.

The remaining ground of appeal, however, raises questions and considerations of difficulty. The defendants contend that the published matter is not, on the face of it, defamatory at all either of the plaintiff or of anyone else. That must, I think, be conceded. Nevertheless, words may be published with reference to such circumstances, and to such persons knowing the circumstances, as to convey a meaning which would not be attributable to them in different circumstances: see per LORD BLACKBURN in *Capital and Counties Bank* v. *Henty* (1) (7 App. Cas. at p. 771). So, too, I think, words may be published with reference to such circumstances, and to such persons knowing the circumstances, as to involve an inference in regard to someone not in terms mentioned in the statement, which would not be involved by the publication of the same words either in different circumstances or to persons ignorant of the particular circumstances which occasion the inference.

The first thing to consider in this case is this question: Can the published matter be reasonably construed as a statement that Mr. Corrigan is an unmarried man? For myself I should answer that the published matter may not only reasonably be so construed, but must necessarily be so construed. I discard as too far fetched the suggestion that it might refer to the announcement of an engagement made by a married man either in anticipation of a divorce or with a view to seduction. If, then, the published matter is a statement that "A.B." is an unmarried man, can "A.B.'s" wife successfully complain of that as a statement defamatory of her? This must depend upon (i) whether the statement that "A.B." is an unmarried man is capable of being defamatory of "A.B.'s" wife, and (ii) whether the statement is in fact defamatory of "A.B.'s" wife. MCCARDIE, J., came to the conclusion that in the present case the published matter was capable of being defamatory of the plaintiff. I can see no reason for differing from that view. The Lord Chancellor in *Hulton & Co.* v. *Jones* (4) used the following language, which seems appropriate to the present case ([1910] A.C. at p. 23):

> "Libel . . . consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both."

Applying those words to a statement—which for this purpose must be false—that "A.B." is an unmarried man, is it a reasonable view that people who have known a lady who has called and is calling herself the wife of "A.B." might think the statement to be defamatory of the lady? In my opinion, the view is an eminently reasonable one. Whether, being capable of a defamatory meaning, the statement was in the circumstances of the particular case defamatory of the plaintiff is another

A question. That is a question of fact for the jury to answer according to their view of the evidence adduced.

It was argued by the defendants that no liability attaches to the publisher of a statement which is not, on the fact of it, defamatory, but which only becomes defamatory in the light of outside facts, unless those facts are known both to the person who publishes the statement and to the persons to whom it is published. B For this proposition reliance was placed upon the views expressed in *Henty's Case* (1) by BRETT, L.J., in the Court of Appeal. So far as concerns knowledge on the part of the persons to whom the statement is published no difficulty presents itself. If the defamatory meaning only arises from a knowledge of outside facts, and the persons to whom the statement is published are ignorant of those facts, those persons could not reasonably attach a defamatory meaning to the statement. C So far as concerns knowledge on the part of the person by whom the statement is published, I feel difficulty in supporting the proposition. BRETT, L.J., undoubtedly asserts it, and as I understand him he bases the publisher's freedom from liability upon absence of intention by him to defame. That is the only meaning which I can attribute to the following language:

D

> "I think it is necessary that the facts should be known both to the person who indites the libel and to the persons to whom it is published, because if facts are known to the latter persons from which they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which E by the hypothesis he could have no reason to suppose would injure anybody, the language used being such as in its ordinary sense would not be defamatory of anybody."

It was said that similar views were expressed by LORD BLACKBURN in the House of Lords, but I am unable to satisfy myself that he did so. But however that may be, the views so expressed are only obiter dicta, and cannot, in my opinion, survive F the decision of the House of Lords in *Hulton & Co.* v. *Jones* (4).

Liability for libel does not depend on the intention of the defamer, but on the fact of defamation. If you once reach the conclusion that the published matter in the present case amounts to or involves a statement that Mr. Corrigan is an unmarried man, then, in my opinion, those persons who knew the circumstances G might reasonably consider the statement defamatory of the plaintiff. The statement being capable of a meaning defamatory to the plaintiff, it was for the jury, upon the evidence adduced, to decide whether the plaintiff had been libelled or not.

It was said that it would be a great hardship on the defendants if they were made liable in consequence of a statement, innocent on its face and published by them in good faith. The answer to this appeal for sympathy seems to be to point out that, H in stating to the world that Mr. Corrigan was an unmarried man—for that construction is the foundation of their liability—they in fact stated that which was false. From a business angle, no doubt, it may pay them not to spend time or money in making inquiries or verifying statements before publication; but if they had not made a false statement they would not now be suffering in damages. They are paying a price for their methods of business. A further point was suggested in I argument of this nature. It was said that the published matter might possibly be construed by those who knew of the existence of the plaintiff as meaning that Mr. Corrigan had, by reason of a divorce obtained by his wife, ceased to be her husband. If that were so, then it was argued that the published matter, being capable of a meaning in no way defamatory of the plaintiff, should only have that meaning attributed to it, and that, accordingly, it was not open either to the judge to leave the case to the jury or to the jury to find libel. The foundation of this argument rested on the following passage from BRETT, L.J.'s judgment in *Henty's Case* (1) (5 C.P.D. at p. 541):

"It seems to me unreasonable that when there are a number of good interpretations the only bad one should be seized upon to give a defamatory sense to the document." A

It was suggested that in face of that opinion the innocent interpretation, if there be one, must always prevail. I cannot follow how this can be right, for if it be, then how can the rules survive that the judge must decide whether the statement is capable of a defamatory meaning, and that the question of libel or no libel is for B the jury? Each of these rules postulates the possibility of various meanings, defamatory and non-defamatory, attaching to the statement. In truth, when the context is examined, it will be found that BRETT, L.J.'s statement is addressed only to the question whether, as regards the particular customers to whom—and to whom only—the alleged libel in *Henty's Case* (1) was published, it would be unreasonable for them, who knew the facts, to attribute to the document its only C possible defamatory meaning. The quotation from the lord justice does not, in my opinion, support the argument which was based upon it. When all is said and done, the defendants have published to the world the statement that Mr. Corrigan was, on Feb. 21, 1928, an unmarried man. That statement was, in fact, false, and has been found by the jury to be defamatory of the plaintiff, and to have caused her damage. There is ample evidence to support the findings, unless we can say D that the published matter was incapable of being defamatory of the plaintiff. This I am not prepared to do. For these reasons I agree with SCRUTTON, L.J., that this appeal fails.

Appeal dismissed.

Solicitors: *Michael Abrahams, Sons & Co.*; *Edmond O'Connor & Co.* E

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

Re THOMAS. THOMAS *v.* THOMPSON

[Chancery Division (Farwell, J.), November 1, 1929]

[Reported [1930] 1 Ch. 194; 99 L.J.Ch. 140; 142 L.T. 310]

B *Settled Land—Partition—Land held on statutory trusts—Land left by testator dying before* 1926 *on trust for persons for life and thereafter for their children in undivided shares—Trustees given power to partition—No partition before* 1926*—Power to partition—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28 (1), (3)*—Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 57.

A testator who died before 1926 left freehold and leasehold property to his C trustees on trust as to one moiety for his son absolutely and as to two equal fourth parts one for each of his two daughters for life and thereafter for their children. The will contained a wide power of appropriation and partition by the trustees with the consent of the majority of the beneficiaries of full age, but no appropriation in respect of any of the shares was made before Jan. 1, 1926, and, accordingly, the trustees held the property thereafter on the statu- D tory trusts pursuant to the Law of Property Act, 1925, s. 35, s. 36. One daughter was married and had infant children, but the other daughter was still a spinster. The trustees and adult beneficiaries all agreed a scheme for the partition of the property, and the trustees, on a summons for authority to carry out the scheme, contended that they had power to do so under s. 28 (3) of the Act because the net proceeds of sale had "become absolutely vested in E persons of full age in undivided shares," or, alternatively, on the ground that, as the settled land had become vested in the trustees on the statutory trusts, they had all the powers of the settlement, including the power of partition conferred by the will, by virtue of s. 28 (1) of the Act, as amended by the schedule to the Law of Property (Amendment) Act, 1926.

Held: as the proceeds of sale were vested only in life tenants s. 28 (3) did F not apply, and as the statutory trusts were overriding trusts and the power of partition contained in the will would pro tanto defeat the overriding statutory trust for sale, that power of partition was not exercisable despite s. 28 (1); partition, therefore, could not be effected under any power vested in the trustees by the trust instrument or by law, but, as it was expedient, would be authorised by the court under s. 57 of the Trustee Act, 1925.

G *Re Flint*, *Flint* v. *Flint* (1), [1927] 1 Ch. 570, and *Bernhardt* v. *Galsworthy* (2), [1929] 1 Ch. 549, applied.

Notes. Distinguished: *Gorringe and Braybon, Ltd.'s Contract*, [1933] All E.R.Rep. 401. Considered: *Re Brooker, Public Trustee* v. *Young*, [1934] All E.R.Rep. 703.

As to the abolition of partition actions, see 14 Halsbury's Laws (3rd Edn.) 502, H para. 954; for the Law of Property Act, 1925, s. 28 (1), (3), and the Trustee Act, 1925, s. 57, see 20 and 26 Halsbury's Statutes (2nd Edn.) pp. 275–279 and p. 138 respectively.

Cases referred to:

(1) *Re Flint*, *Flint* v. *Flint*, [1927] 1 Ch. 570; 96 L.J.Ch. 248; 137 L.T. 178; I 40 Digest (Repl.) 859, *3339*.

(2) *Bernhardt* v. *Galsworthy*, [1929] 1 Ch. 549; 89 L.J.Ch. 284; 140 L.T. 685; Digest Supp.

(3) *Re Pedley*, *Wallace* v. *Wallace*, [1927] 2 Ch. 168; 96 L.J.Ch. 438; 137 L.T. 636; 71 Sol. Jo. 583; 24 Digest (Repl.) 658, *6462*.

Adjourned Summons by trustees for authority to partition trust property.

James Thomas by his will devised and bequeathed his residuary real and personal estate upon trust as to one moiety for his son, Frederick, absolutely, and as to the other two equal fourth parts, as to one upon trust for his daughter, Constance,

for her life and after her death upon trusts for her children, and as to the other fourth part upon trust for his daughter, Mary, for her life and after her death upon trusts for her children. There was an accruer clause if the children of either daughter did not attain a vested interest. The testator gave to his trustees a wide power, with the consent of the majority in number of the testator's children and adult grandchildren for the time being interested in possession or expectancy in his residuary estate, to allot or appropriate any part of his real or personal estate in or towards satisfaction of the share or shares of his children or grandchildren in his residuary estate, and to determine the value for such allotment or appropriation. The three trustees of the will were the son, Frederick, the daughter, Constance, and another person. Constance was still a spinster, but Mary was married before the date of the will and had five surviving children, all of whom were infants. The residuary estate consisted of freeholds, leaseholds, and investments.

No appropriation in respect of any of the shares had been made before the Law of Property Act, 1925, came into operation on Jan. 1, 1926. Upon that event, as the trusts were of undivided shares the trustees held the freeholds and leaseholds upon the statutory trusts. It was now considered highly expedient, desirable, and beneficial for all persons interested that the trustees should exercise the power of appropriation by partitioning the freeholds and leaseholds, and allotting the investments to the several shares. A proper valuation of the freeholds and leaseholds was made, and on May 27, 1929, a partition agreement based on such valuation was made between Frederick, Constance and Mary and the trustees. Doubts, however, arose whether, now that the trustees held on the statutory trusts, they could properly carry the agreement into effect. The trustees, therefore, on July 4, 1929, issued this summons, to which Mary and her children were defendants, asking: (i) that the trustees might be authorised to exercise (a) their power of appropriation conferred by the will, or alternatively (b) the powers conferred on them by the Law of Property Act, 1925, s. 28 (3) or by s. 28 (1), as amended by the Schedule to the Law of Property (Amendment) Act, 1926, of partitioning the freeholds and leaseholds held by them upon the statutory trusts between the persons beneficially interested therein in accordance with the agreement of May 27, 1929. (ii) Alternatively, if the court should be of opinion that none of these powers were exercisable by the trustees, that the trustees might be authorised and empowered under s. 57 of the Trustee Act, 1925, to effect the said partition in accordance with the said agreement.

Watmough, for the trustees, referred to *Re Flint*, *Flint* v. *Flint* (1), *Re Pedley*, *Wallace* v. *Wallace* (3), and *Bernhardt* v. *Galsworthy* (2).

Church, for Mary and her children, supported the trustees' application.

FARWELL, J., stated the facts and the terms of the will, and continued: Apart from the new legislation the trustees could have acted on their power of appropriation, but the position now is not so easy. The trustees have tried to persuade me that the case comes within s. 28 (3) (a), which provides that where the net proceeds of sale have, under the trusts affecting the same, "become absolutely vested in persons of full age in undivided shares," the trustees may, with the consent of the persons, if any, of full age, not being annuitants, interested in possession in the net rents and profits of the land until sale, partition the land remaining unsold or any part thereof. They contend that the settled fourth shares are absolutely vested in the respective life tenants who are of full age. It is impossible, however, to accede to that contention, and therefore s. 28 (3) does not apply.

The trustees next contend that the case falls within s. 28 (1), which, as amended by the Schedule to the 1926 Act, provides that, where by statute settled land is or becomes vested in the trustees of the settlement upon the statutory trusts, such trustees shall also have all the additional or larger powers (if any) conferred on them by the settlement. But the statutory trusts are overriding trusts (*Bernhardt* v. *Galsworthy* (2), *Re Flint*, *Flint* v. *Flint* (1)), and as the power of partition

would pro tanto defeat the overriding statutory trust for sale, I cannot hold that it is exercisable. This, therefore, being a case where partition cannot be effected under any power vested in the trustees by the trust instrument or by law, I am entitled to consider whether it is expedient and ought to be carried into effect. If so I can authorise the trustees to effect it under s. 57 of the Trustee Act, 1925, provided that I am satisfied that it cannot be effected in any other way. That is why I felt bound to express my opinion as to the non-applicability of s. 28 (1) and (3). Here the evidence justifies me in saying that partition is expedient, and I will confer power on the trustees to make a partition. But I cannot at present approve the particular partition proposed. The trustees can either partition on their own responsibility or come again with full evidence to obtain the approval of the court to the particular partition.

Solicitors: *Phillips & Cumming.*

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

CHAPMAN (or OLIVER) *v.* SADDLER & CO.

[HOUSE OF LORDS (Lord Buckmaster, Viscount Dunedin, Lord Shaw and Lord Atkin), March 11, April 29, 1929]

[Reported [1929] A.C. 584; 98 L.J.P.C. 87; 141 L.T. 305; 45 T.L.R. 456; 34 Com. Cas. 277

Dock—Loading and unloading—Stevedore—Negligence—Stevedore allowing unloading sling to be used gratuitously by porters to whom load delivered—No reasonable opportunity for inspection of sling by porters.

Bailment—Gratuitous bailment—Duty of care of bailor—Stevedores allowing unloading sling to be used by porters to whom load delivered—No reasonable opportunity for inspection of sling by porters.

The usual method of unloading cargoes of grain from ships at a certain port was for stevedores, employed by the shipowners, to make up loads of several bags of grain in the ship's hold, to fasten the bags constituting a load together with a sling belonging to the stevedores, and then to raise the load in the sling on to the deck with the ship's derrick. The load was then delivered to porters, employed by the cargo-owners, and one of the usual methods of unloading employed by the porters was to unhook the stevedores' sling from the derrick and immediately hook it, while still round the load, to a dockside crane in order to swing the load by crane to the quay, there to unhook the sling and release the load, and then hook the empty sling back on the crane and so return it to the stevedores aboard the ship. The stevedores kept a servant whose duty it was to prepare and inspect the slings, and to reject any defective ones, and it was also the duty of the stevedores' other workmen on board the ship to inspect the empty slings passing through their hands and to reject any defective ones. The porters and their labourers had no real opportunity to examine the slings, and, as the stevedores well knew, relied on the care of the stevedores for the safety of the slings. The stevedores made no charge to the porters for the use of the slings. While bags of grain were being swung in this way by the porters from the deck to the quay, a sling broke, causing the death of a porter's labourer. It was found by the trial judge that the stevedores had not used reasonable care to examine the sling which broke. In an action by the widow and other dependants of the porter's labourer against the stevedores,

Held: the stevedores were liable because, having provided a sling to be used in conditions of danger by the porters, knowing that the latter would have no reasonable opportunity of examining the sling, and intending that the porters should rely on the examination by the stevedores, the stevedores owed a duty to the deceased to take reasonable care to provide a rope fit to support the load entrusted to it.

Interlocutor of the First Division of the Court of Session in Scotland (reported 1928 S.C. 608) reversed.

Caledonian Rail. Co. v. *Warwick* (1), [1898] A.C. 216, distinguished.

Notes. Considered: *McAlister* (*or Donoghue*) v. *Stevenson*, [1932] All E.R.Rep. 1; *Gledhill* v. *Liverpool Abattoir Utility Co., Ltd.*, [1957] 3 All E.R. 117. Referred to: *Otto* v. *Bolton and Norris*, [1936] 1 All E.R. 960; *Horton* v. *London Graving Dock Co., Ltd.*, [1950] 1 All E.R. 180.

As to the duty of an employer towards employees of a second employer whom he allows to use his tackle gratuitously for a joint operation, see 23 HALSBURY'S LAWS (2nd Edn.) 575, para. 827, text and note (c), and ibid. 631, para. 886; and as to the obligations of the lender of a chattel see 2 HALSBURY'S LAWS (3rd Edn.) 110, para. 218. For cases as to the liability of stevedores employed to unload a vessel, see 36 DIGEST (Repl.) 160, *844–846*.

Cases referred to:

(1) *Caledonian Rail. Co.* v. *Mulholland*, [1898] A.C. 216; 67 L.J.P.C. 1; 46 W.R. 236; 14 T.L.R. 41; sub nom. *Caledonian Rail. Co.* v. *Warwick*, 77 L.T. 570, H.L.; 36 Digest (Repl.) 14, *54*.

(2) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10*.

Appeal against an interlocutor of the First Division of the Court of Session in Scotland, dated Mar. 20, 1928, recalling an interlocutor pronounced by the Lord Ordinary (MORISON) on July 21, 1927.

The action was brought by the widow and five children of John Oliver, dock porter's labourer, against the respondents, stevedores, for damages in respect of the death of John Oliver, which occurred in consequence of the accidental breaking of a sling on Dec. 10, 1925. The case is reported 1928 S.C. 608. The facts, which are summarised in the headnote, are fully set out in the opinion of LORD ATKIN. The First Division (the Lord President, LORD SANDS and LORD BLACKBURN) held, reversing the decision of the Lord Ordinary, that the stevedores owed no duty of care towards the deceased, because, when the accident happened, the sling was not being used on the stevedores' business, but on that of the porters.

The plaintiffs appealed.

Cragie M. Aitchison, K.C., and *James A. R. Mackinnon* (both of the Scottish Bar), and *W. S. Morrison* for the plaintiffs.

W. G. Normand, K.C., and *J. R. Wardlaw Burnet* (both of the Scottish Bar), and *H. L. Holman* for the stevedores.

The House took time for consideration.

April 29. The following opinions were read.

LORD BUCKMASTER.—The real appellants in this case are the widow and five children of a dock porter named John Oliver, who died on Dec. 21, 1925, owing to injuries he received on Dec. 10, 1925, while unloading grain from the steamship *Platon* at the port of Leith. The respondents are a firm of stevedores who were separately employed in an independent operation connected with discharging the cargo on the day in question. The injury of John Oliver was caused by the breaking of a defective rope, the property of the stevedores, which formed the sling holding six bags of grain. The rope broke as the grain was being swung from the deck of the vessel to the quay, with the result that the bags fell on the deceased. These facts are not in dispute. What is disputed is the allegation that the stevedores owed any duty to the deceased to see that the rope was sound and alterna-

A tively, if such duty existed, the stevedores say, that it was discharged. These issues were found against the stevedores by the Lord Ordinary who tried the case and in their favour by the First Division of the Court of Session.

The first of the issues involves a question of law upon which I have found little help in considering the statement of general propositions such as those contained in the judgment of Brett, M.R., in *Heaven* v. *Pender* (2). The duty alleged to B have been owed by the stevedores to the deceased is said to arise out of a combination of special circumstances that have nowhere been the subject of decision, and these circumstances require close examination. The method of unloading a ship at the port of Leith involves the employment of two distinct groups of men who are severally employed by the owners of the ship and the receivers of the cargo. The former are the stevedores and the latter the porters. In the case of a grain C cargo the shipowners give delivery on to steelyards on the vessel's deck, where the bags are placed by the stevedores who lift them from the hold; from the deck the porters take control and discharge the cargo on to the quay. The method adopted for this latter operation is at the discretion of the porters and depends in part on the tide and the height at which the vessel is riding. If the deck is above the quay it is obvious that the simplest method is to slide the bags down a gangway, D but under different conditions, such as those existing in the present case, the bags are slung from the deck to the quay by cranes belonging to the Leith Dock Co. Although the operations of bringing the bags on to the deck and transferring them to the quay are distinct, there is one feature that remains throughout, and that is the grouping of the bags in sets. This is effected by the stevedores in the hold of the vessel who provide the ropes necessary for the slings in which the sets are E placed. These slings are never undone throughout the combined operations. The bags are hauled up by the stevedores and placed on the steelyards; the slings are then detached from the derrick and hooked to the crane tackle and immediately slung ashore. It is in the interests of everyone concerned in the expeditious discharge of the cargo that these operations should be continuous. The ropes which are provided by the stevedores are thus used throughout and this is the common F and accepted practice. The danger due to imperfection in the ropes is well known, and the stevedores have a man whose business it is to make the slings and to examine these ropes before use, both those that are new and those that have been used. With him also lies the custody of the ropes, and so important is this constant supervision that the ropes are kept separate, the new ones being separated from those once used. It is in fact essential for the safety of all concerned that G the ropes should be kept under constant examination to detect any weakness that might from time to time arise. The nature of the operation itself is such that effective examination by the porters is almost impossible. To examine the rope when the goods are taken off the steelyard would involve complete unloading of the set, and when the bags are released, the rope is, in the ordinary course, withdrawn for the next consignment.

H It is stated in the evidence that in these circumstances the porters relied on the stevedores to examine the ropes, that the stevedores knew that such reliance was placed on them, knew the danger, knew that in the accepted course of unloading the porters could not properly make the examination themselves, and did not make it, and that consequently they owed a duty to see that such examination was made with due care and skill. This evidence is in part contested by the stevedores, but I in substance I think it must be accepted. The stevedores' witness, David Moffat, says that his men—that is, the stevedores—are "deeply interested" in the slings, especially when working underneath them, and again he says that he relies on "the rigger," that is, the rope inspector, seeing that the rope is good, and that "all the men who work with the cargo rely on the rigger seeing that all the ropes are good." There is other evidence to the same effect, and also evidence explaining and attempting to modify these statements, but the character of the operation, itself well known and established for some years, seems to me to lead irresistibly to the conclusion that the evidence I have quoted fairly states the true position,

and I agree in the conclusion of LORD MORISON that these circumstances did disclose a duty cast on the stevedores to take proper steps to see that the ropes were safe. That inspection was essential is common ground, that the opportunity for such inspection by the porters was extremely limited, and, without interruption of the operation, could not be properly carried out, seems to me plain, and that in these circumstances the stevedores, who knew that their inspection was relied on by the porters for their safety, discharged the duty of inspection on behalf of all parties is in my opinion the only reasonable inference. It does not, therefore, seem to me that the Lord President accurately stated the position when he said that the question to be answered remained as to whether the rope was being used on the stevedores' business, and that he considered the case concluded by *Caledonian Rail. Co.* v. *Warwick* (1), a case which influenced the judgment of the other learned judges, and, if it is relevant to the case, binds ours as well. In my opinion, however, the critical features of this case are lacking in the authority named.

In that case coal was put into the trucks of the Caledonian Rail. Co. for delivery to certain gasworks; at Dumfries the railway system of the Caledonian Rail. Co. ended, but the Glasgow and South Western Rail. Co., who had undertaken to carry the coal for the consignees, then took charge of the wagons and proceeded to haul them over a private line. In the course of this latter operation, owing to a defect in the brakes of one of the wagons, an employee of the Glasgow and South Western Rail. Co. was killed. The suit of his representatives to recover damages for his death from the Caledonian Rail. Co. failed on the ground that they had nothing whatever to do with the operation in which the accident occurred. At first sight it certainly appears that the cases are allied. In each there was one complete operation carried out by two different agencies, and a defective instrument owned by the one party and provided for the use of the other gave rise to the accident, but closer examination has satisfied me that the determining factors which exist here were absent there. In that case examination of the wagons was equally open to both parties by whom they were used. It was not known by the Glasgow and South Western Rail. Co. whether the Caledonian Rail. Co. had examined them or not, and even if they had it was perfectly clear that neither the Caledonian nor the Glasgow and South Western Rail. Co. ever for a moment thought that examination by the former was to be relied on by all the persons who at different stages made use of their stock.

It is not the fact of one operation effected in two stages by two persons with the common use of the property of one of them that creates liability, it is the fact that for the safe conduct of that operation something must be done and that in the circumstances of this case the performance of that act could only be reasonably carried out by one party to the work. Finally, I am satisfied from the evidence that this position was known to the stevedores, and never having been repudiated must be regarded as having been accepted by them. There remains the question as to whether the duty was discharged, and upon that question, from the short-hand notes of the evidence, it is clear that different opinions might well be formed, but in all such questions I attach great importance to the finding of the Lord Ordinary who saw the witnesses and before whom the evidence was given associated with all the incidents due to inflexion of voice, appearance and manner of the witnesses and the circumstances that make a living scene of that which on appeal is reduced to the flat monotony of print. No question is raised here as to the effect of documents on oral testimony nor any of the matters upon which it might have been possible to hold that important elements in the evidence had been over-looked or over-stressed. For these reasons I accept the conclusion of fact reached by the Lord Ordinary at the trial, and it follows that in my opinion the interlocutor pronounced by him should be restored.

LORD ATKIN.—This was an action brought by the widow of a dock labourer, John Oliver, to recover damages for herself and her children for the death of her

husband, due to the alleged negligence of the defenders, the stevedores. The defenders deny that they owed any duty of care towards the deceased, and that if any duty of care existed they were guilty of any breach. Both issues were decided against them by the Lord Ordinary, but on appeal the learned judges of the First Division reversed the decision on the issue of duty, refraining from expressing any final opinion on the issue of breach. In order to determine the questions in dispute it is necessary to examine the facts with some care. John Oliver, the deceased, was a dock labourer who was employed on Dec. 10 in discharging the cargo of the steamship *Platon* at the port of Leith. The discharge had been continuing for four or five days, and on this day the deceased was taking part in discharging the cargo of No. 5 hold, which consisted of maize meal in bags. The deceased was engaged in receiving the bags on a staging on the quayside; as a load of six bags was being swung by the shore crane over the staging the rope sling that held the load gave way, and the bags fell on the deceased, inflicting injuries from which in a few days he died. The particular question is whether the stevedores owed a duty to the deceased to take reasonable care that the sling should be fit to carry the load, and, if so, whether they omitted to take such care, whereby the sling broke. The *Platon* was being discharged in accordance with the custom of the port of Leith, which for grain cargoes appears to be as follows: The ship's part in the discharge is performed by stevedores on behalf of the shipowners: the defenders are the firm of stevedores who acted for the *Platon*. When discharge is made of cargo in bags the stevedores' men in the hold make up loads of five or six bags, which are held together by a rope sling. The sling consists of a length of 3 in. rope six fathoms long, the ends of which are spliced together so as to form one continuous whole. When the sling is used it is laid down doubled so that two lines of rope are adjacent. The bags are then laid crossways over the sling, the ends of which are then drawn over the middle of the bags; the loop at one end is drawn under the loop at the other end and is attached to the hook of the ship's derrick. The load is then drawn up by the ship's derrick and lowered on to a steelyard on the deck. At that stage the operation is continued by the agents of the receivers of the cargo. At Leith the merchant's part in discharge is undertaken by companies of porters, unincorporated associations of men of various numbers and with distinctive titles. In this case the discharge was in the hands of a company of porters, consisting of eight men, by whom the deceased was employed. Two of the porters' men on deck detach the derrick hook from the load, and after the weight has been recorded by official weighmen the porters take delivery on behalf of the receiver. Several methods are open to the porters: they may handle the bags by hand labour and carry them or truck them by gangways to the quay: if the elevation of the ship in relation to the quayside permits they may discharge the bags by chutes to the quay. But the more usual and convenient method for all parties, because it is quicker, is to transfer the load by crane to the quay. This was the method employed in discharging the *Platon's* cargo in bags. The porters obtain the use of the shore crane belonging to the Leith Dock Commissioners; after weighing, the men on deck attach the hook of the shore crane to the sling, and the load is swung on to the desired position on the quay, quay space, railway truck, or, as here, staging. The porters' men on the quay receive the load, release the sling from the crane hook to release the bags, and then attach the now empty sling to the crane hook for the purpose of being swung back in return to the ship. The sling when the crane returns is detached by the porters, handed to the stevedores' hatchway man, who returns it down the hold for its next journey.

1. It will thus be seen that the same sling is attached to the load for the whole journey from hold to quay. This seems to me to be an obvious business necessity. The ship's part of the discharge would obviously be hopelessly obstructed if the shore crane had to wait while the six bags were handled afresh from the steelyard and laid upon another sling, while the ship's derrick had already swung back to the hold and was picking up a fresh load.

2. The next important fact is that the slings for the operation are provided by

the stevedores. This is the invariable practice, and it seems to me at least possible that it has become part of the custom of the port, so as to form an incident in the contract between shipowner and bill of lading holder, between shipowner and stevedore, and possibly a term of implied contract between stevedore and porters. But this contention was not put forward and therefore not investigated at the trial, and cannot be taken into account in this case in this House, and I refrain from expressing any final opinion about it.

3. It is apparent that the safety of everyone concerned in the discharge depends upon the strength of the sling. The total weight of the load of six bags is slightly over 10 cwt., and the life of anyone who comes under the load, whether in the hold, on deck, or on the quay, is imperilled by a defective sling.

4. The stevedores recognise that it is their duty to take care that the sling is fit to carry the load. They have a servant, the rigger, specially charged with the duty of preparing slings and inspecting them when made and when in use. His duty is to prepare them from new and satisfactory rope, to see that they are not used to excess, and to visit the ship once or twice a day to examine the slings in use, and reject those that he thinks defective. In addition to this, it is the duty of the hatchway man through whose hands the sling passes on its return journey to examine and reject a defective sling, and a similar duty is cast upon the men in the hold. As the safety of the latter depends upon the efficiency of the sling it is obviously their interest as well as their duty to their employer to take this care.

5. The porters themselves have no real opportunity of examining the sling. On the steelyard it still encircles the bags, and no examination of any value is even possible. It is not until it has completed its loaded journey that it is detached and in the porters' hands at all, and then only in the hands of men whose duty it is at once to handle six bags, and whose whole duty in relation to the sling is to attach it to the shore crane for speedy return to the ship. It follows that in practice, as was clearly established in evidence by the witnesses of porters and of stevedores, the porters rely for the safety of the sling on the care of the stevedores, and the stevedores know that the porters so rely.

The only addition that it seems necessary to make to the general statement of facts is that in this particular discharge of No. 5 hold, double loads were being handled by the derrick and the crane. Six bags were held by each sling, but two loads were attached by a saddle to the hook, and were so conveyed by the crane to the shore. It was one of such loads that fell upon the deceased, the other being left suspended. Fourteen slings were in use in the hold; two would be on the loads being discharged, two would be in course of return and ten would be in the hold having loads made up on them.

In the circumstances detailed above I am of opinion that the stevedore firm owed a duty to the porters to take reasonable care to see that the sling was in a fit condition to take the weight of the load. They provided a sling to be used in conditions of danger by their own men, and to be used in similar conditions by the porters, knowing that the latter would have no reasonable opportunity of examining the sling, and intending that they should rely on the examination by themselves, the stevedores. They clearly owed a duty to their own men as to everyone on deck while the load was being swung by the ship's derrick; and it appears to me that in this case the duty continued towards the men who were concerned in the second part of the operation. They intended for their own business convenience that the one sling should complete the cycle; and in my opinion intended that the safety of the sling should throughout the cycle depend upon their own vigilance and of no one else. They appear to me to be responsible if through lack of vigilance personal injury is suffered by one who was entitled to trust to them.

I cannot agree with the opinion expressed below that the stevedores in these circumstances were in the same legal position as though they were gratuitous bailors. If such had been the relation simpliciter I agree that the bailor would

have been liable only for a defect actually known to him. In the present case the porters were possibly entrusted with the sling, but merely to be used in a particular way, to be returned forthwith to the bailors in an operation the speedy completion of which was of vital importance to the bailors' business, where bailor and bailee to the knowledge of both relied for their safety on the care of the bailor. In these conditions the rule as to gratuitous bailors appears to me to have no application. Similarly, the facts appear to distinguish this case from *Caledonian Rail. Co.* v. *Warwick* (1). In that case, which turned on the question whether the pleadings disclosed a relevant case against the Caledonian Rail. Co., it appeared that the company had conveyed coals from a colliery consigned to the Dumfries gas commissioners. The haulage by the Caledonian Rail. Co. ended at a point at Dumfries Station. From that point by arrangement between the Glasgow and South Western Rail. Co. and the Gas Commissioners, the Glasgow and South Western Rail. Co. hauled the coal wagons two at a time by horses along a line of rails about 400 yards in length running along the public street to the Commissioners' premises. There was a dip and sharp ascent up to the gate of the gasworks, which it was the practice to allow the second wagon to negotiate by its own weight, and owing to a defective brake one of the workmen of the Glasgow and South Western Rail. Co. was killed. His widow sued both railway companies. No question arose as to the relevance of the claim against the Glasgow and South Western Rail. Co. LORD HERSCHELL giving the leading judgment thought that it was altogether unreasonable to maintain that there was a duty on the part of the Caledonian Rail. Co. after they had fulfilled their contract of carriage to examine the wagons and see that the brakes were fit for the subsequent journey on which for their purposes the other company were going to haul them into the premises of the Gas Commissioners.

> "With that haulage the Caledonian Rail. Co. had nothing to do—their contract was at an end; it was a new journey along an entirely different railway, and with the incidents of that journey the Caledonian Rail. Co. were altogether unconnected."

There appears to be a gulf between the case where it was unreasonable to maintain that there was a duty to examine and see that the appliances were fit for a new journey, and the present case where the duty to examine is recognised and relied on by both parties, and between the case where a railway company hands over trucks at rest to another railway company for an indefinite detention with ample opportunities for examination, and the present case where the slings are handed over for immediate return for the first party's convenience and with no reasonable opportunity for examination. Except that the contract of the first party terminated before the second party took part I see no resemblance between the cases; and in the present circumstances I cannot think that the respective contractual obligations of the parties to the shipowners and the merchants respectively govern their liabilities to one another.

For the above reasons I am of opinion that the stevedores owed a duty to the deceased to take reasonable care to provide a rope fit to support the load entrusted to it. The only remaining question is whether there was a breach of this duty which caused the deceased's death. Upon this matter the learned trial judge who had the advantage of seeing the rope in the hands of the witnesses came to the conclusion that the pursuers had made out their case. There appears to me to have been abundant evidence to support his finding, and I can see no reason for interfering with it. I am of opinion, therefore, that this appeal should be allowed and the judgment of the Lord Ordinary restored.

I am asked to say that **LORD SHAW** agrees with this judgment.

VISCOUNT DUNEDIN.—I admit that at the close of the argument, if I had had to deliver an opinion at once, I should have been for dismissing the appeal. I was much pressed by *Caledonian Rail. Co.* v. *Warwick* (1). Further consideration and

discussion with your Lordships have convinced me that the proposal from the Woolsack is right and I have also had the advantage of reading the judgment just delivered by LORD ATKIN; but I do wish to express emphatically the very narrow limits within which my concurrence is confined, for I cannot help feeling that this decision might be drawn into a precedent for what it does not warrant.

The facts are so accurately set forth by LORD ATKIN that I do not need to restate them. Now, if the operation of getting the bags out of the ship's hold on to the quay could be considered as a joint operation of the stevedores and the porters, the matter would be easy. But I do not think it is possible so to view it, for it is distinctly found that the stevedores' actual participation in the operation ends when they deposit the bags on the steelyard. Their contract ends there. But what I think is even more determinative of the point is that, after that, there are various ways of getting the bags on to the quay which depend really on the state of the tide and in the choice of which the stevedores have no part whatever. That ground of judgment being gone, one has next to consider the question from the point of view of the sling being a defective chattel that was owned by the stevedores. It is here that I am apprehensive that the judgment might be misinterpreted. As has been said, and I think rightly said, there can be no liability ex dominio solo. There is, so to speak, an element of danger in every chattel; it may break, it may be defective in such a way as to allow of misuse, and the result may be injury, but I think there must always be found somewhere the element of negligence on his part to make the owner of a chattel liable for that injury. Take the extreme instance of a loaded gun. This is so obviously dangerous when it gets into unknown hands that the law holds it to be negligence on the part of the owner to let the gun leave his possession in that state and be put in inexperienced hands. It seems to me, therefore, that if there is to be liability one must find in the present case the same kind of element of negligence. I think one can find it, but only find it under the peculiar circumstances of the case which make it special and not easily to be drawn into a precedent. It is here that I have come to the conclusion that a distinction can be drawn between this case and *Caledonian Rail. Co.* v. *Warwick* (1) on which the judges below entirely based their judgment. If I may say so without offence, it is in the treatment of the *Caledonian Case* (1) that I find my only point of disagreement with LORD ATKIN. He finds that case and this dissimilar with one point of similarity. I find them similar with one, and one only point of difference. In both the chattel belonged to the person sought to be made liable; in both the operation which was continuous—the delivery of the bags on to the quay in this case and the delivery of coals into the siding in the other—was not a joint operation in the legal sense; in both the contract of the person sought to be made liable had determined at a point before the accident happened; in both there was the knowledge and acquiescence that the chattel was to be used in a subsequent operation: but the one point of difference is this—in the present case the use to which the chattel was being put was obviously dangerous, the bags were to be hoisted over the heads of men and all depended on the reliability of the slings, in the *Caledonian Case* (1) there was no obvious danger in allowing the wagon to be taken off their own line on to another for transit into a siding. There was no knowledge so far as I can see on the part of the Caledonian Rail. Co. that the brake would have to be used at all, still less a knowledge that a dangerous operation was going to be performed in which all depended on the reliability of the brake.

It is this consideration that makes me able to concur in the judgment. The stevedores knew that the sling was to be used in an obviously dangerous operation where all depended on its reliability; they knew that the only persons who could make that inspection which would ensure reliability were themselves. Out of these circumstances arises, I have come to think, duty and neglected duty—i.e., of inspection, which I think is clearly proved, and that is negligence. But I look on the case as not only narrow but peculiarly dependent on its own circumstances,

and that must be my excuse for troubling your Lordships with these observations, which I have only added in case I should be thought to be pushing the idea of the liability of the owner of the defective chattel much farther than I think it ought to be pushed.

Appeal allowed.

Solicitors: *H. M. Meyler & Co.*, for *Alexander McClure & Morrison*, Edinburgh; *Holman, Fenwick & Willan*, for *Boyd, Jameson & Young*, W.S., Leith, Edinburgh.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

DICKINSON *v.* DEL SOLAR

[KING'S BENCH DIVISION (Lord Hewart, C.J.), July 9, 31, 1929]

[Reported [1930] 1 K.B. 376; 99 L.J.K.B. 162; 142 L.T. 66; 45 T.L.R. 637]

Constitutional Law—Diplomatic privilege—Nature—Waiver—Obligation of diplomat to obey direction of his superior—Liability to execution on judgment obtained as result of waiver.

Insurance—Motor insurance—Third party—Tort committed by diplomatic agent—Waiver of immunity by direction of diplomat's superior—Judgment against diplomat—Liability of insurer.

Diplomatic agents are not immune from legal liability for wrongful acts. Diplomatic privilege does not give immunity from legal liability, but only exemption from local jurisdiction and can be waived with the sanction of the Sovereign or of the official superior of the agent.

A diplomat, a member of the staff of a foreign legation in London, effected a policy of motor insurance against legal liability for third-party risks which provided that "the assured . . . shall not in any way act to the detriment or prejudice of the [insurer's] interests." The insured car knocked down and injured the plaintiff, who began an action for damages against the assured. The head of the legation directed him not to plead diplomatic privilege, and he, accordingly, entered an appearance in the action. The plaintiff succeeded in the action, but the insurer refused to indemnify the assured, claiming that the waiver of his immunity was an "act to the detriment or prejudice of the insurer's interests" and so relieved the insurer from liability.

Held: the insurer was liable to indemnify the assured because the assured was bound to obey the direction of the Minister and so was not guilty of any breach of the condition of the policy, and the judgment against the assured created a legal liability within the meaning of the policy.

Quære, whether execution could issue in this country on the judgment against the assured while he remained a diplomatic agent here.

Notes. Referred to: *R.* v. *A.B.*, [1941] 1 K.B. 454; *Littlewood* v. *George Wimpey & Co. and British Overseas Airways Corpn.*, [1953] 2 All E.R. 915.

As to diplomatic privilege from legal process, see 7 HALSBURY'S LAWS (3rd Edn.) 269–274, paras. 574–582; and for cases on the subject, see 11 DIGEST (Repl.) 628–635, *512–598*; and as to the meaning of "legal liability" in insurance policies, see 22 HALSBURY'S LAWS (3rd Edn.) 333, para. 681.

Cases referred to:

(1) *Taylor* v. *Best* (1854), 14 C.B. 487; 8 State Tr.N.S. 317; 23 L.J.C.P. 89; 22 L.T.O.S. 287; 18 Jur. 402; 2 W.R. 259; 2 C.L.R. 1717; 139 E.R. 201; 11 Digest (Repl.) 629, *517*.

(2) *Re Suarez, Suarez* v. *Suarez*, [1918] 1 Ch. 176; 87 L.J.Ch. 173; 118 L.T. 279; 34 T.L.R. 127; 62 Sol. Jo. 158, C.A.; 11 Digest (Repl.) 635, *594*. A

(3) *Duff Development Co., Ltd.* v. *Kelantan Government*, [1924] A.C. 797; 93 L.J.Ch. 343; 131 L.T. 676; 40 T.L.R. 566; 68 Sol. Jo. 559, H.L.; 11 Digest (Repl.) 616, *439*.

Action tried before LORD HEWART, C.J., with a special jury.

The plaintiff sought to recover damages from the defendant, D.S., for injuries caused to him by the negligence of the defendant or his servant. On Oct. 15, 1928, the plaintiff was knocked down by a motor car driven by the defendant's chauffeur. The defendant was First Secretary of the Peruvian Legation in London, and was insured against third-party claims with the third parties, the Mobile and General Insurance Co. The Minister directed the defendant that he should not plead diplomatic privilege. The insurance company were made third parties to the action and the defendant claimed against them a declaration that he was entitled to be indemnified by them in respect of the plaintiff's claim and his own costs in defending the action. In the result the special jury returned a verdict in favour of the plaintiff for £956 damages, and judgment was entered accordingly. The insurance company relied on the diplomatic immunity and pleaded that as the defendant had waived that right he had acted to the prejudice of the company's interests in breach of the special conditions of the policy and they were relieved from liability. B C D

Bensley Wells and *S. J. R.* Bucknill for the defendant.

Tristram Beresford for the insurance company, third parties.

Cur. adv. vult.

July 31. **LORD HEWART, C.J.,** read the following judgment: This is an action in which the plaintiff, Mr. Dickinson, sought to recover damages against the defendant, Mr. Del Solar, for injuries caused by the negligence of himself or his servant. That action was tried before me with a special jury on July 9 last, and in the result the jury awarded £956 damages. Judgment was entered accordingly. The defendant had an insurance against third-party risks with the Mobile and General Insurance Co. and he claimed a declaration that he was entitled to be indemnified by them in respect of the plaintiff's claim and his own costs in defending the action. The company repudiated liability on the ground that the policy contained a clause "the assured . . . shall not in any way act to the detriment or prejudice of the company's interests" and that the defendant, by waiving diplomatic privilege, had broken that condition. The writ in the action was not issued till Dec. 19, 1928. The accident was on Oct. 15, 1928. On March 5, 1929, the defendant wrote that diplomatic privilege was not to be raised but in the meantime certain steps had been taken in the action. The car at the time of the accident was being used by the defendant for private and not diplomatic purposes. The question I have to decide is whether the third parties are liable. E F G

In my opinion, diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is, I think, that they are not liable to be sued in the English courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent: *Taylor* v. *Best* (1), *Suarez* v. *Suarez* (2). In the present case the privilege was waived and jurisdiction was submitted to by the entry of appearance (see *Suarez* v. *Suarez* (2), [1918] 1 Ch. at p. 193; *Duff Development Co.* v. *Kelantan Government* (3), [1924] A.C. at p. 830), and, as the defendant had so submitted to the jurisdiction, it was no longer open to him to set up privilege. If privilege had been pleaded as a defence, the defence could, in the circumstances, have been struck out. The defendant, I think, was bound to obey the direction of his Minister in the matter. In these circumstances it does not appear to me that there has been, on the part of the defendant, any breach of the conditions of the policy, and the judgment clearly H I

A creates a legal liability against which the insurance company have agreed to indemnify him. It has been argued that, by reason of the privilege, execution cannot issue against the defendant on the judgment. That is perhaps an open question (see *Duff Development Co., Ltd.* v. *Kelantan Government* (3)). However, in my opinion, it is not necessary to decide it. Even if execution could not issue in this country while the defendant remains a diplomatic agent, presumably B it might issue if he ceased to be a privileged person, and the judgment might also be the foundation of proceedings against him in Peru at any time. I hold, therefore, that the third parties here are liable.

Judgment for the defendant against the third parties.

Solicitors: *Digby & Co.*; *S. Myers & Son.*

C [*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

D

R. *v.* HUNTINGDON CONFIRMING AUTHORITY
Ex parte GEORGE AND STAMFORD HOTELS, LTD.

E [COURT OF APPEAL (Lord Hanworth, M.R., Greer, L.J., and Romer, J.), February 19, 1929]

[Reported [1929] 1 K.B. 698; 98 L.J.K.B. 331; 141 L.T. 75; 93 J.P. 81; 45 T.L.R. 260; 73 Sol. Jo. 173; 27 L.G.R. 319]

Licensing—Confirmation of licence—Conditions attached by confirming authority —Acceptance of one and deletion of another by justices—Subsequent meeting F *of confirming authority—No notice to parties—Deletion accepted—Confirmation of licence with one condition—Right of parties to be heard before confirming authority—Licensing Rules*, 1910, *r.* 47—*Licensing* (*Consolidation*) *Act*, 1910 (10 *Edw.* 7 *& 1 Geo.* 5, *c.* 24), *ss.* 13 (2) *and* 14 (5).

On March 12, 1926, licensing justices granted a new licence to certain premises unconditionally despite opposition. On April 25, 1928, the confirming G authority, the county licensing committee, after hearing the applicants for and opponents to the grant, imposed two conditions. On May 8, 1928, the licensing justices accepted the first of these conditions, but refused the second. On May 16, 1928, the confirming authority accepted the deletion of this second condition, and confirmed the grant of the licence subject only to the first condition. The parties who had been before the confirming authority on April 25, H 1928, were given no notice of and so did not attend the meeting of the confirming authority on May 16, and had no opportunity to be heard thereat. The constitution of the confirming authority was not the same at the two meetings, but a quorum of the members who were present on April 25 were present on May 16, and a clear majority of those present on both April 25 and May 16 voted for the confirmation of the licence subject to the first condition.

I **Held:** the purported confirmation on May 16 was a nullity, and, therefore, certiorari lay to quash it and the matter had to be remitted to the confirming authority, who were still seized of it, to be properly heard and determined, because (i) it was the duty of the confirming authority, in the new and altered circumstances created by the licensing justices' refusal of one of its conditions, to sit again as a judicial body for the purpose of adjudicating on the matter judicially, and to reach a conclusion only after the parties who were interested had been given the opportunity at least to make an application to be heard: *R.* v. *Jackson* (1) (1906), 96 L.T. 77, applied; (ii) the justices who heard the

case as members of the confirming authority on the first hearing on April 25 should not have been joined at the subsequent hearing for the purpose of reaching a decision on the question of confirmation by justices who had not heard the case.

Notes. The Licensing (Consolidation) Act, 1910, has been repealed and replaced by the Licensing Act, 1953, s. 9 and s. 6 (9) of which have replaced s. 13 and s. 14 (5) of the 1910 Act.

As to variation by a confirming authority of the conditions of on-licences, see 22 HALSBURY'S LAWS (3rd Edn.) 595, para. 1220; and for cases on the subject, see 30 DIGEST (Repl.) 52, *392–395*. For the Licensing Act, 1953, s. 6 (9), s. 9, see 33 HALSBURY'S STATUTES 152; and for the Licensing Rules, 1910, r. 47, see 12 HALSBURY'S STATUTORY INSTRUMENTS.

Case referred to:

(1) *R.* v. *Jackson* (1906), 96 L.T. 77; 71 J.P. 25; 23 T.L.R. 128; 51 Sol. Jo. 130, C.A.; 30 DIGEST (Repl.) 52, *396*.

Appeal from a decision of the Divisional Court, given on Dec. 20, 1928, refusing to make absolute a rule nisi for certiorari to quash an order of the confirming authority for the county of Huntingdon purporting to confirm the grant of a new licence granted to the applicant licensee by the licensing justices. The facts and arguments are stated in the judgment of LORD HANWORTH, M.R.

The Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), provided:

"Section 14 (1): The licensing justices on the grant of a new justices on-licence may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public subject as follows: (a) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices when licensed, and the value of the same premises if they were not licensed: Provided that in estimating the value as licensed premises of hotels or other premises where the profits are not wholly derived from the sale of intoxicating liquor, no increased value arising from profits not so derived shall be taken into consideration. (b) The amount of any payments imposed under conditions attached in pursuance of this section shall not exceed the amount thus required to secure the monopoly value. (2) The licensing justices may, if they think fit, instead of granting a new justices' on-licence as an annual licence grant the licence for a term not exceeding seven years. . . . (5) On the confirmation of a new justices' on-licence the confirming authority may, with the consent of the justices authorised to grant the licence, vary any condition attached to the licence under the provisions of this section.

By r. 47 of the Licensing Rules, 1910: Where the confirming authority desire to vary under sub-s. 5 of s. 14 of the Act any conditions attached to the grant of a new licence, they shall send to the justices authorised to grant the licence a statement of the variations proposed by them, together with their reasons for the proposed variations. (2) As soon as may be after the receipt of any such statement the justices shall hold a meeting of which special notice shall be given to each acting justice, for the purpose of considering and, if they think fit, consenting to the proposed variations. (3) The justices shall send notice of their decision with respect to the proposed variations, as soon as may be, to the confirming authority. (4) The consent of the justices authorised to grant a new licence may be given to the variations proposed by the confirming authority at the meeting at which the variations are proposed if the justices authorised to grant the new licence are all members of the confirming authority

and a number of those justices is present equal to the number which would constitute a quorum of those justices for the purpose of granting a new licence."

Whiteley, *K.C.*, and *A. C. C. Willway* for the appellant, the opponent to the grant of the licence.

F. J. Tucker for the confirming authority.

Montgomery, *K.C.*, and *Sidney Lamb* for the applicant, the licensee.

LORD HANWORTH, M.R.—This is an appeal from the Divisional Court, who refused to make absolute a rule nisi which had been obtained on June 21, 1928, for a certiorari to bring up a certain order made by the confirming authority of the county of Huntingdon on or about May 16, confirming a new licence which had been granted to enable one Cyril James Allday, of Fotheringhay, to hold an excise licence to sell at premises at Stibbington spirituous and intoxicating liquors. The case was heard before the Divisional Court and judgment was given on Dec. 20, 1928, a judgment in which the Lord Chief Justice and Acton, J., held that the rule nisi ought not to be made absolute, while Avory, J., differing from his colleagues, thought the rule nisi should be made absolute.

The question which arises is an interesting one, and it arises on these facts: an application was made by Cyril James Allday to hold an excise licence at a hotel which is called "The Haycock," on the Huntingdonshire side of the Nen at Wansford, in the village called Stibbington. That was an application for a new licence. It was an application that a licence should be granted to a house which, some thirty-five years ago, had held a licence, but at which the licence had been abandoned, and this was a fresh application in order that there might be a new hotel opened on the Great North Road at the point of its passage through Wansford. The matter was heard by the licensing justices at their proper licensing meeting, and they granted the licence. It then had to go, under sections which I will deal with in a moment, before the confirming authority, and the confirming authority imposed two conditions: First, that there should be no bar at this hotel, and secondly, that the sale of intoxicating liquors should be made only to persons resident in the hotel. That was the decision of the confirming authority on April 25. In consequence of those conditions having been imposed, the matter had to go back to the licensing justices, and on May 8 the licensing justices refused to accept the second condition and left standing only the condition that there should be no bar at the hotel. Thereupon the matter was once more brought before the confirming authority and on May 16 that confirming authority accepted the deletion of the second condition which they had imposed, and were content to grant a licence with the sole condition that there should be no bar. In consequence, the official stamp of the confirming authority was put on, and that enabled the holder of this licence to obtain the usual customs licence for the sale of liquors, and he has been carrying on the hotel and selling liquors under the authority so confirmed by the confirming authority on May 16, 1928. Although the confirming authority made the announcement in court on May 16 that they would accept the decision of the licensing justices, the parties who had been before the confirming authority on April 25 were not given notice of the further meeting on May 16, and they did not attend it; no one was there at the hearing or to take part in any hearing on May 16. The result was that the decision reached by the confirming authority was reached at a meeting of the justices alone, and confirmation was given on that day in the absence of parties who had previously been before the confirming authority. More than that, there were two or three justices who attended on May 16 who had not attended on April 25. A sufficient number of justices who had attended and heard the case on April 25 attended on May 16, and the decision which was reached, after it had been put to a vote, was such that there was a sufficiently large number of justices who had been present and heard the evidence on April 25 to justify the decision which was reached on May 16 as being one in which a majority of those who had taken part on April 25 were present. A rule nisi for a certiorari was asked for and obtained on June 21 in consequence of the

objections which were taken by the opponents to this new licence, that is, the George and Stamford Hotels Co., Ltd., and the objection was taken that in fact the proceedings of the justices on May 16 were irregular, in that the parties before the court on April 25 were not heard, and also on the ground that there were present on May 16 justices who were not qualified to take any part in the deliberations of the confirming authority on that date. The rule nisi was granted and was dealt with in the manner I have already stated by the Divisional Court, and it now comes before this court by way of appeal.

It is necessary to deal with some of the sections to which our attention has been called in the Licensing (Consolidation) Act, 1910. First of all, it is provided under s. 2 of that Act that the licensing justices are the justices acting in and for the petty sessional division, and the confirming authority are Quarter Sessions. Then it is provided by s. 6 (2) that the confirming authority of the court, that is Quarter Sessions, may delegate any of their powers under this Act to a committee and shall so delegate their power of confirming the granting of a new justices' licence; hence the confirming authority here was a committee formed out of the justices of Quarter Sessions. Then the procedure in respect of a new licence is this: under s. 12 (2) the grant of a new justices' licence by the licensing justices shall not be valid unless it is confirmed by the confirming authority, and by s. 13 (2) it is provided that any person who has appeared before the licensing justices and opposed the grant of a new justices' licence, and no other persons, may appear and oppose the confirmation of the grant by the confirming authority; and finally, in s. 14, it is laid down that the licensing justices on the grant of a new licence must impose a condition as to monopoly value, and they may attach to the grant of the licence such conditions both as to the payments to be made and the tenure of the licence, and as to any other matters as they think proper in the interests of the public. By sub-s. 5:

> "On the confirmation of a new justices' on-licence, the confirming authority may, with the consent of the justices authorised to grant the licence, vary any conditions attached to the licence under the provisions of this section."

It will be observed in relation to that matter that one condition at least must be imposed and therefore the confirming authority may vary the conditions attached, of which there must be one, to the licence, and they may, therefore, suggest that further conditions should be imposed, but the structure of sub-s. 5 is important. It says this:

> "On the confirmation of a new justices' licence, the confirming authority may, with the consent of the justices authorised to grant the licence, vary any condition,"

and under the rules it is provided by r. 47 (1) that the confirming authority may send to the justices authorised to grant the licence, a statement of the variations proposed by them, together with their reasons for the proposed variations, and by sub-r. (2), as soon as may be after the receipt of such statement, the justices shall hold a meeting of which special notice shall be given to each acting justice for the purpose of considering, and if they think fit, consenting to the proposed variation, and then under sub-r. (3) the justices shall send notice of their decision with respect to the proposed variation as soon as may be to the confirming authority. When the form is looked at, namely, form 20, it is clear that the statement of variations in conditions proposed by the confirming authority is to be sent to the justices authorised to grant new licences in the licensing district. Those sections and rules and form appear to lay down the procedure. The primary duty of deciding whether there shall be a new licence or not is for the licensing justices, but their decision is not effective and complete unless and until the confirming authority have confirmed the new licence granted by the justices. When confirming the new licence, the confirming authority may impose fresh conditions with the consent of the licensing justices. Those proposals for new conditions must be submitted to the licensing

A justices, and the licensing justices have a right to determine whether they will assent or not to those conditions, and then the matter must go back with the answer of the licensing justices to the confirming authority.

At the outset it is very important to remember and observe that the licensing justices who are dealing with the applications are an executive body. In saying this I do not overlook the duty that they have to hear the parties who come before B them, and the like, and that they have many duties which are, in their nature, judicial; but a distinction has often been drawn between the licensing authority as being an executive body and the judicial duties which are imposed upon the court of quarter sessions of which this confirming authority is a committee, and it is clear from cases which have been decided, that the confirming authority is a judicial body and must exercise its functions judicially. That connotes the fact that they C must hear the parties who appear before them, they must hear both sides and they must give an opportunity for applications to be made, by those parties who are concerned in the court in which they are sitting judicially.

What happened in the present case was this: The confirming authority imposed two conditions; on reference to the licensing justices, one of those conditions was removed, it was not assented to. What was the effect upon the confirming D authority? It appears to me that they must then re-consider the position; they must decide whether, when only a proportion of their proposed variation is accepted, they will adhere to the proposed confirmation by them. In fact, what they had to do on May 16 was once more to re-consider the application for confirmation in the light of the fact that the licensing justices had not assented to one of the conditions which they had thought proper to suggest. It has been argued E in some of the cases and before us here to-day, that what the confirming authority did on May 16 was merely to come to a final conclusion on the order they had made on April 25, and that their proceedings may be treated in this way: that a final order has been made by them confirming the licence of April 25, but attaching to that confirmation, which was to be of standing effect, two conditions which, if assented to, could be added to the confirmation, but which, if not assented to, F might pass away, and did not in any way nullify the confirmation granted. It appears to me that that is not a right conclusion to come to either upon the view that is indicated by the sections of the Act or upon the facts. It appears to me that having regard to the section, the confirming authority must submit the proposed conditions, and that when they have learned from the justices what their view is of the conditions, they ought to go on with the hearing of the application G before them, and come to a conclusion on the new and altered circumstances, namely, the refusal of one of the conditions, as to whether or not they will decide finally to confirm or not.

That view seems to follow from the decision of the court in *R.* v. *Jackson* (1). In that case there was a recommendation or condition, suggested by the confirming body, that a monopoly value which had been imposed by the licensing justices of H £2,250 should be raised to £5,000. A minute was referred to under which that condition was imposed, and which read as follows:

> "It is ordered that the licence be confirmed, and the conditions attached to the licence be, with the consent of the justices authorised to grant the licence, varied by fixing the monopoly value at £5,000."

I It was argued that that was an out-and-out confirmation, and inasmuch as the amount of the monopoly value was not assented to by the justices, still the confirmation stood. Collins, M.R., said this (96 L.T. at p. 83):

> "It seems to me that we should be putting too technical a construction upon what is recorded in the minute of the confirming authority if we were to hold that it is an absolute order of confirmation followed by an abortive condition which may be rejected, so that the confirmation may be treated as valid and the condition as a nullity. It seems to me that the fair reading of the minute is that the confirmation is conditional upon the monopoly value being increased

to the amount proposed by the confirming authority, and until that condition is fulfilled there has in fact been no confirmation." A

COZENS-HARDY, L.J., said:

"It seems to me to follow logically that there can be no confirmation of a grant so long as there is a difference of opinion between the licensing justices and the confirming authority as to the amount of the monopoly value." B

Those observations appear to apply to this case, and I agree with them. It seems to me that it is impossible to say that the confirming authority, which annexed certain conditions to its confirmation, can be held bound by that confirmation if and when the conditions are struck out. It appears to me that the licensing justices and the confirming authority must get into line before the matter is concluded. In other words, the so-called confirmation on May 16 was not an absolute C confirmation, because the confirming authority had to view the new situation created by the refusal of the licensing justices on May 8 to accept the two conditions imposed by them on April 25. It is clear from what happened on April 25 that the justices themselves recognised the importance of a further sitting. The clerk to the confirming authority says in his affidavit:

D

"Immediately after the court had announced their views as clerk of the authority I pointed out to the committee and to all parties concerned that the conditions sought to be inserted in the licence as drafted by [counsel for the appellant opponents] himself and handed in to the committee required first of all to be submitted to the Norman Cross justices for their approval or otherwise stating as I did at the same time that if the justices concurred with E the views of the confirming authority in their entirety no further meeting would become necessitated. In the alternative should the justices decline to the imposition of the conditions suggested for their consideration it would be incumbent on the committee to meet again, and counsel and the other parties openly concurred in this decision."

What is the meaning of meeting again? It is the confirming authority that would F have to meet again. That confirming authority, as I have pointed out, is a judicial body, and if it has a meeting again, it must sit as a judicial body for the purpose of adjudicating on the matter judicially. Although the confirming authority, when it met on May 16, had complete seisin of its own proceedings, and could determine whether it would hear anything more from counsel on any particular point, yet it had to sit as a judicial body, and not merely to sit as a body of justices in the G justices' room and come to a decision without sitting and hearing and determining the matter as a court.

Those being the facts in this case, it appears to me that the sitting on May 16 was a sitting at which a conclusion was reached, which ought not to have been reached, in the sense that it was too early for the confirming authority to issue a licence. They ought to have heard, as a judicial body, anything more that was to H be said on the matter, if they thought that there was something more to be said which was material. If they determined that it was not, then, sitting judicially, they could come to the same conclusion which they did reach; but that ought to be after the opportunity had been given for those parties who were interested at least to make an application to be heard; whether that application was granted or not would be for the discretion of the confirming court to decide. Under these circum- I stances it appears to us that the order that was made was in effect a nullity; that the confirming authority had not taken the steps by way of issuing notices and the like which it was necessary for them to take in order to come to a final determination, but we do not think that the matter has passed out of their hands and that this order that they purported to issue is in effect a nullity. They are still seised of the matter, and as a confirming authority and sitting judicially they will be entitled again to proceed with the question of this confirmation now that they know that the justices will accept only one condition and not both. The result will be

A that the confirming authority must once more sit and come to a conclusion. We think that the application for a certiorari was a right one, and that it was necessary, if the order was to be set aside, to apply for a certiorari.

One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on April 25 but who appeared at the meeting of May 16. We think that the confirming authority ought to be composed in the B same way on both occasions; that new justices, who have not heard the evidence given, ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision on this question of confirmation. The result will be that this appeal will be allowed C and this appeal will be allowed with costs, because we think that this appellant had to come to this court. With regard to the costs of the previous proceedings, we will hear what counsel for the licensee has to say about them; the order will be for the rule to be made absolute, but a clear indication is given by the court to the confirming authority that it must now proceed to hear and determine the matter as to whether or not it will decide to confirm the single condition accepted by the D licensing justices or not.

GREER, L.J.—I agree. I should only like to add a very few words. In order to complete the last sentence of my Lord's judgment, I should like to add that the application to the confirming authority, when it is renewed, must be after notice to the parties, and not merely after notice to the parties, but after hearing any E evidence and any argument that may be presented to them by either of the parties.

This case may be stated quite shortly by me, having regard to the fact that my Lord has called attention to the relevant sections of the Act of Parliament which deal with the matter we have to consider. Counsel has taken two points on behalf of the appellants. He says in the first place that this matter was finally disposed of on April 25; the confirming authority on that date decided, according to his F argument, that they would not confirm this licence unless two conditions were accepted by the licensing justices. If I had come to the conclusion that that was the right construction to put upon the evidence which is before us, I should have thought it a sound argument, but, in my judgment, what really happened was that the magistrates in the first place, when they gave what is called their decision, misunderstood what they were doing, and said: "We will grant the licence on G these two conditions." They had no power to grant licences, all they had to consider was whether they could confirm a licence which was already granted, and to suggest, if they did confirm it, modifications in any conditions laid down by the magistrates. They thereupon suggested that there should be two conditions considered by the licensing magistrates before the licence should be deemed to be confirmed. The licensing magistrates considered those two conditions and agreed H that they would grant the licence with one of those conditions, but refused to attach the other. Then, what was the condition of that licence? It was a licence which was unconfirmed, which was being put forward by the licensing justices with one condition; how could it be dealt with by the confirming justices, except, when they received notice of what the magistrates were doing, by considering, and considering fully and judicially, whether they should confirm the licence with that one I condition only? In those circumstances those who opposed the licence were entitled to be heard by the confirming authority before they finally decided whether they would confirm the licence with that one condition alone, they having previously intimated that their primâ facie view was that there ought to be two conditions. A judicial authority deciding that question behind the backs of the parties interested, without giving them an opportunity of being heard, was doing that which it was not entitled to do, and that the court ought to do what Avory, J., in the court below, thought should be done, namely, bring the order into this court and set it aside—quash the order. I agree with my Lord that it does not finally determine

the rights of the parties in this matter; it only gets rid of an order that ought not to have been made, and leaves it for the confirming authority to consider, after taking the proper proceedings, what they ought to do having regard to the decision of the magistrates. For these reasons I agree that this appeal should be allowed, and allowed with costs, because, unfortunately, the appellant had to come here to get what he was entitled to.

ROMER, J.—I agree. As we are differing from the view of the majority of the Divisional Court, I think it is only right that I should express, quite shortly, my own view. It is quite unnecessary for me to recapitulate the facts, but in my opinion it is not possible to say that confirmation here was refused unless the two conditions that have been mentioned were imposed. In the first place, speaking entirely for myself, I doubt very much whether a confirmatory committee has any power to make a conditional refusal. It seems to me, from the Act, that they must either confirm or refuse to confirm, that the only power they have to impose conditions is the power given by sub-s. (5) of s. 14, and that that power is one of varying conditions on the confirmation of a new justices' licence. In the second place, the confirming authority in the present case did not purport to do any such thing; what they did purport to do was to confirm the licence subject to two conditions. They did not express any view one way or the other as to what they would do if those conditions did not receive the assent of the justices. Where a confirming authority desires to vary the conditions imposed by the justices, they ought to ascertain, before making any order, whether the justices consent to such variation or not. This is the true effect of sub-s. (5) when properly construed, and it is made still clearer by r. 47 of the Licensing Rules, 1910. If the justices do not consent the confirming authority must then hold a further meeting to decide whether, in the new circumstances of the licensing justices not consenting, they will confirm the order or not. This was not done in the present case, but the result is precisely the same, for a confirmation subject to a condition which is not fulfilled is no confirmation at all, as was pointed out by the Court of Appeal in *R.* v. *Jackson* (1). Therefore, a further meeting had to be held. It follows that the only confirmation here was given at the meeting of May 16. At that meeting the appellant was entitled to be present, but he was given no opportunity of being there. It is said that it would not have made any difference if he had been there. Whether that is so or not, I do not know, future events will show. In any case, however, it appears to me to be an irrelevant consideration. Further, at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.

Appeal allowed.

Solicitors: *Willis & Willis*, for *Stapleton & Son*, Stamford; *Peacock & Goddard*, for *J. P. Maule*, Huntingdon; *Clarke, Rawlins & Co.*, for *Wyman & Abbott*, Peterborough.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

WARD *v.* PATERSON

[CHANCERY DIVISION (Romer, J.), May 31, June 4, 5, 1929]

[Reported [1929] 2 Ch. 396; 45 T.L.R. 519; 98 L.J.Ch. 446; 141 L.T. 683]

B

Sale of Land—Restrictive covenant—Erection of "not more than one bungalow" —"Bungalow."

By a conveyance dated Mar. 25, 1928, the grantee covenanted with the grantor not to erect more than one "bungalow" on the land conveyed.

Held: "bungalow" was not an ordinary English word of the meaning of which the court must take judicial notice, but was a term of art which meant a building of which the walls, with the exception of any gables, were no higher than the ground floor storey and of which the roof started at a point substantially not higher than the top wall of the ground floor, no matter in what way the space left in the roof of the building constructed in such a manner was used.

C

D

Kemp v. *Bird* (1) (1877), 5 Ch.D. 549, applied.

Notes. As to the construction of a covenant relating to the use or enjoyment of land, see 29 HALSBURY'S LAWS (2nd Edn.) 442, para. 650, note (k); and for cases on the subject, see 40 DIGEST (Repl.) 328, *2696* et seq.

Cases referred to:

E

(1) *Kemp* v. *Bird* (1877), 5 Ch.D. 974; 46 L.J.Ch. 828; 37 L.T. 53; 42 J.P. 36; 25 W.R. 838, C.A.; 31 Digest (Repl.) 180, *3128*.

(2) *Sharp* v. *Harrison*, [1922] 1 Ch. 502; 91 L.J.Ch. 442; 28 Digest 449, *681*.

Witness Action.

The plaintiff, by a conveyance dated Mar. 25, 1928, conveyed to the defendant a piece of land, and the conveyance contained a covenant by the defendant not to erect more than one bungalow on the land. The defendant built a dwelling-house on the land containing more than one storey. The plaintiff asked for an injunction restraining the defendant from building on the land a house other than a bungalow.

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Archer, K.C., and *J. Leonard Stone*, for the plaintiff, referred to *Sharp* v. *Harrison* (2).

Geoffrey Lawrence, K.C., and *Ronald Smith*, for the defendant, referred to *Kemp* v. *Bird* (1).

G

ROMER, J. (after stating the facts).—The only question I have to determine is what is the meaning of the word "bungalow"? It is said that I ought to have regard to the obvious intention of the plaintiff. But to ascertain his intention I must look at the conveyance and nothing else. For there was no other contract between the parties, and all that I am able to gather from this contract is that the plaintiff wished to restrict the defendant to the erection of one bungalow. I have no doubt that, in insisting on that restriction, he desired to preserve his view as far as possible. Any building, however, would obstruct his view to some extent, and the parties in effect agreed that the view should not be obstructed to any greater extent than it would be obstructed by one bungalow. I can find nothing further to give me any further help. If it should turn out that the word "bungalow" meant something different from that which the plaintiff thought it meant, the plaintiff has only himself to thank. If he had wished to insure that the defendant should not erect a building of more than a certain height, nothing would have been easier than for him to specify that height. But I am not entitled to supply some term in the conveyance, in order to give him the benefit of something which he intended to preserve, but for which he has omitted to stipulate. That is laid down in *Kemp* v. *Bird* (1). I must look at the conveyance and the conveyance only, and must now consider what the word "bungalow" in the covenant means.

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I

It is said by counsel for the plaintiff that the word "bungalow" is an ordinary English word, of the meaning of which the court must take judicial cognisance, though dictionaries can be looked at for the purpose of refreshing the memory. I do not take that view at all. It is not an ordinary English word. It is an Indian word, or rather a word of Indian derivation, and is obviously used in this conveyance as indicating a building which has some particular architectural features. It is a word of art, and I must find out its meaning from the evidence of persons acquainted with that art. The dictionaries are not unanimous. Looking at the majority of them, it would appear that their compilers regarded a bungalow as a house of one storey, lightly built. But the plaintiff called two architects, who told me their view as to the meaning of the word. They at once dissented from the dictionaries, because they agreed that among English architects the word does not now connote a light style of building. They did not even agree that a bungalow is necessarily a building of one storey, for they considered that there might be included in the roof one or more rooms. But they added the reservation that any such room must not be inhabited. The architects called on behalf of the defendant also agree that the dictionaries are wrong in that a bungalow is not necessarily a light building or one of one storey, but that it can have a room in the roof, i.e., above the ground floor. They say, however, that such a room can be used for any purpose whatsoever, and need not be uninhabited or uninhabitable. Having heard the evidence on both sides, I attach more weight to that of the defendant's experts than to that of the plaintiff's experts, because, when once it is admitted that the bungalow may have two storeys, in the sense that it may contain a room in the roof above the ground floor, it does not seem reasonable to suppose that when the room is a boxroom the building is a bungalow, but that when it is a bedroom the building is not a bungalow. The defendant's experts have, indeed, given a definition which I accept, namely, that a bungalow is a building of which the walls, with the exception of any gables, are no higher than the ground floor, and of which the roof starts at a point substantially not higher than the top of the wall of the ground floor, and that it does not matter in what way the space in the roof of the building so constructed is used. The defendant's architects are not merely expressing their own opinion, but they fortify it by reference to technical literature used in their profession. Mr. R. A. Briggs, for instance, in his book, BUNGALOWS AND COUNTRY RESIDENCES, gives the following definition:

> "A bungalow in England has come to mean neither the sunproof squat house of India, nor the rough log hut of colder regions. It is not necessarily a one-storied building, nor is it a country cottage. A bungalow essentially is a little 'nook' or 'retreat.' A cottage is a little house in the country, but a bungalow is a little country house—a homely, cosy little place, with verandahs and balconies, and the plan so arranged as to ensure complete comfort with a feeling of rusticity and ease."

In the book itself he gives illustrations of various bungalows, and some of his illustrations are of houses which conform to the definition given by the defendant's witnesses, and which contain in the roof space for one or more rooms. In all the literature to which I have been referred there are to be found instances of bungalows complying with the definition of the defendant's experts, and having a roof space intended to be used for habitation.

There is one further observation to be made. The plaintiff contends that this building obstructs his view considerably more than it would be obstructed by a bungalow in the narrower sense used by the plaintiff's experts. But even accepting the definition of the plaintiff's experts this building would be a bungalow if the rooms inside the roof were taken away, and, if that were done, the roof would be just as high as it is at present having regard to the angle of slope necessitated by the use of tiles employed by the defendant. If I had been able to hold that the plaintiff was right and that a bungalow is a building such as his witnesses suggest, his view might have been damaged to precisely the same extent as it is

at present. However that may be, I have come to the conclusion that I must give the word "bungalow" the definition which I have mentioned and that the defendant's building is a bungalow within that definition. The action must be dismissed with costs.

Judgment for the defendant.

Solicitors: *Field, Roscoe & Co.*, for *J. Noel Cooper*, Saxmundham; *M. L. Moss.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re CUMMING AND WEST. Ex parte NEILSON AND CRAIG *v.* TRUSTEE

[CHANCERY DIVISION (Tomlin, J.), January 30, 31, February 1, 1929]

[Reported [1929] 1 Ch. 534; 141 L.T. 61; 98 L.J.Ch. 83; [1929] B. & C.R. 4]

Bankruptcy—Postponement of debt—Partnership—Claim by trustee of one partner's marriage settlement—Covenant by that partner to pay premiums on life policy assigned to trustee—Bankruptcy Act, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 33 (6), 42 (2), 63 (1).

C. and W. were traders in partnership and became bankrupt in 1927. In 1910 on his marriage C. by a settlement assigned a policy of assurance on his life to the trustees and covenanted to pay the premiums and to enable them to effect a substituted policy if the policy should become void. On C.'s bankruptcy and failure to pay certain premiums the trustees claimed an amount sufficient to make the policy fully paid.

Held: the covenant to pay the premiums was one "for the future payment of money for the benefit of the settlor's wife . . . or children" within s. 42 (2) of the Bankruptcy Act, 1914, and so the trustees' claim was postponed until all the other creditors for valuable consideration, both of the separate estate of C. and of the joint estate of the partnership, had been paid.

Per **Curiam:** The words "wherein the settlor had not at the date of the marriage any estate or interest" in s. 42 (2) apply only to the antecedent word "property," and not to the antecedent word "money."

The word "creditors" in s. 33 (6) and s. 63 (1) of the Act means the persons entitled to prove in the bankruptcy, and so does not include persons, [such as the trustees], whose claims are made void by s. 42 (2).

Notes. Referred to: *Re Debtor* (*No. 707 of* 1939), *Official Receiver* v. *United Auto and Finance Corpn., Ltd.*, [1947] 1 All E.R. 417.

As to the application in bankruptcy of the joint and separate estates of partners, see 2 HALSBURY'S LAWS (3rd Edn.) 490, para. 968, and 512, para. 1018; and for cases on the subject see 4 DIGEST 420 et seq., *3788* et seq.

Cases referred to:

(1) *Re Tuff, Ex parte Nottingham* (1887), 19 Q.B.D. 88; 56 L.J.Q.B. 440; 56 L.T. 573; 35 W.R. 567; 4 Morr. 116; 4 Digest 481, *4336*.

(2) *Re Grason, Ex parte Taylor* (1879), 12 Ch.D. 366; 41 L.T. 6; 28 W.R. 205, C.A.; 4 Digest 484, *4357*.

Bankruptcy Motion by the trustees of the marriage settlement of a bankrupt partner, appealing against the rejection of their proof for monies covenanted to be paid by the bankrupt in respect of a settled policy of assurance of his life.

Motion.

John B. Cumming and Milward West traded in partnership under the name of Cumming and Kelley. In 1927 a receiving order was made against their estates, and they were adjudged bankrupt. During the proceedings it appeared that the separate estates showed a surplus sufficient to pay private creditors, after satisfaction of trade creditors in full. In 1910 Cumming had executed an ante-nuptial settlement and assigned to trustees a policy of assurance for £1,000 and bonuses in the Sun Life Assurance Society at the annual premium of £24 11s. 8d., to be held by them on the trusts thereof. He had also covenanted to bring into settlement a further sum of £1,000. By cl. 6 of the settlement he had covenanted (i) that he would not do or suffer anything whereby the said policy might become void or voidable; (ii) that he would pay all premiums and do all other things necessary to keep the same on foot or to restore the same if it should become voidable; (iii) that if it should become void he would as soon as might be, and at the option of the trustees, either effect or enable them to effect with such company or society as the trustees should direct and in their names a new policy or policies in his name which would secure to the trustees such a benefit or benefits as . . . in the opinion of the trustees would be as advantageous to their beneficiaries as those which the void policy would have secured if it had continued in force; (iv) not to do or suffer anything whereby the trustees might be prevented from recovering or receiving any of the money intended to be assured by the said policy or any future policy as aforesaid. By cl. 7 it was provided that it should not be obligatory on the trustees to enforce any of the covenants thereinbefore contained in relation to the said policy or policies, and no omission by them to enforce the same should be chargeable as a breach of trust, and neither the trustees nor any of them nor their executors or administrators should be answerable for any of the said policies becoming void through any means whatsoever. Cumming did not perform the covenant as to the second £1,000, and was now unable to pay the premiums on the first £1,000. A. Neilson, a trustee of the settlement, in consequence, on behalf of himself and his co-trustee, on July 10, 1928, lodged a proof in the bankruptcy for £367 1s. against the separate estate, the commutation of the annual premiums sufficient to make it fully paid. On failure to pay another premium in December, 1928, the proof was altered to £386 6s. 3d. The trustee in bankruptcy rejected the proof by reason of the Bankruptcy Act, 1914, s. 42 (2), alleging that insufficiency of assets would prevent the other creditors for valuable consideration from being satisfied. This motion was then brought by the settlement trustees, asking that this rejection might be reversed, varied, or discharged, and that the trustee in bankruptcy should be directed to admit the proof in full. The question whether the trustee had properly rejected the proof under s. 42 (2) was first argued.

By Bankruptcy Act, 1914, s. 42 (2):

> "Any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy, be void against the trustee in the bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied."

Tindale Davis for the trustees of the settlement.
F. Morton for the trustee in bankruptcy.

TOMLIN, J.—On July 25, 1910, an ante-nuptial settlement was executed on the marriage of one John Barr Cumming and Gladys L. N. Hubbard. By the settlement the husband assigned a policy of assurance on his own life for £1,000, and agreed to pay a certain sum of £2,000 to the trustees. The trustees were to hold the trust fund from and after the marriage on trust to pay the income to the husband during his life, but subject to a trust to pay the premiums needed to keep in force any policy for the time subject to the settlement: then the wife took a second life interest and there was an ultimate trust for the children of the marriage. There were also certain covenants by the husband with the trustees: first, that if the marriage should be solemnised he would not do or suffer anything whereby the policy assigned or any policy or policies which might be effected as thereinafter provided might become void or voidable: and secondly, that he would pay the annual premiums or other money—if any—and do all things necessary to keep on foot the policy assigned or any other policy or policies. By cl. 6, sub-cl. 3, it was provided that in case any policy or substituted policy should become void the husband would either, at the option of the trustees, effect or enable them to effect with an insurance company substituted policies. Also by cl. 7, sub-cl. 2, it was provided that it should not be obligatory on the trustees to enforce the husband's covenants in respect of the policy.

On Oct. 28, 1927, a receiving order was made against the husband, and adjudication followed in due course, and thereupon the trustees of the settlement put in a proof to this effect, that the bankrupt was at the date of the receiving order and still was justly and truly indebted to them, the trustees of the settlement, in the sum of £367 1s.—subsequently amended to £386 6s. 3d.—as compensation for breach of covenant to pay premiums on the policy of assurance upon his life as shown by the endorsement thereon. The endorsement referred to the settlement of July 25, 1910, and stated that the trustees claimed the amount required to make the policy fully paid; and reference was also made to a letter from the Sun Life Assurance Society dated June 6, 1928, indicating that a single payment at that time of £367 1s., payable on or before June 30, would constitute the policy fully paid. The trustee in bankruptcy rejected the proof in these terms:

> "I have this day rejected your claim . . . on the following ground: That by reason of the provisions of s. 42 (2) of the Bankruptcy Act, 1914, the said claim for dividend is postponed until all the other creditors for valuable consideration in money or money's worth have been satisfied, and the insufficiency of the assets will prevent the said creditors being so satisfied."

Then there is a notice that if the trustees are dissatisfied they can apply to the court.

The trustees, being dissatisfied, have applied to the court, and the question which I have to determine is whether the trustee in bankruptcy has properly rejected the proof under s. 42 (2) of the Bankruptcy Act, 1914. [His Lordship read the subsection.]

The subsection contains elements of obscurity, but there are certain features in it which I think are reasonably clear. It is said by counsel on behalf of the applicants, as I understand it, that the subsection ought to be read as though the words "wherein the settlor had not at the date of the marriage any estate or interest whether vested or contingent" were governed both by money and by property; and that in a case of this sort where a settlor has assigned a policy and covenanted to pay the premiums, the covenant to pay the premium is only in the nature of a covenant of indemnity to the trustees, ancillary to the transaction of assignment which has been executed, and is not, as I understand him, an independent transaction which falls within the words "any covenant . . . which has not been executed at the date of the commencement of the bankruptcy." Further, he argues that such a covenant is not a covenant for the future payment of the money in the sense in which it is used in the section, because a covenant for the future payment of money, as I understand him, means a covenant to transfer

some specific sum of which it can be predicated at the date of the settlement that the settlor had or had not an interest therein. First, let me say how I read the section. I do not read the section as counsel reads it. It seems to me that the words "wherein the settlor had not at the date of the marriage any estate or interest" are words governed by the word "property." If the construction for which counsel contends were the true one it seems to me that the language of the section should run in this way: "Either for the future payment for the benefit of the settlor's wife or husband or children or for the future settlement on or for the settlor's wife or husband or children of property." In fact it runs:

> "For the future payment of money for the benefit of the settlor's wife or husband or children, or for the future settlement on or for the settlor's wife or husband or children of property."

It is difficult to see how both "money" and "property" in that collocation of the words can constitute the antecedents of "wherein." That being so, I think the problem is simply this: Is the covenant to pay the premiums a covenant for the future payment of money under a covenant which has not been executed? It is, in my judgment, clearly a covenant for the future payment of money. I am unable to see how, where there is an assignment of a policy with a covenant to pay the premiums, it can be said that the covenant to pay the premiums ceases to be a covenant for the future payment of money within the language of the section because, in fact, the covenant is taken for the protection of the property which has been assigned. That is, no doubt, a good reason for taking the covenant, but it does not seem to me to be a reason for altering the meaning of the words of this section. In my judgment, the covenant falls within the language of the section, and the trustee was right in rejecting the proof upon the footing that he did, namely, that it is a claim for something which is only provable after the other creditors for valuable consideration in money or money's worth have been satisfied.

The question whether this claim was postponed only to the separate debts of the bankrupt or to both the separate debts and the joint debts of the partnership was then argued.

Bankruptcy Act, 1914, s. 33 (6) provides that:

> "In the case of partners, the joint estate shall be applicable in the first instance in payment of their joint debts and the separate estate of each partner shall be applicable in the first instance to payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estates."

Section 63 (1) provides that:

> "Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts."

Tindale Davis for the settlement trustees.—Section 33 (6) and s. 42 (2) are inconsistent. See WILLIAMS ON BANKRUPTCY (13th Edn.), p. 189. Section 63, if relied on, is also inconsistent. Section 33 (6) and 42 (2) apply only to the case of a sole trader.

F. Morton, for the trustee in bankruptcy, cited *Ex parte Taylor*.

Tindale Davis replied.

TOMLIN, J.—The second point in this case raises a question of some interest. A receiving order was made against a partnership firm of two persons, and in due course adjudication followed; that is to say, adjudication of each of the partners. In the administration in bankruptcy of their estates, it is found that, in regard to

A one of the partners, Mr. J. B. Cumming, the separate estate, after providing for the separate creditors, other than the creditors whose claims are in question, shows a substantial surplus, whereas upon the joint estate, after payment of the joint creditors, there is a deficiency. Assuming that there were no claims in respect of the separate estate covered by the Bankruptcy Act, 1914, s. 42 (2)—to which I will refer in a moment—in the ordinary course the deficiency on the joint debts B would be satisfied, in part at any rate, out of the surplus on the separate estate. Section 42 (2) is a section which postpones certain classes of claims. There being a claim within the subsection, the contest now is whether that claim is postponed to all the debts, separate and joint, or whether it is postponed only to the separate debts.

The difference to the claimants is material because if it be postponed only to C the separate debts, they will be paid, whereas if it be postponed to the separate and joint debts, by the time the joint creditors have had what they are entitled to out of the surplus of the separate estate, there will be little or nothing left for the claimants.

The Bankruptcy Act, 1914, provides by s. 33 (6) how the estates of partners, where there is an adjudication against all the partners in the firm, are to be dealt D with. The subsection is in these terms. [His Lordship read the subsection.] That is a clear provision as to the manner in which the administration of those two estates, the separate estates of the partners and the joint estate of the firm, is to be dealt with. Section 42 provides by sub-s. 2 as follows: [His Lordship read it.] On that the question arises, where there is a joint adjudication, whether the claim for dividend which is saved out of the voidness is something that is E postponed only to the claims of separate creditors, or whether it is postponed to the claims of all creditors.

It is said that if one reads literally the words "all claims of the other creditors," so that the postponement is a postponement to both separate creditors and joint creditors, one finds a provision which is inconsistent with s. 33 (6), which I have already read, because it is said that there is a plain direction in terms that the F separate estate is to be applied to the payment of all the separate debts before any of it goes to the joint creditors; and the joint estate is to be applied in payment of the joint debts before any goes to the separate creditors. If, in fact, one postpones under s. 42 (2) this particular claim to both separate and joint creditors, one is, in fact, applying the separate estate in a manner which is contrary to the provisions of s. 33 (6). Therefore it is said that in order to produce consistency it is neces- G sary to read s. 42 (2) with a limitation of this nature, namely, that the postponement is until "all claims of the other creditors" of the same class have been satisfied; and that if one does that, one then has a consistent whole. On the other hand, it is said "No, you must adhere to the primary and natural meaning of the words"—it is "all claims of the other creditors"—and there is no justification for cutting the words down, but one must read this subsection as in the nature of a H proviso upon s. 33.

Before expressing a view as to the merits of those two alternative constructions, I desire to call attention to another section of the Act of 1914 which may be said to have some possible bearing upon the question. Section 63 (1) of the Act provides: [His Lordship read the subsection.]

It is said that where, instead of joint adjudication, one has only one member of I the firm adjudged bankrupt, and in his case there is a claim which is postponed under s. 42, this section, if read literally, provides that the joint creditors shall not be paid until all the separate creditors have received the full amount of their respective debts; and "all the separate creditors"—unless one is going to limit those words—must mean including those separate creditors who, under s. 42 (2), are postponed in the terms of that section. The result is that if one reads in s. 42 (2) "all other creditors" as meaning joint as well as separate, one produces, where there is a joint adjudication, a result different from the result that follows under s. 63 (1), where there is an adjudication of one partner only. That again is

urged as a reason why I should make an effort to introduce a measure of consistency through all these sections by reading s. 42 (2) as a section in which the creditors to whom the claimant is postponed are creditors of the particular category, namely, separate creditors.

One other section has been referred to, and that is s. 36 (2), which deals with the postponement of husbands' and wives' claims, and which is a reproduction of a section originally appearing in the Married Women's Property Act, 1882. That provides as follows:

> "Where the husband of a married woman has been adjudged bankrupt any money or other estate of such woman lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of his estate and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied."

There again we get the phrase "all claims of the other creditors," quite a general phrase.

In regard to that section, or the earlier appearance of it in the Married Women's Property Act, where it is substantially in the same words, my attention has been called by counsel for the trustees of the settlement to *Re Tuff, Ex parte Nottingham* (1). There it was held that, where a wife lends her money to a trading partnership of which her husband is a member, she is, notwithstanding the section, entitled to prove, on the bankruptcy of the partnership, against the joint estate in competition with other creditors. That case was determined by CAVE, J., and, as I read his judgment, what he held was that the section did not in terms apply to a loan by the wife to her husband and another when they were carrying on business together. In other words, he said that the section was one which related to a loan by a wife to a husband exclusively, and not to a loan by the wife to a husband and somebody else jointly, and taking that view of the section he said that it did not apply. At the end of his judgment he put it in this way:

> "It is clear that s. 3 applies only where a husband is a sole trader; and does not apply to the case of a husband carrying on business in partnership with another, and the question which I shall ask myself is this: Was this a loan to the firm? Or was this a loan to the husband to do as he pleased with, and to give to the firm if he thought proper?"

I understand him to mean by that, that the section only applies to a loan to the husband. If there is a loan to the husband, and the husband in fact is a member of a partnership, but is carrying on business on his own account as well, in order that it may be ascertained whether the section applies, there will arise the question of fact whether the money was lent to the husband, or whether it was lent to the partnership. But it does not appear to me that that case is directed in any way to determine what is the meaning of the words "all claims of the other creditors." Therefore, so far as s. 36 (1) and *Re Tuff* (1) are concerned, I get, from that decision, no light on the matters which I have to solve.

In construing an Act of this kind, it is the anxious desire of the court to arrive at a conclusion which will not produce an inconsistency, if the language employed admits of that result. If I were driven to select one or other of the constructions which have been offered to me with a view to arriving at consistency, it may be that it would be my duty to select that which will produce the nearest approach to consistency. But I doubt whether this problem of inconsistency really arises upon the Act. It is to be remembered that s. 42 (2) is framed in a special way. It provides that the contract or covenant shall be void against the trustee in bankruptcy except so far as it enables the persons entitled under the covenant to claim for dividend in the settlor's bankruptcy under or in respect of the covenant. That is curious language. Presumably the curious or unusual framework of the clause

A is due to the desire of the legislature to produce a special result. The contract is void against the trustee, but there is reserved out of the voidness a right on the part of the persons entitled under that contract to claim for dividend. It has been quite fairly and properly admitted by counsel for the trustees that, having regard to the decision in *Re Grason, Ex parte Taylor* (2), the trustee in bankruptcy is entitled, on a claim made within s. 42 (2), to reject the proof; leaving, of course, B the claimant free, when all those creditors to whom he is postponed have been satisfied, to return to the charge, if he finds that the circumstances of the case are such that he can thereby obtain some advantage.

The real explanation of these sections, and the explanation which seems to me to make them consistent throughout, is that "creditors" there means the persons entitled to prove; and that when there is a reference to "separate creditors," it C means separate creditors, that is to say, persons whose claims are not made void by s. 42, but persons whose proofs the trustee is entitled to accept; and in the same way "joint creditors" means those creditors whose proofs the trustee is bound to accept; and that persons who claim under a contract made void against the trustee are not creditors. They are persons having a special right, namely, a right to a claim for dividend in the settlor's bankruptcy, under or in respect of the D contract, after all the claims of the other creditors for valuable consideration have been satisfied. If, as I think, that is the true meaning of these sections, the result is that the claimants in this case do not stand to-day as creditors, and their right to put in a proof, or their right to insist on the acceptance of that proof by the trustee, must depend upon all the creditors, that is to say, all the separate and joint creditors, whose proofs the trustee is bound to accept, having been first E satisfied.

Therefore, I think that the settlement trustee's claim fails, and that this application, having failed on the first point also, must be dismissed.

Motion dismissed.

Solicitors: *May, Woulfe & Gwyther; Constant & Constant.*

F [*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

Re GROVE-GRADY. PLOWDEN *v.* LAWRENCE

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), December 17, 18, 1928, February 13, 1929]

[Reported [1929] 1 Ch. 557; 98 L.J.Ch. 261; 140 L.T. 659; 45 T.L.R. 261; 73 Sol. Jo. 158; [1929] W.N. 51] B

Charity—Benefit to community—Protection of animals from pain—Provision of refuge for animals—No molestation by man.

A testatrix by her will gave her residuary estate to trustees to form a fund for the establishing and maintaining of an institution to be called "The B. Animals' Benevolent Society." The will provided that the society should C have three objects: (i) the provision of a refuge or refuges for the preservation of "all animals birds or other creatures not human" and the employment of such custodians as might be necessary; (ii) the payment of annual sums to such societies or homes for the benefit of animals generally, or for the benefit of individual cases, British or foreign, as the committee might think fit; (iii) the founding, establishing, supporting, and providing hospitals or homes for D animals in Great Britain having no declared vivisectionist upon the governing body or in any way connected with the management thereof. On an originating summons taken out to determine whether the bequest was a valid charitable gift,

Held (LAWRENCE, L.J., dissentiente): while the refuge, the first object under the will, was to be free from the molestation of man, all the animals E within it were to be free to molest and harry each other; no animal within the area could be destroyed by man, however necessary that destruction might be in the interests of mankind, the other denizens in the area, and the animal itself, and however painlessly it was effected; accordingly, that provision did not ensure the protection of the animals against pain and cruelty; the objects of the trust must be taken as a whole so that, if one were held to be bad, the F bequest could not be saved by another object or the other objects being held to be good; and, therefore, the trust was not of benefit to the community as promoting kindness and humanity and was not charitable.

Notes. Appeal was made to the House of Lords where the parties reached a compromise and the House ordered that the order of the Court of Appeal be varied by declaring that "the respondents, the executors and trustees of the will of the G testatrix, do retain the sum of £25,000 out of the residuary real and personal estate of the testatrix and do pay the said sum free of all deductions, whether for death duties, costs or otherwise, to trustees to be appointed under a scheme to be settled in the Chancery Division of the High Court, such scheme to provide for the application of the said sum in establishing or assisting homes or hospitals in Great Britain for animals, but so that no part of the said sum is to be available H for antivivisection propaganda." Subject to such variation the decision of the Court of Appeal was affirmed: see sub nom. *A.-G.* v. *Plowden*, [1931] W.N. 89.

Considered: *National Anti-Vivisection Society* v. *I.R.Comrs.*, [1947] 2 All E.R. 217; Applied: *Re Moss, Hobrough* v. *Harvey*, [1949] 1 All E.R. 495. Referred to: *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan* v. *Forrest*, [1946] 1 All E.R. 501; *Williams' Trusts Trustees* v. *I.R.Comrs.*, [1947] I 1 All E.R. 513; *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; *Baddeley* v. *I.R.Comrs.*, [1953] 1 All E.R. 63.

As to charitable purposes beneficial to the community, see 4 HALSBURY'S LAWS (3rd Edn.) 226–232; and for cases see 8 DIGEST (Repl.) 342–352.

Cases referred to:

(1) *Re Wedgwood, Allen* v. *Wedgwood*, [1915] 1 Ch. 113; 84 L.J.Ch. 107; 112 L.T. 66; 31 T.L.R. 43; 59 Sol. Jo. 73, C.A.; 8 Digest (Repl.) 348, *293*.

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1.*

(3) *Macduff*, *Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879.*

(4) *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522, 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836.*

(5) *London University* v. *Yarrow* (1857), 1 De G. & J. 72; 26 L.J.Ch. 430; 29 L.T.O.S. 172; 21 J.P. 596; 3 Jur.N.S. 421; 5 W.R. 543; 44 E.R. 649, L.C. and L.JJ.; 8 Digest (Repl.) 348, *285.*

(6) *Re Douglas*, *Obert* v. *Barrow* (1887), 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786; 35 W.R. 740; 3 T.L.R. 589, C.A.; 8 Digest (Repl.) 348, *290.*

(7) *Armstrong* v. *Reeves* (1890), 25 L.R.Ir. 325; 8 Digest (Repl.) 349, **128.*

(8) *Re Foveaux*, *Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 43 W.R. 661; 11 T.L.R. 540; 39 Sol. Jo. 671; 13 R. 730; 8 Digest (Repl.) 348, *291.*

(9) *Lewis* v. *Fermor* (1887), 18 Q.B.D. 532; 56 L.J.M.C. 45; 56 L.T. 236; 51 J.P. 371; 35 W.R. 378; 3 T.L.R. 449; 16 Cox, C.C. 176; 2 Digest (Repl.) 401, *701.*

(10) *Marsh* v. *Means* (1857), 30 L.T.O.S. 89, 21 J.P. 725; 3 Jur.N.S. 790; 5 W.R. 815; 8 Digest (Repl.) 421, *1117.*

(11) *Re Cranston*, *Webb* v. *Oldfield*, [1898] 1 I.R. 431; 8 Digest (Repl.) 352, **131.*

(12) *Jeffries* v. *Alexander* (1860), 8 H.L.Cas. 594; 31 L.J.Ch. 9; 2 L.T. 748; 24 J.P. 643; 7 Jur.N.S. 221; 11 E.R. 562, H.L.; 8 Digest (Repl.) 373, *615.*

(13) *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534; 27 E.R. 1188, L.C.; 8 Digest (Repl.) 504, *2245.*

(14) *Tatham* v. *Drummond* (1864), 4 De G.J. and Sm. 484; 5 New Rep. 24; 34 L.J.Ch. 1; 11 L.T. 324; 10 Jur.N.S. 1087; 13 W.R. 61; 46 E.R. 1006, L.C.; 8 Digest (Repl.) 348, *286.*

(15) *Re Hummeltenberg*, *Beatty* v. *London Spiritualistic Alliance*, *Ltd.*, [1923] 1 Ch. 237; 92 L.J.Ch. 326; 129 L.T. 124; 39 T.L.R. 203; 67 Sol. Jo. 313; 8 Digest (Repl.) 314, *4.*

(16) *Re Tetley*, *National Provincial and Union Bank of England*, *Ltd.* v. *Tetley*, [1923] 1 Ch. 258; 92 L.J.Ch. 351; 128 L.T. 737; 39 T.L.R. 218; 67 Sol. Jo. 350, C.A.; affirmed sub nom. *A.-G.* v. *National Provincial and Union Bank of England*, [1924] A.C. 262; 40 T.L.R. 191; 68 Sol. Jo. 235; sub nom. *Re Tetley*, *A.-G.* v. *National Provincial and Union Bank of England*, 93 L.J.Ch. 231; 131 L.T. 34, H.L.; 8 Digest (Repl.) 397, *892.*

(17) *Hunter* v. *A.-G.*, [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530, H.L.; 8 Digest (Repl.) 387, *805.*

Appeal from an order of Romer, J., made on an originating summons taken out by trustees to determine whether trusts declared by the will of a testatrix were valid charitable trusts.

The trusts in question related to the residuary estate of the testatrix and were in the following terms:

"Upon trust for the founding and establishing forthwith or as soon as may be after my decease if not already founded in my lifetime (without the acquisition of any interest in land which cannot lawfully be acquired and held for charitable purposes) and the thereafter upholding and maintaining of a charitable institution to be called 'The Beaumont Animals' Benevolent Society' under such rules and regulations and under such committee of management not exceeding ten members and otherwise in all respects as my trustees shall in their absolute discretion think fit and having regard to my wish that the expenses of management shall be kept as low as possible provided that all members of the committee and of the governing body and all officials of the

said society shall be and always have been declared anti-vivisectionists and opponents of all sport involving the pursuit or death of any stag deer fox hare rabbit bird fish or any other animal and to have for its object (1) If the acquisition of land for that purpose shall be sanctioned by a judge of the Chancery Division of the High Court of Justice or the Charity Commissioners or other competent authority the purchase of such lands of any tenure whether being on the mainland or being an island or islands together with the buildings thereon situate in any part or parts of the United Kingdom of Great Britain and Ireland as the committee of 'The Beaumont Animals' Benevolent Society' may in their unfettered discretion deem suitable and proper for the purpose of providing a refuge or refuges for the preservation of all animals, birds or other creatures not human which being feræ naturæ may be living on such land at the time of the purchase thereof or which being feræ naturæ or otherwise may be brought to and placed on such land or some part thereof by or with the consent of the committee of 'The Beaumont Animals' Benevolent Society' and so that all such animals birds or other creatures not human shall there be safe from molestation or destruction by man And I declare that out of the trust fund provision shall be made by and at the discretion of the committee of 'The Beaumont Animals' Benevolent Society' for the maintenance, upkeep and preservation of such lands and buildings and the walls fences and hedges thereof including the employment of such custodians keepers or other persons as may seem necessary or proper And I declare that if the purchase of such lands as aforesaid shall by law require to be sanctioned by a judge of the Chancery Division of the High Court or the Charity Commissioners or other competent authority my trustees or the committee of 'The Beaumont Animals' Benevolent Society' may take any steps which to them may seem expedient to obtain such sanction whether by means of a private Act of Parliament or otherwise to the acquisition of such land as aforesaid and may pay all expenses incidental thereto out of my residuary estate. (2) The distribution of any part of the yearly income of the trust fund among such societies or homes for the benefit of animals generally or for the benefit of individual cases British or foreign as the committee of 'The Beaumont Animals' Benevolent Society' may think fit but without fettering their discretion it is my desire that all charitable subscriptions and donations being paid by me immediately prior to my death shall continue to be paid out of the yearly income of the trust fund so long as the said committee may think fit. (3) The founding establishing endowing supporting maintaining or providing of hospitals or homes for animals in Great Britain having no declared vivisectionist upon the governing body or bodies thereof or in any way connected with the management thereof."

ROMER, J., in giving judgment, said that there were several indications to be found in this clause that the predominating intention in the mind of the testatrix was the protection of the lower animals from cruelty and suffering. He referred to *Re Wedgwood*, *Allen* v. *Wedgwood* (1) and said that in that case the Court of Appeal established that a gift the object of which was to prevent cruelty and suffering to the lower animals was charitable. He was, therefore, of opinion that the trusts were charitable and valid. The heir-at-law and next-of-kin appealed.

W. A. Greene, K.C., and *Norman Daynes* for the heir-at-law and next-of-kin.

The Solicitor-General (*Sir Boyd Merriman*, K.C.) and *Stafford Crossman* for the Attorney-General.

A. Grant, K.C., and *L. W. Byrne* for the trustees.

The arguments are dealt with in the judgments.

Cur. adv. vult.

Feb. 13. The following judgments were read.

LORD HANWORTH, M.R.—The will of the testatrix is dated June 17, 1925, and she died on Nov. 7, 1925, a widow without children. The question to be

A decided is whether the disposition of the residue under cl. 12 of the will is valid as a charitable gift, or offends against the rule against perpetuities. Upon an originating summons taken out to have this question determined, Romer, J., held that a good charitable trust was established. From that decision Mr. Arthur Wilson, who is the heir-at-law of the testatrix and also one of her next-of-kin, and Mr. Charles Richardson, who was added by order dated Jan. 28, 1928, as one of B the next-of-kin, appeal. The amount of the residue in question is round about a sum of £200,000.

It is not necessary to set out the full terms of cl. 12, but some preliminary consideration of it is necessary. It provides for the creation of a trust fund, upon trust for the establishment and maintenance of a charitable institution to be called "The Beaumont Animals' Benevolent Society." A committee and governing body C are to be created in the manner prescribed. The society is to have three objects, which are declared in three sub-paragraphs, and may be summarised as follows: (i) The first is the establishment of a refuge for the

> "preservation of all animals birds or other creatures not human which being feræ naturæ may be living on such land at the time of the purchase thereof or D which being feræ naturæ or otherwise may be brought to and placed on such land or some part thereof by or with the consent of the committee and so that all such animals birds or other creatures not human shall there be safe from molestation or destruction by man."

Provision is made for the upkeep and preservation of such lands, &c., and for the employment of custodians, keepers or other persons as may seem necessary or E proper. (ii) Secondly, for the distribution of the yearly income of the trust fund among such societies or homes for the benefit of animals generally, or for the benefit of individual cases, British or foreign, as the committee may think fit. (iii) For the founding, establishing, supporting, and providing hospitals or homes for animals in Great Britain having no declared vivisectionist upon the governing body or in any way connected with the management thereof. Upon the question of the con- F struction of this clause I think that the objects of The Beaumont Animals' Benevolent Society must be taken as a whole. They cannot be so separated that if (i) were held bad, the other objects set out in (ii) and (iii) might be held to be good, and so save the bequest. Next, I cannot construe the opening words of sub-cl. (1) as to the acquisition of land as being a condition precedent to the whole clause. I agree with the argument that the words are to be read as "if and so far as may G be necessary" and not as precedent to the operation of the clause.

With these points eliminated, it is clear that the question to be decided is that which Romer, J., has determined, namely, does sub-cl. (1) provide for the establishment of a good charitable trust? I, therefore, turn to this sub-clause. It is to be noted that it provides for a refuge for animals which are to be free from molestation, or destruction, by man. There is no direct intimation that mankind H or the community, or any part of it, are to derive any benefit from this establishment. Whatever good may accrue to the community, or any part of it, is indirect —indeed, subconscious—for if the refuge were established upon an island, access to it might not be easy, and the number of visitors would probably be very small. Indeed, there is no provision for access to the refuge by visitors at all.

The speech of Lord Macnaghten in *Income Tax Special Purposes Comrs.* v. I *Pemsel* (2) ([1891] A.C. at p. 583) is generally treated as the locus classicus for the classification of charities, and it is the last of the four clauses there stated into which it is claimed that this bequest falls, namely, "trusts for other purposes beneficial to the community, not falling under any of the preceding heads." The origin of this passage is traced by Lindley, L.J., in *Re Macduff*, *Macduff* v. *Macduff* (3) ([1896] 2 Ch. at p. 467) to the argument of Sir Samuel Romilly in *Morice* v. *Bishop of Durham* (4) (10 Ves. at p. 532). Lindley, L.J., lays stress upon the words of Sir Samuel Romilly used as to the fourth head which Lord Macnaghten did not repeat—"which is the most difficult," as showing that Sir

Samuel Romilly appreciated, as also did LORD MACNAGHTEN, that there might be some purposes of general public utility which might be charitable and some which might not.

It has been held in many cases that charities for animals—using that phrase in a broad sense—are good. Thus in *London University* v. *Yarrow* (5) a bequest

> "for the establishment of an hospital in which animals which are useful to mankind should be properly treated and cured, and the nature of their diseases investigated with a view to public advantage"

was held good: see per LORD CRANWORTH (1 De G. & J. at p. 79). So in *Re Douglas, Obert* v. *Barrow* (6) (35 Ch.D. at p. 487), the Home for Lost Dogs is stated to be a charitable institution, likewise the protection of animals: see *Armstrong* v. *Reeves* (7); and societies for the suppression and abolition of vivisection are charities within the legal definition: see *Re Foveaux, Cross* v. *London Anti-Vivisection Society* (8). In that case CHITTY, J., said:

> "On principle, if a society for the prevention of cruelty to animals is a charitable society, it would seem to follow that an institution for the prevention of a particular form of cruelty to animals is also charitable. The mere infliction of pain is not necessarily cruelty; into the question of what is cruelty the moral element largely enters";

and he cites *Lewis* v. *Fermor* (9), a case in which it was decided that the spaying of sows—an operation practised in some districts—was not cruelty within The Cruelty to Animals Act, 1849, s. 2. From these authorities, it seems clear that if the object be to enhance the condition of animals that are useful to mankind, or to secure good treatment for animals, whether those animals are useful to mankind or not: see per Vice-Chancellor in *Armstrong* v. *Reeves* (7) (25 L.R.Ir. at p. 343); and see per WOOD, V.-C., in *Marsh* v. *Means* (10) (3 Jur.N.S. 790); or to insure humane conduct towards, and treatment of, them, whether in respect of a particular subjection of them to the use of mankind as for food in *Re Cranston, Webb* v. *Oldfield* (11), or in what is called vivisection, such objects are to be deemed charitable.

Plainly, therefore, a very wide interpretation has been given to the term charity, where the objective is not only the condition of men, but also that of animals; but it is not to be treated as inclusive of every purpose which the whim or caprice of a testator may prescribe. The caution administered by LORD CAMPBELL in *Jeffries* v. *Alexander* (12) (8 H.L.Cas. at p. 648) stands good:

> "A man has a natural right to enjoy his property during his life, and to leave it to his children after his death; but the liberty to determine how property shall be enjoyed in sæcula sæculorum, when he, who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless or ludicrous, so that they cannot be said to be directly contrary to religion and morality, is a right or liberty which, I think, cannot be claimed by any natural or divine law, and which I think ought by human law to be strictly watched and regulated."

Illustrations of this limitation or restriction are to be found in the cases. I will refer to *A.-G.* v. *Whorwood* (13) before LORD HARDWICKE, where it is stated (1 Ves. Sen. at p. 536) that:

> "the court has refused carrying into execution a particular turn of mind, though it was not a superstition or illegal, but an indifferent, use, to feed sparrows."

To *Tatham* v. *Drummond* (14), in which LORD WESTBURY rejected a gift

> "towards the establishment of slaughter-houses away from the densely populated places in which they are now situated, and for the relief of and protection from cruelty to animals taken to be slaughtered."

A And in *Re Wedgwood, Allen* v. *Wedgwood* (1) ([1915] 1 Ch. at p. 121) Kennedy, L.J., expresses the opinion that if the intention was the protection and maintenance of noxious animals, or the preservation of beasts of prey or mad dogs, the court would not find any difficulty as to the answer which is dictated by reason and commonsense.

Turning, then, again to the fourth category, in *Pemsel's Case* (2) there are two B questions that must be asked and answered: (i) Is the trust for a purpose beneficial to the community? (ii) If it satisfies that first test, is it charitable? A trust for a philanthropic purpose would satisfy the first question, but not the second: see *Re Macduff, Macduff* v. *Macduff* (3), for there may be philanthropic purposes which are not charitable. Lindley, L.J., treats a philanthropic purpose as one which indicated goodwill to mankind in general, and such purposes may be outside the C construction which the court puts upon charities. Who is to decide these questions? I agree with what Holmes, L.J., said in *Re Cranston, Webb* v. *Oldfield* (11) ([1898] 1 I.R. at p. 455), that the answer does not depend upon the view entertained by any individual "either by the judge who is to decide the question, or by the person who makes the gift." The test is to be applied from evidence, of the benefit to be derived by the public or a considerable section of it; though a D wide divergence of opinion may exist as to the expediency or utility, of what is accepted generally as beneficial. The court must decide whether benefit to the community is established. In my judgment, Russell, J., correctly states the proposition: "The question whether a gift is, or may be, operative for the public benefit is a question to be answered by the court, by forming an opinion upon the evidence before it": *Re Hummeltenberg, Beatty* v. *London Spiritualistic Alliance,* E *Ltd.* (15) ([1923] 1 Ch. at p. 242).

It is necessary, therefore, to consider the facts before us in the present case. Before doing so I desire to follow and apply the rules which were adhered to in *Re Wedgwood* (1)—a case which is binding upon this court. The Master of the Rolls adopts what was said by Fitzgibbon, L.J., in *Re Cranston, Webb* v. *Oldfield* (11) ([1898] 1 I.R. at p. 446):

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> "Any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow creatures—including under decided cases, animals—and which will confer the supposed benefit without contravening law or morals, will be charitable."

G Kennedy, L.J., also follows the reasoning and words of Fitzgibbon, L.J., as forming the standard applicable to the case; and Swinfen Eady, L.J., takes as his canon

> "a gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty and to ameliorate the condition of the brute creation and thus to stimulate humane and generous H sentiments in man towards the lower animals, and by these means, promote feelings of humanity and morality generally, repress brutality and thus elevate the human race."

It is important to remember what were the terms and expressions of the testatrix in relation to which those standards were laid down and applied. The secret trust was given to the trustee, after a discussion with the testatrix, and the trustee I suggested that he might help forward the movement for the humane slaughtering of animals, and also the movement to provide municipal abattoirs where animals could be properly and decently slaughtered, and the testatrix agreed that those were the sort of purposes, among others, which she would like to have forwarded. She wished to leave him an absolutely free hand to use his judgment as cases arose where he thought he could be of use to animals. This statement makes it clear that the testatrix accepted as a primary concern of the trustee the removal of cruelty to animals. Such an object must clearly be accepted as a charity within the decided cases.

But does the present case bear any resemblance to *Re Wedgwood* (1)? In this proposed refuge all creatures are to find freedom and safety from molestation or destruction by man. Whatever animals, birds or other creatures, feræ naturæ, may be living thereon or obtain access thereto are to find sanctuary. The fox and the rabbit, birds of all sorts, with the stoat and the weasel and rats as neighbours, and hawks and crows as spectators, are to live and enjoy themselves after their kind. The struggle for existence is to be given free play—that weapon wherewith nature maintains its balance against over-fertility: see DARWIN'S ORIGIN OF SPECIES, Chap. III. It is not a sanctuary for any animals of a timid nature whose species is in danger of dying out; nor is it a sanctuary for birds which have almost entirely left our shores and may be attracted once more by a safe seclusion to nest and rear their young. No such purpose is indicated—nor indeed possible. The one characteristic of the refuge is that it is free from the molestation of man, while all the fauna within it are to be free to molest and harry each other. Such a purpose does not, in my opinion, afford any advantage to animals that are useful to mankind in particular, or any protection from cruelty to animals generally. It does not denote any elevating lesson to mankind.

LORD STERNDALE in *Re Tetley, A.-G.* v. *National Provincial and Union Bank of England* (16) ([1923] 1 Ch. at p. 266) gives expression to the difficulty he felt in finding what limitation is to be imposed in respect of gifts said to be for the benefit of animals and I share his difficulty. It is, however, in my judgment, clear that a decision that an object such as the testatrix defines in the present case is charitable would go beyond any case decided at present and pass outside such limitations as have been laid down. For these reasons the appeal will be allowed and a declaration made as follows: Discharge the order of ROMER, J., in so far as it declares that the trusts declared by cl. 12 of the will are good and valid charitable trusts and in so far as it orders the settlement of a scheme; and in lieu thereof declare that upon the true construction of the said will the trusts declared by cl. 12 thereof are not good or valid charitable trusts and accordingly fail. Liberty to apply for an inquiry as to the persons beneficially entitled respectively to any real or personal estate of the testatrix, as to which she died intestate. As to the costs of the appeal, same order as in court below.

LAWRENCE, L.J.—In this case I have the misfortune to differ from the other members of the court. In my opinion, the conclusion reached by ROMER, J., was right and ought to be affirmed.

There is no doubt that the trusts declared by the will of the testatrix concerning her residuary estate contravene the rule against perpetuities and cannot be upheld unless they are charitable trusts in the technical sense. The question whether any particular trust is charitable does not depend upon the view entertained by any individual, either by the judge who has to decide the question or by the creator of the trust. It is for the court to decide whether the trust, when properly construed, fulfils the legal conception of a charitable trust: *Re Cranston, Webb* v. *Oldfield* (11) and *Re Hummeltenberg, Beatty* v. *London Spiritualistic Alliance, Ltd.* (15). Further, it is well settled that, if the trusts include non-charitable as well as charitable purposes and under the terms of the trusts the trustees can apply the whole of the trust fund to the non-charitable purposes, the whole trust fails and there is no room for any apportionment between the charitable and non-charitable purposes: *Morice* v. *Bishop of Durham* (4), *Hunter* v. *A.-G.* (17), and *Re Tetley, A.-G.* v. *National Provincial and Union Bank of England* (16).

The present case is concerned with a trust for the benefit of animals. Most (if not all) of the reported cases dealing with such kind of trusts have been cited to us in the course of the argument. The authorities show that the broad ground upon which such trusts have been held to be charitable is that they are for the benefit of mankind in that they cultivate a spirit of humanity and mercy towards the brute creation, and, therefore, have an elevating effect on human beings, even although there is nothing in the instrument creating the trust to show that the intention

of the creator of the trust was to do otherwise than benefit the animals in whose favour he declared the trusts. This ground obviously affords a wide scope for charitable gifts in favour of animals and renders it extremely difficult to place any definite limit upon such trusts. Moreover, as pointed out by Lord Sterndale, M.R., in *Re Tetley* (16) ([1923] 1 Ch. at p. 266), if the purpose to benefit mankind be a good ground for upholding these trusts it is difficult to see why any philanthropic purpose to benefit mankind on all sides should be a bad one. However that may be, the Court of Appeal in *Re Wedgwood*, *Allen* v. *Wedgwood* (1), in a reserved judgment, affirmed the principle which Romer, J., in my opinion rightly held to govern the decision in the present case. In that case the trust was a general trust for the protection and benefit of animals, the trustee being given an absolutely free hand to use his judgment as cases arose where he thought he could be of use to animals, the testatrix assenting to the trustee's suggestion that helping to forward the movement for the humane slaughtering of animals and the movement to provide municipal abattoirs where animals could be properly and decently slaughtered were the sort of purposes, amongst others, which she would like to have forwarded. All the arguments which were addressed to us in the present case were addressed to the Court of Appeal in that case, but notwithstanding those arguments and the wide generality of the trust the Court of Appeal unanimously held that the trust was a valid charitable trust. Lord Cozens-Hardy, M.R., after referring to the relevant authorities, said ([1915] 1 Ch. at p. 117):

> "In my opinion it is not possible for us to hold that this trust for the protection of animals is not a good charitable purpose. Apart from authorities which are binding upon us, I should be prepared to support the trust on the ground that it tends to promote public morality by checking the innate tendency to cruelty."

Kennedy, L.J. (ibid. at p. 120), adopts as one of the main grounds of his decision the following passage from the judgment of Chitty, J., in *Re Foveaux*, *Cross* v. *London Anti-Vivisection Society* (8) ([1895] 2 Ch. at p. 507):

> "Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals whether domestic or not has for its objects not merely the protection of the animals themselves, but the advancement of morals and education among men."

And Swinfen Eady, L.J., says:

> "A gift for the protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race."

The court, accordingly, made a declaration that the residue of the testatrix's estate was subject to the trust for the application thereof as to both capital and income for the protection of animals in such manner as the trustee should think fit and that such trust was a good and valid trust for a public and charitable purpose.

This decision is binding on us and the only question is whether the present case can properly be distinguished from that case so as to exclude the principle upon which it was decided. The testatrix's will was made in 1925, some ten years after the decision in *Re Wedgwood* (1). It is a lawyer's will, as appears from the language employed and from the names and descriptions of the attesting witnesses. The draftsman was evidently acquainted with the Mortmain Acts and with the technical meaning of the word "charitable." Conveyancers had, no doubt, at that time accepted the decision in *Re Wedgwood* (1) as correctly interpreting the law. By the will the trustees were directed to establish (without the acquisition of any interest in land which could not lawfully be acquired and held for charitable purposes) and maintain a charitable institution to be called "The Beaumont Animals' Benevolent Society," under such rules and regulations and under such

committee of management as the trustees should in their absolute discretion think fit. The members of the committee and of the governing body and all officials were to be and always to have been declared anti-vivisectionists and opponents of all sports involving the pursuit or death of any stag, deer, fox, hare, rabbit, bird, fish, or any other animal. It is plain, therefore, that the society so to be established was intended to be a charitable society in the technical sense, and that the trustees were not to acquire any land for its purpose which could not lawfully be acquired and held for charitable purposes. The will then goes on to declare the objects of the society, which, broadly speaking, are: (i) The provision of a sanctuary or sanctuaries for animals in the United Kingdom, (ii) the distribution of income among British and foreign homes for the benefit of animals, and (iii) the provision, endowment, or support of hospitals or homes for animals in Great Britain. The first of these objects, if carried out, necessarily involves the acquisition of land. The third may or may not involve such acquisition, and the second does not involve any such acquisition. As I read the will the trustees are not bound to carry out all these objects, but they cannot travel outside them.

As regards the first object the will provides that if a competent authority (which, as regards land in England and Wales, would be the court, or a judge, or the Charity Commissioners, under s. 8 of the Mortmain and Charitable Uses Act, 1891) should sanction the acquisition of land for that purpose, the trustees should acquire land in any part of the United Kingdom of Great Britain and Ireland for the purpose of providing a refuge or refuges for the preservation of all animals, birds, or other creatures not human, which, being feræ naturæ, or otherwise, might be brought to and placed on the land by or with the consent of the committee, and so that all such animals should there be safe from molestation or destruction by man. Then follows a direction making provision for (inter alia) the employment of such custodians, keepers, and other persons as might seem necessary and proper. And, finally, if the purchase of the land should by law require the sanction of a judge of the Chancery Division or Charity Commissioners or other competent authority, a power to take the necessary steps to obtain such sanction whether by a private Act of Parliament or otherwise. In my opinion, the testatrix in declaring this object of the society has made it sufficiently plain that her intention was that her trustees should establish a sanctuary or sanctuaries for the protection and benefit of (i) all the wild animals living on any land acquired for such sanctuary or sanctuaries at the date of its acquisition, and (ii) all the wild or domesticated animals which the trustees might thereafter cause to be brought upon such land. As appears from the will, the testatrix was an opponent of all forms of sport involving the pursuit and destruction of animals. The stipulation that the persons entrusted with the management of the society should be opponents of such forms of sport shows that her primary intention in providing the sanctuary or sanctuaries was to protect the animals from molestation or destruction by persons engaged in the sports of hunting, shooting, and fishing, although no doubt other forms of molestation and destruction were not excluded.

In my opinion, the trust so created is a trust for the protection of animals and comes within the principle of the decision in *Re Wedgwood* (1). The sort of protection which the testatrix in that case contemplated was protection against unnecessary cruelty by butchers in slaughtering domesticated animals for human food, whereas the sort of protection which the testatrix in the present case contemplates is protection against what she conceives to be the unnecessary cruelty by sportsmen in pursuing and killing wild animals whether destined for food or killed for sport. In both cases the trusts actually declared extend beyond the form of protection particularly mentioned by the creating of the trusts. It seems to me that the establishment of such a sanctuary or reserve as the present testatrix contemplated is well within the scope of the trust which was declared by the court in *Re Wedgwood* (1) to be a valid charitable trust. To hold that the present case does not come within the principle upon which the trust can be divided would be, in my opinion, drawing too fine a distinction between the cruel killing by butchers

and the cruel pursuit and killing by sportsmen, and would further add to the complication of a subject already sufficiently complex. The only real distinction between *Re Wedgwood* (1) and the present case is that in the former every right-minded person would agree as to the cruelty against which the animals were to be protected, whereas in the latter there is a sharp difference of opinion upon the subject—but it cannot be denied that there is a large section of the community which is convinced that hunting, shooting, and fishing are sports involving cruelty to animals. The contention that the trust is bad because it includes the protection of animals which are noxious both to mankind and to their fellow animals is, I think, met sufficiently by the answer given by the court to the same contention in *Re Wedgwood* (1), namely, that the trust must be construed in a reasonable and common-sense manner. The trustees are given ample power of regulation and management. There is nothing that I can see in the trust to warrant the contention that there is an imperative obligation to allow destructive animals to invade or unduly multiply themselves in the reserves. With proper custodians and keepers there would be no practical difficulty in carrying out the object which the testatrix had in view according to both the letter and spirit of her will, and however much I may personally differ from the views which she advocates, I think that a reserve conducted on rational lines would do more towards cultivating a spirit of humanity and mercy towards the brute creation and have a more elevating effect on human beings than many of the trusts in favour of animals which have been upheld as valid charitable trusts, such as for instance trusts to protect animals from vivisection.

Although I am content to rest my judgment on the ground that, according to the authorities as they now stand, the present trust is a valid charitable trust, I am not satisfied that even if that view be wrong the trusts of the residue would necessarily fail. The provision that the society should be established without the acquisition of any interest in land which could not lawfully be acquired for charitable purposes seems to me capable of being construed as being in the nature of a fundamental and overriding condition, and, accordingly, rendering such of the trusts of the society as involve the acquisition of land conditional on the trustees being able lawfully to acquire and hold the land necessary to carry out those trusts with the consequence that, unless and until the trustees are in a position to comply with such overriding condition, either by having obtained the sanction of a competent authority to the acquisition of the necessary land for the purposes of the refuge or refuges (as stipulated in the introductory words of the first object) or by obtaining a private Act of Parliament as mentioned at the end of this object, they would be committing a breach of trust in applying any part of the trust fund in carrying out the purposes of this object. The draftsman of the will may have foreseen the possibility of the trusts to establish a sanctuary being held to be non-charitable, and, therefore, in order to preserve the strictly charitable character of the gift of residue, may have thought it prudent to insert the overriding conditions to which I have referred, so as to prevent the trustees from spending any part of the trust fund of the charity upon any of the objects involving the acquisition of land without first making certain that the necessary land could lawfully be acquired and held by them for the purposes for which it was required. The reference to obtaining a private Act of Parliament is difficult to understand on any other interpretation. If this be the true view the effect would be that unless the purposes of the first object were in fact charitable in the technical sense the trustees could not lawfully acquire and hold land for such purposes without obtaining parliamentary sanction, and in the absence of such sanction they would not be justified in expending any part of the trust fund in carrying out that object, but would have to apply the trust funds wholly for one or other of the charitable purposes specified in the second and third objects. As, however, this point has not been elaborated by counsel, I abstain from expressing any concluded opinion upon it.

There remain only two subordinate points to be mentioned. The first of these is that the trusts of the second object are not wholly charitable in that they include

trusts for individual animals, and the second is that the whole trusts of the residue fail because it would be impossible to find any trustee who had always been a declared anti-vivisectionist and opponent of the sports mentioned in the will. ROMER, J., has dealt with both these points, and I entirely agree with his reasons for holding that they afford no answer to the Attorney-General's contention that the trust created by the testatrix is a valid charitable trust. In the result, I think that the appeal ought to be dismissed, but as my colleagues think otherwise it will be allowed.

RUSSELL, L.J.—There can be no doubt that, upon the authorities as they stand, a trust in perpetuity for the benefit of animals may be a valid charitable trust if in the execution of the trust there is necessarily involved benefit to the public, for, if this be a necessary result of the execution of the trust, the trust will fall within LORD MACNAGHTEN's fourth class in *Income Tax Special Purposes Comrs.* v. *Pemsel* (2) ([1891] A.C. at p. 583), viz., "trusts for other purposes beneficial to the community." So far as I know there is no decision which upholds a trust in perpetuity in favour of animals upon any other ground than this, that the execution of the trust in the manner defined by the creator of the trust must produce some benefit to mankind. I cannot help feeling that in some instances matters have been stretched in favour of charities almost to bursting point; and that a decision benevolent to one doubtful charity has too often been the basis of a subsequent decision still more benevolent in favour of another. The cases have, accordingly, run to fine distinctions, and, speaking for myself, I doubt whether some dispositions in favour of animals held to be charitable under former decisions would be held charitable to-day. For instance, anti-vivisection societies which were held to be charities by CHITTY, J., in *Re Foveaux, Cross* v. *London Anti-Vivisection Society* (8), and were described by him as near the border line, might possibly in the light of later knowledge in regard to the benefits accruing to mankind from vivisection be held not to be charities.

The difficulty arises when you apply the test of benefit to the public to each particular case. The will of Mrs. Grove-Grady is no exception, for it presents a very difficult problem. Clause 8 of her will contains an out-and-out gift of £10,000 to the Royal Society for the Prevention of Cruelty to Animals for a particular purpose, but subject to a certain condition. No question arises under this clause for the legacy was declined, and the sum fell into residue; but the condition ran thus:

> "Provided . . . that at the date of payment . . . the chairman and members of all the committees and the secretaries serving at the headquarters . . . shall then be and always previously have been anti-vivisectionists as regards their opinions, and shall be opposed to all sports involving the pursuit or death of any stag, deer, fox, hare, rabbit, bird, fish, or any other animals feræ naturæ."

This provision was relied upon as throwing some light on the subsequent provision as to residue. The residuary estate is disposed of by cl. 12, by which the trustees of the will are directed to stand possessed of the residuary proceeds of the sale and conversion of her real and personal estate, and all income thereof until sale and conversion, thereinafter called "the trust fund" upon trust for the founding and establishing, and thereafter upholding and maintaining an institution to be called "The Beaumont Animals' Benevolent Society." The testatrix calls the proposed institution a "charitable institution," but this will not make the trust valid if in law the institution is not charitable. To ascertain this we must ascertain the objects of the institution, and the purposes for which the moneys may consistently with the terms of the trust be applied.

After providing for the making of rules and regulations by the trustees and providing that the committee, the governing body, and all officials "shall be and always have been declared anti-vivisectionists and opponents of all sport involving the pursuit or death of any animal," the testatrix defines the objects of The Beaumont Animals' Benevolent Society. They are three in number. The contest

in the present case has centred mainly round number one. This, as I read it, is the provision and maintenance of a sanctuary or sanctuaries for animals, the relevant words being (for the moment I pass by the reference to the purchase being sanctioned)

> "the purchase of . . . lands of any tenure . . . in any part or parts of the United Kingdom of Great Britain and Ireland . . . for the purpose of providing a refuge or refuges for the preservation of all animals, birds, or other creatures not human which, being feræ naturæ, may be living on such land at the time of the purchase thereof, or which, being feræ naturæ or otherwise, may be brought to and placed on such land . . . by or with the consent of the committee . . . and so that all such animals, birds, or other creatures not human shall be safe from molestation or destruction by man, and I declare that out of the trust fund provision shall be made by and at the discretion of the committee . . . for the maintenance upkeep and preservation of such lands and buildings and the walls fences and hedges thereof including the employment of such custodians, keepers or other persons as may seem necessary or proper."

That is the first object of the contemplated society. Two points call for remark at this stage. I have described it as the provision of a sanctuary for animals. The strict wording limits the animals to (a) animals feræ naturæ which were living on the land at the time of purchase, and (b) animals whether feræ naturæ or otherwise subsequently brought on the land by or with the consent of the committee. Animals subsequently coming on to the land either voluntarily from outside or as lineal descendants of animals within class (a) do not fall within the definition of the beneficiaries. In view, however, of the impossibility of compiling a reliable census of the original inhabitants under class (a), it would be wrong to adopt so strict a construction. Indeed, to carry out the trust would be an impossibility, unless you acted as though the strict construction did not prevail, and as though all animals in the sanctuary (except such as were brought there by human agency without the leave of the committee) were objects of the trust and were to be kept safe from molestation or destruction by man. I think all animals for the time being on the land, except such as have been brought there by human agency without the leave of the committee, must be considered as beneficiaries. The second observation is this. I am unable to treat the will as providing that the application of the trust fund to object No. 1 shall be in any way dependent upon the Chancery Division or the Charity Commissioners or any other authority giving its sanction to the purchase of the land. Nor can I assent to the view that any such authority (if its sanction were needed to the purchase) could or would take advantage of that fact to impose terms so as to alter in any way the provisions of the will and turn a non-charitable trust into a charitable trust. The references in object No. 1 to the assent or sanction of some competent authority only apply if the land purchased is in England. There is nothing to prevent the trustees giving full effect to object No. 1 without being under any necessity of applying for any sanction, if the land be purchased in Ireland or Scotland.

Let me assume that the society is formed and that its funds are applied in the following manner, which I believe to be strictly in accordance with the terms of the will under object No. 1: A stretch of land is bought. It is enclosed. Animals are (or are not) introduced thereon by the committee. A staff of custodians, keepers, and other persons is engaged. Their only functions according to the trust would appear to be to see that the animals there are safe from molestation or destruction by man. Except for that the trust contemplates nothing beyond the provision of the land as an abode for the animals. Assuming that I have correctly interpreted object No. 1, it comes down to this, that the residuary estate may be applied in acquiring a tract of land, in turning it into an animal sanctuary, and keeping a staff of employees to ensure that no human being shall ever molest or destroy any of the animals there. Is that a good charitable trust within the authorities?

In my opinion, it is not. It is merely a trust to secure that all animals within the area shall be free from molestation or destruction by man. It is not a trust directed to ensure absence or diminution of pain or cruelty in the destruction of animal life. If this trust is carried out according to its tenor no animal within the area may be destroyed by man no matter how necessary that destruction may be in the interests of mankind or in the interests of the other denizens of the area or in the interests of the animal itself; and no matter how painlessly such destruction may be brought about. It seems to me impossible to say that the carrying out of such a trust necessarily involves benefit to the public. Beyond, perhaps, hearing of the existence of the enclosure the public does not come into the matter at all. Consistently with the trust the public could be excluded from entering the area or even looking into it. All that the public need know about the matter would be that one or more areas existed in which all animals (whether good or bad from mankind's point of view) were allowed to live free from any risk of being molested or killed by man, though liable to be molested and killed by other denizens of the area. For myself I feel quite unable to say that any benefit to the community will necessarily result from applying the trust fund to the purposes indicated in the first object.

If, then, benefit to the community as a necessary result of the execution of the trust is essential, this trust is not charitable. It is well settled that if, consistently with the trust, the funds may be applied for a purpose not charitable, the trust will fail for perpetuity notwithstanding that the funds might under the trust have been applied for purposes strictly charitable. It was, however, argued before us that a trust merely for the protection and benefit of animals must be a good charity, and for this proposition reliance was placed on the decision of this court in *Re Wedgwood*, *Allen* v. *Wedgwood* (1). That case is, of course, binding upon us as a decision, and requires careful consideration. If the argument on this point means that it is unnecessary to find a benefit to the community as an ingredient of the charitable trust, in other words that a gift for the benefit of animals simpliciter which involves no such benefit is a good charity, the answer is that *Re Wedgwood* (1) decides no such thing. All the members of the court discovered in the trust a benefit to the community. Unless such a benefit is involved in the trust, you could not bring the case within LORD MACNAGHTEN'S fourth class in *Pemsel's Case* (2). If the argument is that *Re Wedgwood* (1) lays down as a principle that every trust for the protection and benefit of any animals necessarily involves a benefit to the community, and is, therefore, charitable, again the answer is that *Re Wedgwood* (1) lays down no such principle.

It was a peculiar case in that the trust was a secret trust declared orally. To ascertain the scope of the trust regard had to be had to all the verbal statements made by the testatrix. The testatrix had explained the nature of the methods by which she desired her estate to be applied for the protection and benefit of animals, viz., in obtaining for them the benefit of humane slaughtering, i.e., avoidance of cruelty. All the members of the court refer to that fact in their judgments, and from that they were able to spell out public benefit. Except for that purpose there was no occasion to refer to that fact at all. LORD COZENS-HARDY says: "It tends to promote public morality by checking the innate tendency to cruelty." KENNEDY, L.J., in reviewing ([1915] 1 Ch. at pp. 120 and 121) what he calls the particularly pertinent decisions relies on those in which it is pointed out that the prevention of cruelty to animals is for the benefit of the public. SWINFEN EADY, L.J., seems quite clear on the point. After referring to the explanation of the testatrix above mentioned he uses this language: "The object of the trust being thus ascertained the question arises, is this a valid charitable trust?" He says that it is because it is a gift for a general public purpose beneficial to the community. He arrives at that view because (amongst other things) the discouragement of cruelty promotes humane sentiments in man towards the lower animals and elevates the human race. It seems to me that the decision in *Re Wedgwood* (1) is definitely based on the view that the object of the trust being discouragement of cruelty to lower animals,

then upon the existing authorities that involved benefit to the community. The court in *Re Wedgwood* (1) was certainly not purporting to lay down any new law. It is not, in my opinion, a decision either (i) that every trust for the benefit of animals necessarily involves benefit to the community, or (ii) that a trust for the benefit of animals which involves no such benefit is not a charitable trust.

In my opinion, the court must determine in each case whether the trusts are such that benefit to the community must necessarily result from their execution. In the present case I cannot persuade myself that the trusts described by the testatrix under the head of the first object fulfil that description. To do so would go far beyond any decided case. The authorities have, in my opinion, reached the furthest admissible point of benevolence in construing as charitable, gifts in favour of animals; and, for myself, I am unprepared to go any further. I think Romer, J., erred in this case in attributing too wide an effect to the decision in *Re Wedgwood* (1). He takes the view, I think, that the case decided, or that the decision involves, that every gift for the benefit of the lower animals must tend to promote public morality, and must, therefore, be charitable. As indicated above, I do not take this view. I think the decision covers a much narrower field and is based upon the expressed desire of the testatrix to diminish cruelty, out of which the court felt itself able to find that benefit to the community must necessarily follow from the execution of the trust. I agree with the order suggested by the Master of the Rolls.

Appeal allowed.

Solicitors: *Iliffe, Sweet & Co.*, for *Laycock, Dyson & Laycock*, Huddersfield; *Treasury Solicitor*; *Pennington & Son.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

HUMPHERY *v.* WILSON

[Court of Appeal (Scrutton and Greer, L.JJ., and Eve, J.), June 6, 1929]

[Reported 141 L.T. 469; 45 T.L.R. 535]

Gaming—Bookmaker—Loan to partnership for general purposes of business—Legality—Money not required for making bets—Gaming Act, 1710 (9 *Anne*, *c.* 14) *and Gaming Act*, 1835 (5 *& 6 Will.* 4, *c.* 41).

A loan to a firm of bookmakers for the general purposes of the business and charged by deed on the assets of the partnership is not illegal, in the absence of proof that the money was required for the purpose of making bets, as being "for the reimbursing or repaying any money knowingly lent or advanced for betting" within the meaning of the Gaming Acts, 1710 and 1835.

Per Lord Hewart, C.J. (at first instance): A partnership for carrying on the business of a bookmaker is not unlawful: *Jeffrey* v. *Bamford* (1), [1921] 2 K.B. 351, followed.

Notes. There is a conflict of authority as to whether a partnership for carrying on the business of a bookmaker is in itself unlawful. In favour of its legality are the dictum and case cited above; *Partridge* v. *Mallandaine* (1886), 18 Q.B.D. 276 (which was, however, decided before the Gaming Act, 1892; *Harvey* v. *Hart* (1894), 38 Sol. Jo. 418 (betting merely collateral to the partnership); *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496 (in which, however, the Gaming Act, 1892, was not referred to); *Brookman* v. *Mather* (1913), 29 T.L.R. 276; and *Keen* v. *Price*, [1914]

2 Ch. 98. However, in *Hyams* v. *Stuart King*, [1908] 2 K.B. 696 at p. 718 (overruled on another point by *Hill* v. *William Hill* (*Park Lane*), *Ltd.*, [1949] 2 All E.R. 452), FLETCHER MOULTON, L.J., in the Court of Appeal, said that such a partnership was impossible in law; and there are decisions to this effect by DARLING, J., in *Thomas* v. *Dey* (1908), 24 T.L.R. 272, and in *O'Connor & Ould* v. *Ralston*, [1920] 3 K.B. 451.

As to betting partnerships, see 18 HALSBURY'S LAWS (3rd Edn.) 178, paras. 355–356; and as to loans for gaming and wagering, see ibid. 179–180, paras. 357–358.

Cases referred to:

(1) *Jeffrey* v. *Bamford*, [1921] 2 K.B. 351; 90 L.J.K.B. 664; 125 L.T. 348; 37 T.L.R. 601; 65 Sol. Jo. 580; 25 Digest 413, *164*.

(2) *Sutters* v. *Briggs*, [1922] 1 A.C. 1; 91 L.J.K.B. 1; 125 L.T. 737; 38 T.L.R. 30; 66 Sol. Jo. (W.R.) 9, H.L.; 25 Digest 418, *213*.

(3) *Re Lister*, *Ex parte Pyke* (1878), 8 Ch.D. 754; 38 L.T. 923; 26 W.R. 806; sub nom. *Re Lister*, *Ex parte Pike*, 47 L.J.Bcy. 100, C.A.; 25 Digest 415, *191*.

(4) *Re O'Shea*, *Ex parte Lancaster*, [1911] 2 K.B. 981; 81 L.J.K.B. 70; 105 L.T. 486; 18 Mans. 349, C.A.; 25 Digest 415, *192*.

(5) *Applegarth* v. *Colley* (1842), 10 M. & W. 723; 12 L.J.Ex. 34; 7 J.P. 741; 7 Jur. 18; 152 E.R. 663; 25 Digest 416, *203*.

Appeal from a decision of LORD HEWART, C.J., in an action tried without a jury.

In November, 1927, the plaintiff advanced £2,000 to the defendants, a firm of bookmakers, by way of additional capital in their business. The repayment of the money advanced, together with interest thereon, was secured by deed, charging the assets of the partnership. In an action brought by the plaintiff to recover the money lent, the defendants admitted that they had received the money and that it had not been repaid, but pleaded that it had been advanced for the purpose of gaming, and therefore was not recoverable under the Gaming Acts, 1710 and 1835. For the plaintiff it was argued that he could disregard the charge and sue for return of money lent, and further, that the money was advanced for the general purposes of a legitimate business and used to pay rent, taxes and salaries, just as much as for payment of bets. The plaintiff was ignorant of the special purposes for which the money was required. LORD HEWART, C.J., gave judgment for the plaintiff and the defendants appealed.

Croom-Johnson, *K.C.*, and *Harold Simmons* for the defendants.

Geoffrey Lawrence, *K.C.*, and *W. T. Monckton*, for the plaintiff, were not called upon.

SCRUTTON, L.J.—If it were necessary to decide all the points which have been argued by counsel in support of this appeal, we should certainly desire to hear counsel for the respondent plaintiff, and should probably have to take time to consider the effect of the conflicting currents of authority which have been cited to us, but in our view the ground upon which the Lord Chief Justice has decided this case is correct, and that relieves us from going into questions which might raise considerable difficulty.

The case arises in this way. There is a firm of Leslie Wilson & Co. who carry on a business. I do not say what the business is at present. Sir John Humphery, the plaintiff, has lent that business £2,000, of which the gentlemen carrying on the business of Leslie Wilson & Co. have had the full benefit. The plaintiff wants to be repaid, whereupon the gentlemen who have had the benefit of the £2,000, the defendants, think it consistent with honourable dealing to take the view that they are not liable to repay the £2,000 because the transaction is contrary to the Gaming Act. There are people who, having taken bets, run away with the crowd after them; they are called welshers. One can do it in a more superfine way by pleading the Gaming Act in court, and I regret that the gentleman who appears to have held

A a commission in His Majesty's Army should have thought it right, and consistent with his honour as a gentleman, to plead the Gaming Act. However, he is entitled to a judgment on a point of law, and that judgment I will endeavour to give. It appears that when the loan of £2,000 was made a document was drawn up in which it was described as a charge to secure £2,000 and interest. That document does not mention what the business is that the defendants, Arthur Marcus Mosley B Cheeke and Robert Talbot Cowley Brown, are carrying on, except that they are carrying it on at 12, Rochester Row, in the city of Westminster. It recites that the borrowers, the defendants, have requested Sir John Humphery, the mortgagee, the plaintiff, to lend them the sum of £2,000, and that the mortgagee has agreed to lend upon having the repayment of the said sum with interest secured to him and in consideration of the sum of £2,000 paid to the borrowers. This deed wit- C nesses . . . Then the borrowers give a charge to secure the £2,000, and for the consideration aforesaid they covenant to repay the £2,000 on the 25th day of March next.

What is said is that the charge or security is contrary to a statute to the terms of which I will refer in a moment, and it is said that inasmuch as the charge is made void by that statute, the covenant to pay, by which the charge is a security, D is also made void. A very large number of authorities one way or the other have been cited in support of that contention. I do not propose to express any opinion upon that argument, except to say that when it becomes necessary to investigate it, some very pertinent remarks of LORD SUMNER will be found in *Sutters* v. *Briggs* (2). I mention that case because it has not been cited to us, and it seems to me very instructive. But before we get to the point whether the covenant cannot be sued E upon because the charge or security is made invalid by a statute, one has to see whether the charge or security is made invalid by a statute, and that turns in the first place on the provisions of the Gaming Act, 1710. That section provides:

> "That for the further preventing of all excessive and deceitful gaming be it enacted . . . that all mortgages and other securities or conveyances where the whole or any part of the consideration of such conveyances or securities shall F be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice tables, tennis, bowls, or other game or games whatsoever."

That has nothing to do with this case, except that by a series of decisions it has been decided that racing is a game, and, as I had occasion to say during the argument, it appears to be a game of chance. The section goes on: "or by betting on G the sides or hands of such as do game at any of the games aforesaid." That has nothing to do with this case, but we now come to the words which are said to be material in this case:

> "or for the reimbursing or repaying with money knowingly lent or advanced for such gaming or betting as aforesaid or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid H shall be utterly void."

Now was the money in this case lent by the plaintiff to the defendants, two gentlemen who are admitted to be carrying on the business of bookmakers; was it lent or advanced for such "gaming or betting as aforesaid"? This statute is in the nature of a penal statute; it makes that void and irrecoverable which, but for the statute, could be recovered and would not be illegal, and in my view the person I in court who alleges that such a transaction is made void and irrecoverable must prove it strictly. One has a little difficulty in this case, because neither side called any evidence with the result that the court must take judicial knowledge of what is a bookmaker's business as far as it can, and, using the very limited knowledge which I possess of a bookmaker's business, I say that a bookmaker does not need money to bet with. A bookmaker is not like a backer who very frequently has to deposit money when he bets. The bookmaker never—or, as far as I understand, hardly ever, probably never—starts by depositing money when he bets. His need for money comes when he has to pay the bet that he has made, and he trusts that

in the result of the combined operations of his bets he will have sufficient money to pay all. Further, the bookmaker undoubtedly incurs a series of expenses which he has to pay which are in no way illegal or irrecoverable. At present he has to pay His Majesty's Government a tax on his bets; there is nothing void about that, and he is bound to pay it. He probably has to pay rent for the premises he occupies; he may have to pay salaries to any clerks he employs. And there are two decisions of the Court of Appeal which have been referred to (*Re Lister, Ex parte Pyke* (3) and *Re O'Shea, Ex parte Lancaster* (4)) to the effect that this statute does not apply to money lent to pay bets which have been lost, but that it only applies to money lent in order to make bets. When one sees that there are all these matters which do not come within the scope of the statute, and that the only suggestion made why this money is irrecoverable is that it may be used—although there is no evidence of it—in order to make bets, I come to the conclusion that the defendant has not satisfied the burden laid upon him of showing that the money was to be used for purposes which would make the security void under this statute, and under the later statute would make the security given for an illegal consideration. That is substantially the ground taken by the Lord Chief Justice. I agree that it is the correct view to take of the facts and of the burden of proof, and I have the greatest pleasure in deciding the point of law in accordance with what I think is common honesty. For these reasons I think the appeal should be dismissed with costs.

GREER, L.J.—I agree. I also think that if it had been necessary to determine whether the law was correctly laid down by ROLFE, B., in *Applegarth* v. *Colley* (5), or whether or not, having regard to the subsequent cases, some qualification must be put upon the dicta of ROLFE, B., representing himself and the other judges of the Court of Exchequer in that case, I should have found it necessary to reserve my decision and to consider the authorities. But in my view no such question arises on this appeal.

This action was brought to recover £2,000, money lent on Nov. 18, 1927, and interest thereon at 15 per cent. The claim succeeded, and judgment was recovered for £2,147. The plaintiff established, and indeed it was not in dispute upon the pleadings such as there were in this case, that he had in fact advanced £2,000 upon the terms contained in the document creating a charge, but which also contained the promise to repay the amount of £2,000 with the agreed interest of 15 per cent. Once that was established it was necessary that the defendants should meet the primâ facie claim by establishing one of the pleadings they had put on the record in the shape of the affidavit under Ord. 14 to which pleas they were expressly, by the order of the court, confined. The only material plea which I have to consider for the purpose of my judgment is that which is contained in para. 4 of the affidavit, and which reads thus:

> "On or about the Nov. 18, 1927, the plaintiff lent to me and my co-defendants the sum of £2,000. The said loan was made for the purpose of enabling me and my co-defendants to effect bets and wagers in the course of our business and such money was so used. I contend that the money having been so advanced was advanced for the purpose of gaming and wagering and is irrecoverable in consequence of the statute of 9 Anne, c. 14, and 5 & 6 Will. 4, c. 41."

No evidence was called by the defendants at all in support of that plea, but they say that there was enough contained in the admissions made by counsel for the plaintiff to make it as a matter of law necessary that the learned Lord Chief Justice should draw the inference that they had established this plea. The extent of the admission as I understand it was this, that the defendants were in fact bookmakers, and that the money was lent to them to be used by them in their business as bookmakers. That seems to me quite consistent with it having been lent for purposes which are perfectly lawful for a bookmaker or for anyone else to carry out. It is not unlawful, as I understand the law, for a bookmaker to have an

office and to agree to pay rent; it is not unlawful for him to have clerks and to agree to pay their wages; it is not unlawful for him to have an accountant to audit his books; and there are innumerable ways in which he may, for the purposes of carrying on his business, make perfectly lawful contracts, for implementing which he may require money. It has also been determined that if in fact at the time the money is lent he owes money upon bets which have already been made and lost by him it is quite lawful for him to borrow money in order to pay those debts of honour. Under those circumstances, I do not see how it can be said or suggested that there was any real evidence upon which the learned judge could have been asked to find that pleas put upon the record by the defendants had been established. He has found that they were not established, and that the plaintiff is entitled to recover, and I see no reason for interfering with that decision.

EVE, J.—I am of the same opinion. One can test the case by assuming that the plaintiff had elected, as he well might have done, to bring an action to enforce the security. In such an action he would have pleaded the security and the covenant, and he might well have admitted that he knew that the money he was advancing on the security was to be utilised for the business which the defendants were carrying on and that the business was that of bookmakers. To that the defendants would have pleaded that the money was advanced for the purpose of wagering, and if they had so pleaded, they might probably have been required to give particulars. But if they had not given particulars or if they had given particulars at the trial, the burden would have been upon them to set aside the security and the covenant by establishing the truth of the plea which they advanced by way of defence. Unless counsel for the defendants is prepared to go to this length, that every loan to a person carrying on a bookmaker's business is void, I cannot see how he can support his case in the absence of evidence to show that in this particular case the money was to be applied for purposes which rendered this an illegal contract. I think the judgment which was given in the court below is correct, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Button, Fitch, Aylmer & Cooper*; *Charles Wilmot & Co.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

A

STANYFORTH *v.* INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Viscount Dunedin, Lord Warrington and Lord Atkin), February 25, 27, March 13, 1929]

[Reported [1930] A.C. 339; 99 L.J.K.B. 327; 142 L.T. 641; 46 T.L.R. 288] B

Stamp Duty—Voluntary disposition—Reappointment of settled estates—Valuation for stamp duty "of the property transferred"—Liability to defeasance by re-appointment of interest to be valued—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 74.

By a strict settlement, dated June 27, 1870, family estates of an agreed present value of £7,454,200 were settled subject to a power conferred on certain members of the family to revoke all the trusts of the settlement and to re-appoint the settled estates. This power was exercised several times, and was expressly preserved by each deed of re-appointment. By a deed poll, dated Sept. 16, 1911, this power of re-appointment, which was then vested in V.P. and H.B.P., was exercised to cut down the then reversionary interest in the settlement of C.B.P. and his issue, and to transfer part of such interest to the persons then entitled in remainder to C.B.P. and his issue. This deed of 1911 preserved the power of revocation and re-appointment over the property re-appointed contained in the settlement of 1870, and declared that the power was to override all the uses created by the 1911 deed. If the existence of these powers of revocation and re-appointment were to be disregarded the difference between the market value of the property enjoyed by C.B.P. and his issue before the 1911 deed and that of the property enjoyed by them after such deed amounted to £1,990,700, but, owing to the existence of these powers, the actual open market value of the interests, which were liable to be defeated by the powers, of which C.B.P. and his issue were deprived by the 1911 resettlement, was only £50. On the question what was "the value of the property conveyed or transferred" by the 1911 resettlement on which, by the Finance (1909–10) Act, 1910, s. 74, the stamp duty on the resettlement deed was to be assessed,

C D E F

Held: the overriding power of revocation and re-appointment could not be disregarded in assessing the value for stamp duty purposes of the property transferred, and such value was, therefore, only £50.

Earl of Westmorland v. *I.R.Comrs.* (1), [1928] 1 K.B. 703, overruled. G

Notes. Considered: *Fuller* v. *I.R.Comrs.*, [1950] 2 All E.R. 976.

As to stamp duty on an appointment, see 28 HALSBURY'S LAWS (2nd Edn.) 457, para. 971; on a voluntary disposition, see ibid. 475–477, paras. 1004–1007.

Case referred to:

(1) *Earl of Westmorland* v. *I.R.Comrs.*, [1928] 1 K.B. 703; 97 L.J.K.B. 116; 138 L.T. 171; 71 Sol. Jo. 946, C.A.; 39 Digest 284, *667*. H

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., and SLESSER, L.J.; LAWRENCE, L.J., dissenting) ([1930] 1 K.B. 58) on a Case Stated by the Inland Revenue Commissioners pursuant to s. 13 of the Stamp Act, 1891. The Case Stated, so far as material, was as follows: 1. The opinion of the court is desired as to the stamp duty chargeable on an instrument which has been presented to the Commissioners of Inland Revenue on behalf of the appellants, Colonel Edwin Wilfred Stanyforth, C.B., and the Hon. Egremont John Mills (who are hereinafter called "the appellants" and who are the present trustees for the purposes of the Settled Land Act of the Portman family settled estates) or their predecessors in title by Messrs. Wilde, Wigstone, and Sapte, their solicitors, under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which it is chargeable. 2. The instrument in question is a deed poll dated Sept. 16, 1911, under the hands and seals of the Right Hon. William I

A Henry Berkeley, second Viscount Portman (who died on Oct. 16, 1919), and the third Viscount Portman, then the Hon. Henry Berkeley Portman, who was at the date of the deed poll the eldest surviving son of the second Viscount Portman and who died on Jan. 18, 1923. 3. The resettlement is a deed of revocation of certain uses, estates, or limitations, and new appointment of certain other uses, estates or limitations of freehold property of great value in London, Middlesex, Dorset, and B elsewhere (forming the Portman family settled estates) and capital moneys representing the proceeds of sale of part of the London and Middlesex settled estates and liable to be invested in the purchase of land to be made subject to the subsisting uses of the London and Middlesex settled estates. 4. Immediately prior to the resettlement the London, Middlesex, and Dorset settled estates forming part of the Portman family settled estates (together with certain other estates in Somerset C and Devon, which are dealt with by the resettlement, but in respect whereof no claim for ad valorem stamp duty as hereinafter appearing has been made) stood limited subject to certain jointures and family charges and powers of charging and other powers including powers of revocation and new appointment by deed, which were reserved to the second Viscount Portman and the Hon. Henry Berkeley Portman, as hereinafter appearing to the following uses successively, namely: (1) to D the use of William Henry Berkeley, second Viscount Portman, for life, (2) to the use of the Hon. Henry Berkeley Portman, afterwards third Viscount Portman, for life, (3) to the use of the first and other sons of the Hon. Henry Berkeley Portman successively according to seniorities in tail male, (4) to the use that if the Hon. Claud Berkeley Portman (the second surviving son of the second Viscount Portman and the present fourth Viscount Portman) or any son of his should become entitled E in possession under the following limitation the Hon. Gerald Berkeley Portman (the fourth surviving son of the second Viscount Portman) during his life and after his death his eldest surviving son during his life should receive a yearly rentchange of £5,000 and subject thereto, (5) to the use of the Hon. Claud Berkeley Portman for life, (6) to the use of the first and other sons of the Hon. Claud Berkeley Portman successively according to seniorities in tail male, (7) to the use that if the F Hon. Seymour Berkeley Portman, the third surviving son of the second Viscount Portman, should succeed to the title he should receive for life a yearly rentcharge of £4,000 and subject thereto, (8) to the use of the Hon. Gerald Berkeley Portman for life, (9) to the use of the first and other sons of the Hon. Gerald Berkeley Portman successively according to seniorities in tail male, (10) divers uses over in remainder. 5. By the resettlement the second Viscount Portman and the Hon. G Henry Berkeley Portman, in whom jointly the above-mentioned power of revocation and new appointment was vested, in exercise of that power revoked the uses identified above by the numbers (4) to (10) and appointed new uses, effecting the changes hereinafter specified, but in other respects restoring the interests previously subsisting but subject as hereinafter mentioned. 6. The settlement of the said settled estates as altered by the resettlement differed from the settlement subsisting H immediately before the execution of the resettlement in the following respects, namely, under the resettlement the Hon. Claud Berkeley Portman took in the place of his life interest in the London and Middlesex estates (including investments representing proceeds of sale of parts of those estates) a life rentcharge of £50,000 charged on those estates, and the sons of the Hon. Claud Berkeley Portman took in the place of their successive estates in tail male in the London, Middlesex, and I Dorset estates successive estates for life or in tail male in a rentcharge of £50,000 charged on the London and Middlesex estates, and, except to the extent of the said rentcharge of £50,000 a year, the limitations of the London and Middlesex estates which under the former settlement took effect in remainder after the successive life estate and estates in tail male of the said Claud Berkeley Portman and his sons respectively were advanced and replaced by life estates or estates in tail male taking effect in succession immediately after the estates for life and in tail male of the Hon. Henry Berkeley Portman and his sons respectively, and the limitations of the Dorset estate which under the former settlement took effect in remainder after

the estates in tail male of the sons of the Hon. Claud Berkeley Portman were advanced and replaced by estates for life or in tail male taking effect in succession immediately after the life estate of the said Claud Berkeley Portman, the effect being to accelerate the interests of the subsequent remaindermen as if the life estate and estates in tail male of the said Claud Berkeley Portman and his sons had, to the extent mentioned, been surrendered in favour of the remaindermen. 8. The appointment effected by the resettlement was made subject and without prejudice as to all the hereditaments thereby appointed or as to such of them as were affected thereby respectively to the uses and estates which preceded the use or limitation in favour of Claud Berkeley Portman and his assigns during his life and to the powers (including all powers of revocation and new appointment which powers were thereby preserved and were intended to override all the uses powers and provisions created by the resettlement) and privileges and trusts to such precedent uses and estates respectively annexed or exercisable during the continuance or by virtue thereof. 9. The powers of revocation and new appointment above referred to were reserved or created by an indenture dated June 27, 1870, and made between the late Right Hon. Edward Berkeley first Viscount Portman and the second Viscount Portman (then the Hon. William Henry Berkeley Portman) of the one part, and Henry Beilby William Milner and the Hon. George Henry Cavendish of the other part. The said powers had been preserved by two deeds of partial revocation and new appointment dated March 13, 1906, and Jan. 25, 1909, under the hands and seals of the second Viscount Portman and the late Edward William Berkeley Portman. 11. The commissioners were of opinion that the resettlement conferred a substantial benefit on the persons (other than Claud Berkeley Portman and his male issue) who took interests thereunder in remainder expectant on the determination or failure of the uses referred to in para. 4 of this case as numbers (1) (2) and (3) and that the resettlement operated as a voluntary disposition inter vivos within the meaning of s. 74 of the Finance (1909–10) Act, 1910, of the London, Middlesex, and Dorset estates, and the capital moneys representing the proceeds of sale of part of the London and Middlesex estates, subject to the estates therein of the second Viscount Portman and Henry Berkeley Portman and his male issue, and was subject to ad valorem duty accordingly. 12. The commissioners were further of opinion that in arriving at the value of the property conveyed or transferred by the resettlement (by reference to which the stamp duty under the last-mentioned section is chargeable) the overriding powers of revocation and new appointment were to be disregarded and such value was to be arrived at by deducting from the agreed value of the estates in possession, namely, £7,454,174, the values of the estates either preserved or restored by the settlement. The value of the property conveyed as fixed by the commissioners, £1,990,700, equals the difference (arrived at on the basis of a fair distribution of the market value of the estate as a whole among the persons entitled to the several estates and interests therein) between what Claud Berkeley Portman and his issue had (1) before and (2) after the resettlement which difference was by the resettlement transferred from Claud Berkeley Portman and his issue to other persons. 13. It is agreed between the appellants and the commissioners and their respective actuaries that if the overriding powers of revocation and new appointment are to be disregarded and if the method adopted in the case is the correct method of arriving at the value of the property conveyed for the purpose of s. 74 of the Finance (1909–10) Act, 1910, then the value of the property conveyed or transferred by the resettlement is £1,990,700. The commissioners have, accordingly, assessed the duty, with which the resettlement is chargeable, at £19,907 ad valorem duty under s. 74 of the Finance (1909–10) Act, 1910, and 10s. the fixed duty in respect of the rest of the operation of the resettlement. The duty as assessed was paid under protest on Feb. 6, 1928. 14. No objection was taken by the appellants to the fixed duty of 10s., but the appellants contended first that the resettlement, being subject to the overriding powers of revocation and new appointment, was at the material date an ambulatory document and was not a disposition within the meaning of s. 74 of the

Finance (1909–10) Act, 1910, and, secondly (if this first contention were wrong), that in valuing the property conveyed or transferred by the resettlement for the purpose of s. 74 of the Finance (1909–10) Act, 1910, the overriding powers of revocation and new appointment had to be taken into account, and that these powers had the effect of reducing the value of the property conveyed or transferred to a nominal sum, and that the ad valorem duty under the said section should be assessed at 10s. The commissioners admitted that the value of the expectant reversionary interests of which Claud Berkeley Portman and his male issue were deprived as aforesaid if sold at the date of the resettlement in the open market, subject to the overriding powers of revocation and new appointment vested in other persons by which they were liable to be defeated, did not exceed a nominal sum which the commissioners were prepared to agree at £50. 15. The appellants contended alternatively that, if they were wrong in their first contention and in their contention that the overriding powers of revocation and new appointment should not be disregarded but should be taken into account in valuing the property, then the claim of the commissioners to ad valorem duty should be restricted to the value in the open market of the reversionary interests of which Claud Berkeley Portman and his male issue were deprived by the resettlement over and above the new interests conferred on them by the resettlement, disregarding the overriding powers of revocation and new appointment. It had been agreed between the appellants and the Commissioners of Inland Revenue that the value (if such value were relevant to the issues in this case) in the open market at the date of the resettlement of the reversionary interests of Claud Berkeley Portman and his male issue of which they were deprived by the resettlement, over and above the value in the open market at the date of the resettlement of the interests conferred on them by the resettlement, disregarding the overriding powers of revocation and new appointment, was the sum of £1,250,000. The appellants accordingly contended that the commissioners' claim for ad valorem duty should be restricted to £12,500 ad valorem duty on £1,250,000. The main reason for the difference between the said sums of £1,990,700 and £1,250,000 was that the asset under valuation was of a kind for which it would be extremely difficult to find a purchaser who would pay its full value. 16. The appellants, being dissatisfied with the assessment of duty at £19,907, duly required the commissioners to state and sign a case setting forth the question on which their opinion was required and the assessment made by them in pursuance of s. 13 of the Stamp Act, 1891. 17. The questions for the opinion of the court were: (i) Whether, in addition to the fixed duty of 10s., the resettlement was liable to £19,907 as assessed by the commissioners. (ii) Whether, in addition to the fixed duty of 10s., the resettlement was liable to £12,500 ad valorem duty on £1,250,000. (iii) Whether, in addition to the fixed duty of 10s., the resettlement was liable to 10s. ad valorem duty on £50. (iv) Whether, in addition to the fixed duty of 10s., the resettlement was liable to any duty and if so what duty?

The Court of Appeal held (affirming the decision of Rowlatt, J.; Lawrence, L.J., dissenting) that the commissioners had not in fact disregarded altogether the powers of revocation and new appointment, but had considered that such powers were not an overriding factor in arriving at the value of the property conveyed by the resettlement. *Earl of Westmorland* v. *I.R.Comrs.* (1), which bound the court to hold that the fact of the existence of such powers in the deed to be stamped ought to be estimated and not treated as an overriding consideration, applied equally where, as here, the powers were to be found outside the deed in question. The commissioners were right in so deciding, and in their method of reaching the true value of the property conveyed by reference to the value of the estate in possession, after deducting the value of the incumbrances and of the life estates, as that was the principle adopted in the *Earl of Westmorland's Case* (1). Held, by Lawrence, L.J., dissenting, that the commissioners by disregarding the powers of revocation and new appointment had valued the property on the footing that it consisted of an indefeasible estate in remainder when in fact it was a defeasible

estate in remainder. The *Westmorland Case* (1) was essentially different. As the commissioners had agreed that £50 was the true value of the property conveyed if the powers in it were overriding powers, the amount of the stamp duty ought to be estimated on that sum only. The trustees appealed.

A. M. Latter, K.C., and *F. McMullan* for the appellants.

The Attorney-General (Sir William Jowitt, K.C.) and *J. H. Stamp* for the Crown.

The House took time for consideration.

March 13. **LORD WARRINGTON** read the following opinion: The question in this appeal is as to the amount of the ad valorem stamp duty under s. 74 of the Finance (1909–10) Act, 1910, payable in respect of a deed poll dated Sept. 16, 1911, whereby a partial resettlement of the Portman family estates in Dorset, London, and Middlesex was effected. The deed poll was executed under a joint power of revocation and new appointment contained in previous dispositions of the estates, and the appointment thereby made was expressly subject to a further exercise of such power and the deed poll itself also contained a fresh power of revocation and new appointment. The question is whether in assessing the value of the property conveyed or transferred by the deed poll the Inland Revenue Commissioners were justified in disregarding as they did the powers of revocation and new appointment. The commissioners assessed the duty at £19,907. They were required to state a Case for the opinion of the court, and it is on the Case so stated that the question is to be determined. The Case came on for argument before ROWLATT, J., and by his order dated March 19, 1929, he confirmed the assessment of the commissioners.

The Court of Appeal on June 28, 1929, by a majority (the Master of the Rolls and SLESSER, L.J.; LAWRENCE, L.J., dissenting) dismissed the appeal. The appellants (the trustees of the Portman estates) appeal to this House.

There are no facts or figures in dispute, and the question is purely one of principle depending on the true construction and effect of s. 74 of the Act above referred to. The material part of the section is in the following terms:

> "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale."

The words themselves seem simple enough, and as applied to the transfer of an item of property such as a piece of land in fee simple or a sum of stock they present no difficulty. It is when they have to be applied to a complicated instrument such as the present effecting a partial resettlement of family estates that questions arise.

By the settlement of June 27, 1870, the estates were limited to uses in strict settlement in favour of the successive members of the family in the manner usual in such cases. The deed contained a power for the persons therein named by deed to revoke and make void all or any of the uses, trusts, powers and provisions therein expressly or by reference declared and contained of and concerning the settled premises or any other hereditaments which might be settled or subject for the time being to the uses or trusts thereof or of and concerning any part or parts of the same hereditaments, and by the same or any other deed or deeds to limit, declare or appoint any other uses, trusts, powers, limitations or provisions of or concerning the said settled premises or other hereditaments the uses and trusts whereof respectively should be so revoked as aforesaid which they should think fit. In every subsequent deed modifying the provisions of this settlement, of which there were several, there was inserted a similar power of revocation and new appointment. At the date of the deed in question the then subsisting power was vested in the then Viscount Portman and the Hon. Henry Berkeley Portman, his eldest surviving son. The effect of this deed on the then existing limitations of the estates is explained fully in the Case stated by the commissioners. Stated shortly, by eliminating the interests of Claud Berkeley Portman and his issue it accelerated those of persons who under the then existing limitations were postponed to Claud

A and his issue. The commissioners came to the conclusion that the value of the property then transferred was equal to the difference between what Claud and his issue had (i) before and (ii) after the resettlement, which difference was by the resettlement transferred from Claud and his issue to other persons. On this footing the value of the property conveyed or transferred is the agreed figure of £1,990,700, and the ad valorem duty is the £19,907 above mentioned. In arriving at this B value, however, the commissioners disregarded the powers of revocation and new appointment. After the execution of the deed these powers were twofold: (i) the power annexed to the uses prior to that of Claud, and (ii) a fresh power reserved to the appointors and the survivor of them and any person of full age entitled presumptively or otherwise to the London and Middlesex estates in remainder immediately expectant on the death of such survivor. The first of these powers C was expressly preserved, and it was declared that it was intended to override all the uses, powers and provisions created by the deed.

The commissioners, having assessed the duty in the manner stated above, after referring to the appellants' contention that in valuing the property for the purpose of s. 74 of the Act the overriding powers of revocation and new appointment have to be taken into account, and that these powers have the effect of reducing the D value of the property conveyed or transferred to a nominal sum, and that the ad valorem duty should be assessed at 10s., proceed to find as follows:

> "The commissioners admit that the value of the expectant reversionary interests of which Claud Berkeley Portman and his male issue were deprived as aforesaid, if sold at the date of the resettlement in the open market subject E to the overriding powers of revocation and new appointment vested in other persons by which they were liable to be defeated, did not exceed a nominal sum which the commissioners are prepared to agree at £50."

The contest, therefore, is between an ad valorem stamp of £19,907 and one of 10s., the amount of the duty on a value of £50. Ought the commissioners to have taken into account the overriding powers of revocation and new appointment? I F agree with the Crown that the deed in question operated as a voluntary disposition inter vivos. The next point is what is the property conveyed or transferred? Here again I think it is clear that it consists of the property the subject of the transfer, namely, in this case those interests of Claud and his issue which in effect were transferred to the persons who came after him in order of succession. Then how is the value of the property so transferred or conveyed to be ascertained? It is to G be substituted for the amount of the consideration for the sale had the deed been a conveyance or transfer on sale. The commissioners indicate, and I think rightly, the kind of sale they have in mind when they refer in cl. 12 of the Case to the "market value" and in cl. 14 quoted above to "a sale in the open market." At such a sale the property would have to be put up with all its incidents, including provisions for defeasance either in whole or in part, powers vested in persons not H controlled by the vendor to create charges taking precedence of the property sold, and so forth. I really fail to understand, with all respect to those who have taken a different view, how the most drastic power of destroying the property to be sold vested in persons over whom the purchasers would have no control could properly be disregarded. But, it is said, the donees are members of the family, and, if asked what they would give, would not have been affected by the fear of a sub- I sequent exercise of the power. I cannot follow this. Facts might have been found, and in another case may be found, tending to show that the present arrangement might fairly be regarded as final, and I desire to leave open the question what might be properly done in such a case, but this was not the case here; on the contrary, since the execution of the settlement of 1870 there have been several exercises of the power, and care has always been taken to preserve or renew it to the full extent. In my opinion, therefore, the overriding powers ought to have been regarded as affecting the value, and that being so there is no alternative other than the £50 to the value accepted by the commissioners. The Crown naturally relied

upon the decision of the Court of Appeal in *Earl of Westmorland* v. *I.R.Comrs.* (1). In that case the only power of revocation was one contained in the conveyance or transfer itself. In my opinion this cannot make any difference. If I am right that "the property" in the section means "the subject-matter of the conveyance or transfer," this subject-matter is as much affected in value by a power of revocation contained in the deed of conveyance or transfer as in some other deed. I think that *Earl of Westmorland* v. *I.R.Comrs.* (1) ought to be treated as overruled, and that the judgment of LAWRENCE, L.J., in the present case was right. The appeal ought to be allowed with costs, and the matter remitted to the commissioners with directions that the ad valorem stamp be adjudged to be 10s. and no more. The £19,907 has been paid under protest; I assume that it will be returned without an order to that effect.

VISCOUNT DUNEDIN and **LORD ATKIN** concurred.

Appeal allowed.

Solicitors: *Wilde, Wigston & Sapte*; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. *v.* SOUTHAMPTON JUSTICES. Ex parte PORTEOUS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Talbot, JJ.), December 10, 1929]

[Reported 142 L.T. 597; 94 J.P. 70; 46 T.L.R. 157; 28 L.G.R. 84; 29 Cox, C.C. 113]

Magistrates—Procedure—Right of accused to claim trial by jury for summary offence—Need for accused to be expressly informed of right "before the charge is gone into"—Accused informed only after evidence heard—Protest by accused—Consent by accused's solicitor to summary trial when told accused would otherwise be sent for trial—Summary Jurisdiction Act, 1879 (42 & 43 *Vict.*, *c.* 49), *s.* 17—*Criminal Justice Act*, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 40.

The defendant, who was represented by a solicitor, was charged before a court of summary jurisdiction with an offence for which, if convicted, he would have been liable to imprisonment for a term exceeding three months. He was not informed of his right to trial by a jury on appearing before the court before the charge was gone into, but he was informed of it afterwards, when all the evidence had been heard, but before the court had announced their decision. The defendant protested twice by his solicitor that he could not at that stage be put to this election, but on being informed by the chairman that, if he did not elect, the case would be sent for trial, he stated by his solicitor that he would be dealt with summarily. The defendant was then convicted and fined.

Held: the proceedings were a nullity, and the conviction must, therefore, be quashed, as the informing of the defendant of his right to trial by a jury on his appearing before the court, "before the charge is gone into," in accordance with s. 17 of the Summary Jurisdiction Act, 1879, was a condition precedent to the validity of the subsequent proceedings.

R. v. *Cockshott* (1), [1898] 1 Q.B. 582, and *R.* v. *Beesby* (2), [1909] 1 K.B. 849, followed.

Per Avory, J.: If, when the defendant in this case was informed of his right to trial by a jury at the close of the evidence, he had claimed that right and been sent for trial, objection might have been taken successfully at the trial by the defendant that he was not charged with an indictable offence as the condition precedent under s. 17 to "dealing with the case in all respects as if the accused were charged with an indictable offence" had not been fulfilled.

Notes. The Summary Jurisdiction Act, 1879, has now been repealed and replaced by the Magistrates' Courts Act, 1952, s. 25 (2) and (3) of which corresponds to s. 17 (1) and (2) of the 1879 Act. Section 40 of the Criminal Justice Act, 1925, has been repealed by the Road Traffic Act, 1930, s. 122 and Fifth Schedule, s. 15 of which Act corresponds to s. 40 of the 1925 Act.

As to the magistrate's duty to inform an accused of his right to claim trial by jury, see 25 Halsbury's Laws (3rd Edn.) 179, para. 330, text and notes (o) and (q). For the Magistrates' Courts Act, 1952, s. 25 (2), (3), and the Road Traffic Act, 1930, s. 15, see 32 and 24 Halsbury's Statutes (2nd Edn.) pp. 443 and 589 respectively.

Cases referred to:

(1) *R.* v. *Cockshott*, [1898] 1 Q.B. 582; 67 L.J.Q.B. 467; 78 L.T. 168; 62 J.P. 325; 14 T.L.R. 264; 42 Sol. Jo. 346; 19 Cox, C.C. 3, D.C.; 14 Digest (Repl.) 143, *1064*.

(2) *R.* v. *Beesby*, [1909] 1 K.B. 849; 78 L.J.K.B. 482; 100 L.T. 486; 73 J.P. 234; 25 T.L.R. 337; 53 Sol. Jo. 289, 22 Cox, C.C. 47, D.C.; 14 Digest (Repl.) 143, *1066*.

Rule nisi for certiorari.

On Aug. 16, 1929, the defendant, Major Richard Porteous, who was represented by a solicitor, was charged before a court of summary jurisdiction, sitting at Havant, for that he on July 14, 1929, was drunk while in charge on a certain highway of a private motor car. That offence under s. 40 of the Criminal Justice Act, 1925, renders an offender liable to imprisonment for a period not exceeding four months. The defendant was not informed of his right to claim trial by jury in accordance with the provisions of s. 17 of the Summary Jurisdiction Act, 1879, before the charge was gone into. Evidence was called for the prosecution and for the defence, and the court was then cleared so that the justices might come to a decision in private, their own room being occupied by a second court. After twenty minutes' interval the defendant and his solicitor re-entered the courtroom, whereupon the clerk to the justices said: "We have not told the defendant that he was entitled to be tried by a jury, if he desired to be. Are you willing that the case should be dealt with summarily, or does he desire to be tried by a jury?" The solicitor for the defendant replied: "We are not prepared at this stage of the proceedings to elect." The clerk then said: "Unless you elect to be dealt with summarily I shall advise the magistrates to send this case for trial." The solicitor replied: "I do not think you are entitled to call upon us to elect at this juncture." The clerk said: "Very well, then, I shall advise the magistrates to send the case for trial," and the chairman of the justices added: "Unless you are prepared to let us deal with this matter, we are advised the right course to adopt is to send it for trial. Will you elect?" The solicitor for the defendant then said: "Very well; we elect to be dealt with summarily." The defendant was then convicted of the offence and fined £15. His licence was suspended during its currency, and he was disqualified from obtaining a licence for twelve calendar months. The defendant thereupon obtained this rule nisi for certiorari to quash the conviction on the ground (inter alia) that the justices had no jurisdiction to adjudicate on the summons, not having given to the defendant before the charge was gone into the warning prescribed by s. 17 of the Summary Jurisdiction Act, 1879. Section 17 (1) and (2) of the Summary Jurisdiction Act, 1879, and s. 40 of the Criminal Justice Act, 1925, will be found set out in the judgment of Lord Hewart, C.J.

Schiller, K.C., and *C. A. Collingwood*, showing cause for the justices, referred to *R.* v. *Cockshott* (1) and *R.* v. *Beesby* (2). A

F. J. Tucker, for the defendant, in support of the rule, was not called on.

LORD HEWART, C.J.—This is a rule nisi for a writ of certiorari directed to justices of the county of Southampton to remove into this court a certain conviction, under the hands and seals of two of their number dated April 16, 1929, by which the defendant Richard Porteous was convicted "for that he on July 14, 1929, was drunk while in charge on a certain highway there situate, to wit, Havant Road, in the parish of Farlington, in the said county, of a certain mechanically propelled vehicle, to wit, a private motor car, contrary to the form of the statute in such case made and provided." For that offence he was fined £15 and his licence was suspended during its currency, and he was disqualified for obtaining a licence under the Motor Car Act, 1903, for twelve calendar months. B C

The fundamental point involved here may be very shortly stated. Under the provisions of s. 40 of the Criminal Justice Act, 1925:

> "any person who is drunk while in charge on any highway or other public place of any mechanically propelled vehicle shall, on summary conviction, be liable in respect of each offence to imprisonment for a period not exceeding four months or to a fine not exceeding £50 or to both such imprisonment and fine." D

Under s. 17 of the Summary Jurisdiction Act, 1879:

> "(1) A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the court and before the charge is gone into, but not afterwards, claim to be tried by a jury; and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused was charged with an indictable offence and not with an offence punishable on summary conviction, and the offence shall as respects the person so charged be deemed to be an indictable offence. . . ." E F

The words which seem to me to be of importance here are: "May, on appearing before the court, and before the charge is gone into, but not afterwards." They are to be read in close conjunction with the next subsection:

> "(2) A court of summary jurisdiction before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him to the following effect: 'You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury; do you desire to be tried by a jury?' with a statement, if the court think such statement desirable for the information of the person to whom the question is addressed, of the meaning of being dealt with summarily, and of the assizes or sessions (as the case may be) at which such person will be tried by a jury." G H

The scheme of the section seems to be abundantly clear. The claim to be tried by a jury cannot be made after the charge is gone into. The words in sub-s. (2) are "before the charge is gone into . . . shall address him to the following effect." These are the emphatic words. I

What happened in this case was a summons was issued and the defendant appeared. The offence charged was one for which an offender was liable on summary conviction to be imprisoned for a term exceeding three months, and the charge was gone into. The hearing began at about 10.45 a.m. Five witnesses were called for the prosecution, and were cross-examined, and three for the defence, and the hearing of the evidence was finished about 12 noon. The justices then

cleared the court to enable them to come to a decision in private, their private room being unavailable. It was only after all these events had happened and after the defendant and his solicitor had returned into court after twenty minutes' absence that the clerk to the justices said: "We have not told the defendant that he was entitled to be tried by a jury if he desired to be. Are you willing that the case should be dealt with summarily or does he desire to be tried by a jury?" The solicitor for the defendant replied: "We are not prepared at this stage of the proceedings to elect." The clerk then said: "Unless you elect to be dealt with summarily, I shall advise the magistrates to send this case for trial." The solicitor replied: "I do not think you are entitled to call upon us to elect at this juncture." The clerk said: "Very well, then, I shall advise the magistrates to send the case for trial," and the chairman of the justices added: "Unless you are prepared to let us deal with this matter, we are advised the right course to adopt is to send it for trial. Will you elect?" The solicitor for the defendant then said, at the last moment of the eleventh hour: "Very well, we elect to be dealt with summarily." The defendant was then fined £15 and his licence suspended as I have stated.

The law which applies to this matter is to be found in *R.* v. *Cockshott* (1), which, it is to be observed, was decided over thirty years ago. In that case the defendant was not informed of his right to be tried by a jury in accordance with s. 17 of the Summary Jurisdiction Act, 1879. After the charge had been gone into the defendant pleaded Guilty, yet it was held that the conviction was bad. The late Wright, J., said ([1898] 1 Q.B. at p. 586):

> "I think it would be wrong to fritter away the protection which the section intends to give to accused persons. It intends to give them protection in the broadest and most generous way by providing that the option of trial by jury shall be put before any accused person before the charge is gone into. I think the option ought to be put before him before he is asked whether he pleads Guilty or Not Guilty."

And then a little later he says:

> "As to the waiver which has been suggested, there cannot be a waiver of a right which the defendant does not know that he has; I doubt whether he could waive the right to be informed of his option to be tried by a jury, if he knew that he had the option. I am inclined to think that, the duty to inform having been imposed upon the court for the protection of all accused persons, the right to be informed could not be waived."

That case was afterwards referred to in *R.* v. *Beesby* (2), where Walton, J., said ([1909] 1 K.B. at p. 857):

> "As far as I know it was in *R.* v. *Cockshott* (1) that it was for the first time pointed out that the giving of the warning by the justices to the person charged was a condition precedent to the validity of the further proceedings."

In this case, as it seems to me, it is quite clear that this condition precedent was not fulfilled, and it follows that the rest of the proceedings were invalid; they were, in fact, a nullity. What the consequences may be I do not know. I see that the offence was said to have been committed on July 14 last. Here the rule must be made absolute. The justices had no jurisdiction, and the hearing was a nullity. The conviction will be quashed.

Avory, J.—I am of the same opinion, and I only desire to add that a charge triable summarily cannot become triable as an indictable offence, unless the conditions of s. 17 of the Summary Jurisdiction Act, 1879, are complied with. When the defendant on appearing before the court, before the charge is gone into, but not afterwards, claims to be tried by a jury, the court of summary jurisdiction

> "shall deal with the case in all respects as if the accused were charged with an indictable offence . . . and the offence shall as respects the person so charged be deemed to be an indictable offence. . . ."

It seems to me that if in this case, at the last moment, when the defendant was asked to elect, he had elected to claim his right to be tried by a jury and the justices had sent the defendant for trial, objection might have been taken successfully at the trial by the defendant that he was not charged with an indictable offence and that the case could not then have been proceeded with.

TALBOT, J.—I agree that the rule should be made absolute.

Rule absolute.

Solicitors: *Woodham, Smith & Borradaile*, for *Morris, Bew & Longcroft*, Chichester; *Blyth, Dutton, Hartle & Blyth*, for *G. H. King & Franckeiss*, Portsmouth.

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

R. *v.* HARDING

[Court of Criminal Appeal (Lord Hewart, C.J., Avory and Swift, JJ.), November 18, 1929]

[Reported 142 L.T. 583; 94 J.P. 55; 46 T.L.R. 105; 73 Sol. Jo. 853; 28 L.G.R. 69; 21 Cr. App. Rep. 166; 29 Cox, C.C. 108]

Criminal Law—Larceny—Owner—"Special property" in goods—Servant left alone in house—Master's goods seized—Larceny Act, 1916 (6 *& 7 Geo.* 5), *s.* 1 (2) (*iii*).

A domestic servant who is left alone in her master's house has "a special property in" her master's chattels which are left therein within the meaning of s. 1 (2) (iii) of the Larceny Act, 1916, and so may be named in an indictment for larceny as the owner of those chattels.

R. v. *Deakin and Smith* (1) (1800), 2 Leach, 862, applied.

Notes. As to defence to indictment for robbery, see 10 Halsbury's Laws (3rd Edn.) 796, para. 1538; and for cases as to persons having "a special property," see 15 Digest (Repl.) 1087–1088, *10,756–10,788*. For the Larceny Act, 1916, s. 1 (1), (2) (iii), s. 23, see 5 Halsbury's Statutes (2nd Edn.) pp. 1012 and 1025.

Cases referred to:

(1) *R.* v. *Deakin and Smith* (1800), 2 Leach, 862; 2 East, P.C. 653; 15 Digest (Repl.) 1087, *10,760*.
(2) *R.* v. *Ashley* (1843), 1 Car. & Kir. 198; 15 Digest (Repl.) 1087, *10,772*.
(3) *R.* v. *Thomas* (1784), 1 Leach, 330; 1 East, P.C. 417; 15 Digest (Repl.) 1121, *11,169*.
(4) *R.* v. *Fallows* (1832), 5 C. & P. 508; 1 Nev. & M.M.C. 354; 15 Digest (Repl.) 1118, *11,104*.

Appeal against conviction and sentence.

The appellant and another man, who were fugitives from a Borstal institution, were convicted at Dorset Assizes before Charles, J., of housebreaking, wounding with intent to disable, robbery with aggravation, and robbery with violence. The appellant was sentenced to twelve months' imprisonment with hard labour and twelve strokes with a cat o' nine tails. The case for the prosecution was that the two men broke into a house named "Ivybank" at Portland, Dorset, the residence of a Commander Bowen. At the time the only person in the house was a domestic servant named Valetta Mary Matthews. She was attacked by both men, and

struck on the head with a rolling-pin; and, on demand being made upon her for money and clothes, she handed to one of the men a mackintosh, which belonged to Commander Bowen. The indictment charged the prisoners (inter alia) "that they did rob Valetta Mary Matthews of a mackintosh."

The Larceny Act, 1916, provides:

> "Section 1: For the purposes of this Act (1) a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof. . . . (2) (iii) the expression 'owner' includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen."

T. Cox Meech, for the appellant, referred to *R.* v. *Ashley* (2), *R.* v. *Thomas* (3), and Archbold's Criminal Pleading (27th Edn.), p. 553: "It must be proved upon the trial, that the goods stolen are the absolute or special property of the person named in the indictment." [Lord Hewart, C.J.—Is not the question here, whether the servant can be said to have had a custody of this mackintosh sufficient to satisfy the definition in the Larceny Act, 1916?] Counsel then referred to *R.* v. *Fallows* (4).

J. J. Llewellin, for the Crown, referred to *R.* v. *Fallows* (4) and *R.* v. *Deakin and Smith* (1).

The judgment of the court was delivered by

LORD HEWART, C.J.—The appellant was convicted at the Dorset Assizes, together with another prisoner named Herbert Williams, on an indictment which charged them with housebreaking with intent to steal, wounding with intent to disable, robbery when they were armed with an offensive weapon, and robbery with violence. In the result the present appellant was sentenced to twelve months' imprisonment with hard labour and twelve strokes with the cat o' nine tails. The appellant applied in form for leave to appeal against sentence; in substance, however, his application appeared also to ask for leave to appeal against conviction, and the court granted him leave to appeal.

The real question in the case was a question of law, namely, whether upon the facts proved it was open to the jury to convict the appellant of robbery with violence. The case was that the appellant and Williams entered a house known as "Ivybank" at Portland, which was occupied by a Paymaster-Commander Bowen, by opening a French window at about three o'clock in the afternoon of Sept. 18 last. At that time the only person in the house was a domestic servant named Valetta Mary Matthews. She heard a noise and, after finishing what she was doing upstairs, went down into the kitchen; as she entered the door she saw two pairs of boots, and at that moment was struck across the forehead from behind the kitchen door with a rolling-pin. The rolling-pin was afterwards found to be blood-stained; it was usually kept on a shelf just outside the kitchen door. The girl lost her spectacles and for a few seconds, according to her evidence, saw nobody, but then found that she was in the hands of both the appellant and Williams. She tried to get out of the back door, but both the appellant and Williams kept her back; she then went to the larder and tried to scream, but one of the two, whom she believed to be the present appellant, put his hand over her mouth. Then both the men tried to prevent her from getting to the larder, and they took her to the tap and tried to bathe her wound. They said they wanted money and clothes, and she gave one of them, whom she thought was the appellant, her employer's mackintosh coat. Then she went upstairs, was followed by the appellant, and called out to Commander Bowen, who was in the garden. One of the prisoners at that time was in the bathroom and the other in the Commander's bedroom. Commander Bowen came and afterwards it was found that the wound which had been inflicted upon the girl was a wound 1¾ in. long requiring five stitches. The girl was cross-examined and said that she had seen no person in the kitchen before she was struck,

and saw nobody for a few seconds after she was struck; there might have been time, she said, for someone to come into the kitchen between the striking of the blow and the time she recovered. When recovered, she said, she was on her knees and both prisoners were standing up, and they pushed her back when she tried to get to the door. The prisoner Williams was seized upstairs. The appellant gave evidence on his own behalf; he said that hearing someone come downstairs, Williams snatched something off a table and went into the kitchen while he himself went into the scullery and closed the door. Then he heard somebody calling out from the kitchen, rushed in and found Williams supporting the girl; he said to Williams: "We shall swing for this, you see," and then went upstairs and pulled open two or three drawers, pulled out a jacket, heard Williams call him, heard some people downstairs, whereupon he went into a bedroom and got under the bed. Those in outline were the facts of the case and the evidence offered, and the jury convicted the appellant, amongst other things, of robbery with violence.

When one looks at the counts charging robbery the expression which is used in both count 3 and count 4 is: "Did rob Valetta Mary Matthews of a mackintosh," and it is important that in such a charge, as indeed in all charges, that what is alleged should be accurately pleaded.

Now robbery consists in the felonious and forcible taking from the person of another or in his presence and against his will of any money or goods to any value by violence, or putting him in fear, and the question of law which arose in this case was whether it was true to say that Valetta Mary Matthews, being at this time the only person in the house, had a special property in this mackintosh so as to render it possible that by violence she could be robbed of it.

Counsel on behalf of the prosecution has directed the attention of the court to a useful case, *R.* v. *Deakin and Smith* (1); the case is very short and as it is very important it may be well to read it. It is a case of the year 1800. The report says this (2 East, P.C. at p. 653):

> "James Deakin and William Smith were indicted for stealing spoons and other articles, laid in the second count (on which alone they were convicted), to be the property of one Markham. The goods had been sent by a tradesman in London to Mr. Broderick at Spalding by the Spalding coach and were stolen by the prisoners at Ponders End, out of the boot behind the coach. The question was, whether they were properly laid to be the property of Markham, who was not the owner but only the driver of the coach, there being no contract between him and the proprietors that he should be liable for anything stolen, and it not appearing that he had been guilty of any laches. The case being referred to the judges, it stood over for some time, but finally the conviction was holden right, the coachman having the possession and a special property in the goods committed to his charge."

Now, in view of the finding in that case it appears to us that upon the facts of the present case it was correct to allege that these prisoners did rob the maid-servant, Valetta Mary Matthews, of the mackintosh. We have come to the conclusion, therefore, that this conviction was right and calls for no reconsideration.

[His Lordship then considered the sentence, and gave the court's reasons for varying it.]

Conviction affirmed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

Re MANSEL. SMITH *v.* MANSEL

[Chancery Division (Farwell, J.), November 15, 19, 20, 1929]

[Reported [1930] 1 Ch. 352; 99 L.J.Ch. 128; 142 L.T. 281]

Will—Hotchpot clauses—Advances—Shares of residue—Advances in lifetime of testatrix—Adjustment between advanced and unadvanced shares.

A testatrix by her will directed that her real and personal estate should be sold and converted and that the net residue of the proceeds should be invested and that the investments and the unconverted estate should be divided into four equal parts, to be held respectively upon certain trusts for her son T. and three daughters for their respective lives and afterwards for their issue. By a third codicil to her will the testatrix, after reciting that she had given to T. stocks and securities of the value of £11,000, directed that that amount should be deducted from his one-fourth share, so that the trust fund should be divided between her children in such manner that the share of T. should be less in amount than the shares of her other children by the sum of £11,000. By a fourth codicil the testatrix, after reciting that she had given to T. further stocks and securities of the value of £5,120, directed that the said sum of £5,120 should be brought into account on division of the estate in the same words as she had used in the third codicil in respect of the £11,000.

Held: there was nothing in the will or codicils that showed that the testatrix did not intend or contemplate an immediate division of her estate, nor was there anything in the nature of the estate which prevented a fair valuation of it being made as at the death of the testatrix; accordingly, the whole estate ought to be valued as at the death; to the amount of such valuation should be added the aggregate sum advanced, i.e., £16,120; the total sum so found should be divided into four equal parts; and then the £16,120, the sum advanced, should be deducted from T.'s share, and the income divided in the proportion of the shares so arrived at.

Re Hargreaves (1) (1903), 88 L.T. 100, applied.

Re Rees (2) (1881), 17 Ch.D. 701, *Re Poyser* (3), [1908] 1 Ch. 828, *Re Craven* (4), [1914] 1 Ch. 358, *Re Forster-Brown* (5), [1914] 2 Ch. 584, *Re Cooke* (6), [1916] 1 Ch. 480, and *Re Tod* (7), [1916] 1 Ch. 561, explained and distinguished.

Per **Curiam:** *Re Hargreaves* (1) (88 L.T. 100) binds the court to apply the method [of accounting for the sums advanced above set out] unless it is satisfied that, in order to do justice between the parties and put them on a state of equality, some other method should be adopted, . . . or unless it concludes that the testator did not contemplate or intend an immediate division of the estate. The court does not resort to the method of taking interest on the amount of the advances for the purpose of arriving at how the accounting is to be done, unless it is bound to do so.

Notes. Not followed: *Re Wills, Dulverton* v. *Macleod*, [1939] 2 All E.R. 775.

As to a testamentary hotchpot of prior "advances," see 34 Halsbury's Laws (2nd Edn.) 424, para. 470; and for cases see 44 Digest 1247–1250, *10,761–10,776*.

Cases referred to:

(1) *Re Hargreaves, Hargreaves* v. *Hargreaves* (1903), 88 L.T. 100, C.A.; 44 Digest 1248, *10,767*.

(2) *Re Rees, Rees* v. *George* (1881), 17 Ch.D. 701; 50 L.J.Ch. 328; 44 L.T. 241; 29 W.R. 301; 44 Digest 1245, *10,752*.

(3) *Re Poyser, Landon* v. *Poyser*, [1908] 1 Ch. 828; 77 L.J.Ch. 482; 99 L.T. 50; 44 Digest 1248, *10,768*.

(4) *Re Craven, Watson* v. *Craven*, [1914] 1 Ch. 358; 83 L.J.Ch. 403; 109 L.T. 846; 58 Sol. Jo. 138; 44 Digest 1248, *10,770*.

(5) *Re Forster-Brown, Barry* v. *Forster-Brown*, [1914] 2 Ch. 584; 84 L.J.Ch. 361; 112 L.T. 681; 44 Digest 1249, *10,771*. A

(6) *Re Cooke, Randall* v. *Cooke*, [1916] 1 Ch. 480; 85 L.J.Ch. 452; 114 L.T. 555; 60 Sol. Jo. 403; 44 Digest 1249, *10,772*.

(7) *Re Tod, Bradshaw* v. *Turner*, [1916] 1 Ch. 567; 85 L.J.Ch. 668; 114 L.T. 839; 32 T.L.R. 344; 60 Sol. Jo. 403; 44 Digest 1247, *10,766*.

(8) *Re Gilbert, Gilbert* v. *Gilbert*, [1908] W.N. 63; 44 Digest 1247, *10,764*. B

(9) *Re Hart, Hart* v. *Arnold* (1912), 107 L.T. 757; 44 Digest 1248, *10,769*.

Adjourned Summons as to the construction of a will.

By her will, dated June 30, 1920, Mrs. Lilian Augusta Mansel, after appointing executors and trustees, and giving certain legacies and annuities, devised and bequeathed her residuary real and personal estate to her trustees upon trust for sale and conversion, and for investment. She then directed that her trustees C should stand possessed of such investments and of all property retained unsold and unconverted upon trust to divide the same into four equal parts. One of those parts, which was called "Lilian's share," was to be held upon trust to pay the income to her daughter Lilian for her life, and then upon certain trusts for her issue. Another of those parts, which was called "Ada's share," was to be held D upon similar trusts for her daughter Ada. One other of the four parts, which was called "Gwladis's share," was to be held upon trust during the life of her daughter Gwladis

> "to pay or apply the whole or such part of the income of Gwladis's share as my trustees may think sufficient to or for the maintenance, support and benefit of my daughter Gwladis and any husband or issue of hers for the time being in E existence in such manner as my trustees shall think fit and so that during the lives of my daughters Lilian and Ada and the life of the survivor of them my trustees shall be at liberty to leave to my said two daughters or the survivor of them the decision as to the amount of the income to be so applied and the method of application . . . and to pay or apply such part of the income of Gwladis's share as shall not be paid to or applied for the benefit of my daughter F Gwladis or any husband or issue of hers as income arising from the other three-fourth parts of the trust fund."

After the death of her daughter Gwladis, "Gwladis's share" was to be held upon similar trusts for the benefit of the children and issue of Gwladis to those declared for the benefit of the children and issue of her daughter Ada. The remaining G fourth share, which was called "Trevor's share," was to be held upon trust to pay the income thereof to her son Trevor for life and after his death upon certain trusts for his issue. By a first codicil to her will the testatrix appointed her son Trevor to be an executor and trustee. A second codicil was not material. By a third codicil dated April 30, 1923, after reciting that she had recently given and transferred to her son Trevor absolutely, stocks and securities of the value of £11,000, H the testatrix declared and directed that

> "the sum of £11,000, the value of the stocks so given and transferred by me to my said son as aforesaid, shall be deducted from his one-fourth share in the trust fund mentioned in my said will and settled on him thereby and accordingly that the said trust fund shall be divided between my children among whom the same is directed to be divided by my will in such manner that the I share of my son Trevor shall be less in amount than the shares of my other children by the sum of £11,000."

By a fourth codicil dated June 18, 1924, after reciting that she had recently settled upon her son Trevor stocks and securities of the value of £5,120 in addition to the stocks and securities amounting to £11,000 mentioned in the third codicil, the testatrix declared and directed that

> "the sum of £5,120, the value of the stocks and securities so settled by me upon my said son as aforesaid, shall in addition to the said sum of £11,000, be

deducted from his one-fourth share in the trust fund mentioned in my said will and settled on him thereby, and accordingly that such trust fund shall be divided between my children among whom the same is directed to be divided by my will in such manner that the share of my son Trevor shall be less in amount than the share of my other children by the sum of £5,120 in addition to the said sum of £11,000 mentioned in the said third codicil to my will."

The testatrix died on July 13, 1925, leaving her surviving the four children mentioned in her will, namely, Lilian Llewellyn Smith, the wife of John Wyndham Woodhouse Smith, Ada Llewellyn Forestier-Walker, the wife of Charles Evelyn Forestier-Walker, and Gwladis Llewellyn Mansel and Robert Trevor Llewellyn Mansel, who were unmarried at the date of the summons. The executors paid the funeral and testamentary expenses, debts and legacies, but had not yet appropriated the residuary estate to the separate shares. The residuary estate consisted of real estate, certain mining rights, and a number of stocks and securities. The estimated value of the residuary estate at the death of the testatrix was £111,033 7s. 5d. and the net income was £4,369. Questions had arisen as to the right way in the circumstances of carrying out the directions in the will for bringing into account the moneys advanced by the testatrix to her son Trevor in the division of the income of the trust fund between the four shares until appropriation was made. One method suggested was that interest at the rate of £4 per cent. on the two sums of £11,000 and £5,120 advanced to Trevor should be calculated and added for computation to the actual income of the residuary estate and that the aggregate amount of income so arrived at should be divided into four equal parts and that one of those parts should be credited to each of the shares of the sisters, while the amount of the interest on the said sums should be deducted from the share to be credited to Trevor. This method was claimed on behalf of Trevor to be the right one. The other method suggested was that the sums of £11,000 and £5,120 should, for purposes of computation, be added to the actual capital value of the estate at the time of the death of the testatrix, and that the amount so arrived at should be divided into four equal shares and the sums deducted from the share of Trevor and that the annual income of the estate should be divided in the proportions of the respective shares so arrived at. This method was claimed to be right on behalf of the three sisters. The trustees, other than Trevor, therefore issued this summons for the decision of the question, to which the four children were defendants, also the children of Mrs. Lilian Smith and Mrs. Ada Forestier-Walker.

Roger Turnbull for the plaintiffs, the trustees other than Trevor Mansel.

C. L. Fawell, for the defendant, Trevor Mansel, referred to *Re Rees*, *Rees* v. *George* (2), *Re Hargreaves*, *Hargreaves* v. *Hargreaves* (1), *Re Forster-Brown*, *Barry* v. *Forster-Brown* (5), *Re Poyser*, *Landon* v. *Poyser* (3), *Re Craven*, *Watson* v. *Craven* (4), *Re Cooke*, *Randall* v. *Cooke* (6), *Re Tod*, *Bradshaw* v. *Turner* (7), *Re Gilbert*, *Gilbert* v. *Gilbert* (8), and *Re Hart*, *Hart* v. *Arnold* (9).

W. M. Hunt for those interested in the sisters' shares.

FARWELL, J., after stating the provisions of the will and codicils, said: Two possible solutions of this question have been put forward. On behalf of Trevor it had been said that the right method to adopt is to take the whole of the actual income of the trust fund of the residuary estate, and that to that income a sum equivalent to £4 per cent. on the two sums of £11,000 and £5,120 is to be added for purposes of computation. Then divide that into four and deduct from the share of that computed income which belongs to Trevor a sum equal to £4 per cent. on £11,000 plus £5,120. On behalf of the other three shares it is said that the method to be adopted is as follows. The whole estate should be valued either at the death or at the end of the executor's year. To that value should be added for computation £11,000 and £5,120; the total should be divided into fourths and the £11,000 and £5,120 should be deducted from Trevor's share, and the income should then be divided on the footing that those shares represent the shares of the persons

interested in the residuary estate. The question I have to decide is which of the two solutions put forward is the true one.

In *Re Rees* (2) the headnote is this:

> "A testator gave his residuary estate to his widow for life with remainder to his children equally, with a provision, in the common form for bringing into hotchpot all sums advanced to any of them by him during his lifetime. The testator made advances to some of his children. In distributing the estate among the children after the death of the widow: Held, that the advanced children must bring their advances into hotchpot with interest at 4 per cent. per annum up to the distribution of the estate, such interest to be computed from the death of the widow and not from the dates of the respective advances."

It will be seen that the method adopted was the method which is now submitted to be the right one on behalf of Trevor. That was a decision of JESSEL, M.R. It is noticeable that in that case no method of accounting other than that which in fact the court adopted was suggested, and the questions that were argued were as to the rate of interest and the date from which interest ran. All parties seem to have assumed that the method adopted was the right method. It may be, of course, that in effect it would have made very little or no difference in the actual total of the amount which method was adopted; but, however that may be, that method was adopted without argument.

The next authority to which I was referred was *Re Hargreaves* (1). In that case the Court of Appeal came to the conclusion that the best method to adopt for bringing into account sums in a case of this kind was the method which the children of the testatrix in this case other than Trevor now put forward, that is to say, by a valuation of the whole of the estate at the death or at the end of the executors' year and payment of the income on the footing of that valuation. The will in *Re Hargreaves* (1) did contain a somewhat unusual provision. ROMER, L.J., says:

> "He has not simply said the children are to take in equal shares, but that they are to take in shares which are to be ascertained by bringing in artificial sums at his death, so that the true proportions of their shares in his actual estate can only be ascertained, as I have pointed out, by valuing the estate at his death."

In that case, undoubtedly, the will was in an unusual form, and to that extent, of course, the decision is not an authority on any other case which may arise when the will is in a different form. ROMER, L.J.'s judgment was the principal judgment of the court, and he said:

> "It is true that the court on occasions is obliged, in order to do justice between children or other parties, to put them on an equality, when no other method of doing so can be arrived at, to cause interest at some rate or other to be calculated and treated as payable on account by some of the parties, whose rights have to be adjusted, but the court never does that unless it is bound to."

That statement, at any rate, was not merely with reference to the particular case he had to determine. ROMER, L.J., then points out that, although there are cases in which one must resort to calculating interest upon the advances, yet unless the court is driven to take that method it is not a method that ought to be adopted; and that seems to me to be a statement by the Court of Appeal of a general principle which ought to be applied in these cases. As I understand the judgment of ROMER, L.J., it is the method that I am bound to apply, unless I am satisfied that this is one of the cases where, in order to do justice between the parties and put them on a state of equality, some other method should be adopted.

In these circumstances it seems to me that, in considering the question before me, I have to bear in mind what ROMER, L.J., has there said, and to see whether this is a case in which the method adopted by the Court of Appeal in that case should be applied, or whether, because by adopting that method some injustice would be done, the other method ought to be adopted. The cases since *Re Har-*

greaves (1) are those in which the court has found itself able to adopt the principle which I understand ROMER, L.J., to think generally to be the right one, and other cases in which the court has not been able to adopt that method. In *Re Gilbert* (8) NEVILLE, J., followed the decision in *Re Hargreaves* (1), and adopted the method that ROMER, L.J., in that case thought was, generally speaking, the right method to adopt. Similarly, in *Re Hart* (9) EVE, J., took the same course. But there are other cases, the first of which, I think, is *Re Poyser* (3), where WARRINGTON, J., came to the conclusion that the method adopted in *Re Hargreaves* (1) was not a method which was proper in the case he had before him. But, as I read WARRINGTON, J.'s judgment, he certainly did not treat *Re Hargreaves* (1) as being merely a decision on the particular will in that case. He clearly treated it as a decision of general application, but one which, of course, he ought not to follow if he was satisfied that by following it it would result in some injustice to the parties. The learned judge was careful in his judgment to distinguish it, and to point out the grounds upon which he came to the conclusion that he ought not to adopt the method which was adopted in *Re Hargreaves* (1); but it is clear from his judgment that he certainly did not treat that case as one that could be disregarded, but that it was a case which was peculiar to itself, in that the will was in a very unusual form. He came to the conclusion that the method adopted by the Court of Appeal ought not to be adopted in the case before him, and the conclusion he came to was largely based on this, that in the will before him the testator had never contemplated or intended an immediate division of the property. That was followed by *Re Craven* (4). That again was a decision of WARRINGTON, J., and he again came to the conclusion that the case before him was one in which the method adopted by the Court of Appeal in *Re Hargreaves* (1) could not be appropriately adopted. But again he is careful to consider the various cases, and to distinguish *Re Hargreaves* (1), because, I think, he felt that unless he was satisfied that the method adopted in *Re Hargreaves* (1) ought not to be adopted in that case, he would have been bound to adopt it.

The next authority is *Re Forster-Brown* (5), a decision of SARGANT, J. In that case again, SARGANT, J., did not feel himself able to adopt the method of the Court of Appeal in *Re Hargreaves* (1). He does use language in his judgment which suggests that in his view *Re Hargreaves* (1) was a case which, perhaps, had better not have been reported, and which was of no general application whatever; it was merely a decision upon a particular will, and would afford no assistance to the court in considering other wills in other forms. With great respect I doubt whether SARGANT, J., really intended to go so far as that. I think he was pointing out what is perfectly true, that *Re Hargreaves* (1) was a case where the will was in an unusual form, and that he was sounding a note of warning, that the court ought not to treat *Re Hargreaves* (1) as laying down any general rule that that method ought to be adopted in every case. But I cannot think that SARGANT, J., was treating *Re Hargreaves* (1) as being a case which the court was not bound to consider, or as a case in which there was not stated the method which should be adopted, unless there were reasons for not adopting it. It is noticeable that SARGANT, J., himself, in considering *Re Forster-Brown* (5) does point out clearly the reason why, in coming to his decision, he ought not to follow *Re Hargreaves* (1). The principal reason why he thinks there is a distinction is that the testator did not contemplate any immediate distribution of his estate, and in his judgment he says:

> "In the present case it seems to me impossible to say that the testator contemplated any immediate distribution of his estate, or any ascertainment of the relative fractional shares of his children as at that date."

That, I think, was the ground on which he felt that the method adopted in *Re Hargreaves* (1) should not be adopted in the case before him.

That case was followed by a decision of YOUNGER, J., in *Re Cooke* (6). That case was decided during the war, and one of the grounds on which YOUNGER, J.,

came to the conclusion that he ought not to adopt the method in *Re Hargreaves* (1) was that in that case there would be the greatest difficulty in obtaining a fair and proper valuation of the estate, and that, having regard to the fact that no satisfactory valuation could be made at the time, having regard to the nature of the estate and the condition of affairs generally, it would be unfair, and might work serious injustice to adopt the method of *Re Hargreaves* (1), because the valuation which would have to be adopted might not represent the true value of the estate.

The last decision to which I think I need refer is a decision of SARGANT, J., in *Re Tod* (7). In that case, again, SARGANT, J., felt himself able to distinguish the case before him from *Re Hargreaves* (1). When I say "distinguish," I mean that he considered the method adopted in *Re Hargreaves* (1), and he came to the conclusion that to adopt that method in the case before him would be possibly to effect an injustice, and that therefore he did not adopt it.

In my judgment, the result of all these authorities is that this court, at any rate, is bound to approach this question, having in mind the statement in ROMER, L.J.'s judgment in *Re Hargreaves* (1) that the court does not resort to the method of taking interest on the amount of the advances for the purpose of arriving at how the accounting is to be done, unless it is bound to do so. The later cases, I think, do show that there are, at any rate, two grounds on which the method adopted in *Re Hargreaves* (1) should not be adopted: (i) If the nature of the residuary estate, or of a substantial part of the residuary estate, is such that no fair and proper valuation can be arrived at, if, for instance, the estate or a substantial part of the estate consisted of shares in a private company which are not quoted on the Stock Exchange, there might obviously be the greatest difficulty in arriving at a fair valuation of the property, and to adopt the rule in *Re Hargreaves* (1) might, in a case of that kind, result in very great injustice; and (ii) if, on considering the will as a whole, the court comes to the conclusion that the testator never intended or contemplated an immediate division, then again, I think, the court says that the method adopted in *Re Hargreaves* (1) should not be employed; and it says so because it takes the view that, if the testator clearly did not contemplate an immediate division, he must be taken to have contemplated that, pending the actual division, advances should be brought into account by some method other than an immediate division on valuation. In these circumstances, it seems to me that I have to approach this question for the purpose of seeing whether there is anything in the circumstances of this case, or in the language of the will itself, which makes the method adopted in *Re Hargreaves* (1) not a suitable method to apply in the present case. So far as the nature of the property is concerned, I fail to see that there is any real difficulty in arriving at a reasonable and fair valuation of the property as at the death, or at the end of the executor's year. The property consists partly of real estate, there are also certain mining rights, there are a number of securities, most of which are trustee securities, and such securities as are not trustee securities are, I think, all stocks and shares which are quoted on the Stock Exchange. It does seem to me that there would not be any difficulty in obtaining, as at the death of the testatrix, a true and fair valuation of the residuary estate, and that, therefore, the nature of the property itself is not such as to compel me to adopt some other method than that adopted by the Court of Appeal in *Re Hargreaves* (1). Is there anything in the will which leads me to the conclusion that the testatrix did not contemplate or intend an immediate division? I think that here I should say this: that, in my judgment, the method adopted in *Re Hargreaves* (1) is one which is not excluded merely because one finds in the will that the testator may have contemplated that there should be either an immediate division, or that there might be a postponement of that division. I think that the method adopted in *Re Hargreaves* (1) can only be excluded if one finds that the testator did not intend or contemplate an immediate division. There does not appear to me to be in this will anything which indicates that the testatrix did not contemplate the possibility of an immediate division of her property. She gave certain annuities; but there was no difficulty about making provision for these

annuities and, subject to that, having a division of the estate. The direction to invest in the will I must just refer to a little more closely. It is in para. 10 of the will. The direction is:

> "My trustees shall invest the residue of the said money"—that is, the proceeds of sale; she directed a sale and conversion with power to postpone—"in their names or under their control in or upon any of the investments hereby authorised with power for my trustees at their discretion to change such investments for others of a like nature and shall stand possessed of such investments or varied investments."

Now that does show that the testatrix contemplated that there might be a period between the death and the division because she contemplated that there might be a change of investment after her death. Then the clause proceeds:

> "And of all property remaining unsold and unconverted under the power aforesaid, or forming part of my residuary estate . . . upon trust to divide the same into four equal parts."

That does not necessarily mean or imply an immediate division, but I do not think that there is anything in that clause which shows that the testatrix did not contemplate that there might be an immediate division. When one comes to look at the form of the third codicil one finds this expression:

> "Now I declare and direct that the sum of £11,000, the value of the stocks so given and transferred by me to my said son, as aforesaid, shall be deducted from his one-fourth share in the trust fund mentioned in my will and settled on him thereby, and accordingly that such trust fund shall be divided between my children among whom the same is directed to be divided by my will in such manner,"

&c. So there, again, the testatrix is obviously contemplating a division, although it is not inconsistent with a division at some date later than the death or the end of the executors' year.

Counsel for Trevor Mansel has said that in the trust of Gwladis's share the words are:

> "To pay or apply such part of the income of Gwladis's share as shall not be paid to or applied for the benefit of my daughter Gwladis or any husband or issue of hers as income arising from the other three-fourth parts of the trust fund."

Counsel has said that that is some indication that if the method adopted in *Re Hargreaves* (1) were adopted, that might result in an injustice, because it might result to some extent that Trevor was paying twice over in respect of his advances. I do not agree with that view. It seems to me that if the method adopted in *Re Hargreaves* (1) is adopted, and the property is valued and divided on the basis of the valuation plus the advances, the division will be made once for all, and the surplus income will then be divisible equally between the other three parts other than Gwladis's part. That will, I think, be in accordance with the words: "income from the other three parts of the trust fund"; although it is true that in the income of the actual residuary estate the amount payable to Trevor will be less than the amount payable to the others by reason of the fact that there has to be deducted from his share the amount which has been already advanced to him.

Taking the will as a whole, it seems to me that I cannot say that there is in this will any clear indication to show that the testatrix did not contemplate the possibility of an immediate division of her estate, and since the nature of the property is such that there is no reason why the method in *Re Hargreaves* (1) should not be applied in this case, and there is nothing in the will which indicates that an immediate division was not intended or contemplated by the testatrix, then I am bound to give effect to what the Court of Appeal said in that case. I, therefore, come to the conclusion that this is a case in which the method adopted by

the Court of Appeal in *Re Hargreaves* (1) should be adopted, and I propose to make a declaration accordingly.

Solicitors: *Rider, Heaton, Meredith & Mills*, for *Davis, Lloyds & Wilson*, Newport, Mon.; *Routh, Stacey & Castle*, for *Thring, Sheldon & Ingram*, Bath.

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

POCKNEY *v.* ATKINSON

[King's Bench Division (Lord Hewart, C.J., Avory and Branson, JJ.), July 15, 16, 1929]

[Reported [1930] 1 K.B. 197; 99 L.J.K.B. 42; 142 L.T. 135; 94 J.P. 15; 45 T.L.R. 639; 27 L.G.R. 645]

Agriculture—Wages—Minimum wage—Lump sum agreed to be paid for a year's work—Sum equivalent to not less than prescribed minimum wage—Validity of agreement—Wrongful termination of employment by worker before expiry of year—Right to wages—Agricultural Wages (Regulation) Act, 1924 (14 & 15 *Geo.* 5, *c.* 37), *s.* 7.

Section 7 (1) of the Agricultural Wages (Regulation) Act, 1924 [now s. 4 (1) of the Agricultural Wages Act, 1948], provided: "Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and if he fails to do so shall be liable on summary conviction . . . to a fine. . . ." An order under the Act prescribed a minimum weekly rate of wages.

An agreement to employ a worker in agriculture for a year for a lump sum and his board and lodging, equivalent to a rate not less than the prescribed minimum, **held,** not to be a contravention of the Act and so was valid.

In breach of the agreement the worker wrongfully left his employment before the end of the year.

Held: the Act did not oblige the employer to pay the worker for the broken period actually worked at the rate laid down by the Act or at all.

Hampton v. *Smith* (1) (1920), 122 L.T. 783, applied; *Churm* v. *Dalton Main Collieries, Ltd.* (2), [1916] 1 A.C. 612, and *Hooley* v. *Butterley Co., Ltd.* (3), [1916] 2 A.C. 63, distinguished.

Notes. The Act of 1924 has been replaced by the Agricultural Wages Act, 1948, s. 11 (1) (a) of which is in the same terms as s. 7 (10) of the Act of 1924, and s. 4 (1), (2), (3) of which correspond to s. 7 (1), (3) of the Act of 1924.

As to agreements in contravention of the Agricultural Wages Act, see 1 Halsbury's Laws (3rd Edn.) 478, para. 934; and for cases on the subject, see 2 Digest (Repl.) 160 et seq., 1170 et seq. For the Agricultural Wages Act, 1948, s. 4 (1), (2), (3), s. 11 (1) (a), see 28 Halsbury's Statutes (2nd Edn.), pp. 6 and 13.

Cases referred to:

(1) *Hampton* v. *Smith* (1920), 89 L.J.K.B. 413; 122 L.T. 783; 84 J.P. 51; 36 T.L.R. 209; 18 L.G.R. 225, D.C.; 2 Digest (Repl.) 160, *1170.*

(2) *Churm* v. *Dalton Main Collieries, Ltd.*, [1916] 1 A.C. 612; 85 L.J.K.B. 578; 114 L.T. 528; 32 T.L.R. 275, H.L.; 34 Digest 734, *1132.*

(3) *Hooley* v. *Butterley Co., Ltd.*, [1916] 2 A.C. 63; 85 L.J.K.B. 1050; 114 L.T. 858; 32 T.L.R. 375, H.L.; 34 Digest 735, *1133.*

A (4) *Cutter* v. *Powell* (1795), 6 Term Rep. 320; 101 E.R. 575; 34 Digest 88, *649*.
(5) *Jones* v. *Harris*, [1927] 1 K.B. 425; 96 L.J.K.B. 70; 136 L.T. 248; 91 J.P. 1; 43 T.L.R. 1; 25 L.G.R. 27; 28 Cox, C.C. 272, D.C.; 2 Digest (Repl.) 162, *1179*.

Case Stated by justices for the North Riding of Yorkshire.

B An information was preferred, at a court of summary jurisdiction sitting at Pickering, in the North Riding, by the appellant prosecutor, R. P. Pockney, against the respondent employer, J. G. Atkinson, for that he on or about Nov. 23, 1928, being a person who employed John Husband, a worker in agriculture, did not pay wages to John Husband at a rate not less than the minimum rate as fixed under the provisions of the Agricultural Wages (Regulation) Act, 1924, and the Orders of the Agricultural Wages Board made thereunder, No. 267, dated Dec. 19, 1927, and C No. 299, dated Sept. 25, 1928, and the Orders of the Agricultural Wages Committee for the North Riding of Yorkshire dated Nov. 27, 1927, Nos. 6 and 7. The information was dismissed by the justices, who consented to state and sign the following Case.

The following facts were proved or admitted: The prosecutor was a person D authorised by law to institute proceedings under the Agricultural Wages (Regulation) Act, 1924, and he accordingly laid the information against the employer on Jan. 8, 1929. The employer on or about Dec. 4, 1927, entered into a parol contract with the said John Husband whereby he was to employ the said John Husband as a worker in agriculture on his farm called Lodge Farm, Sinnington. By the terms of the contract the worker, John Husband, was hired for a period from Dec. 4, E 1927, to Nov. 23, 1928, at a wage of £48 10s. and his board and lodging, being a rate of wage in accordance with that required to be paid under the Agricultural Wages (Regulation) Act, 1924, and the Orders made thereunder, and the said £48 10s. was agreed to be due and payable on Nov. 23, 1928, provided that the worker duly performed his obligations under the contract. On July 12, 1928, the worker, having refused to obey a lawful order given by the employer, left the F employment without notice and in breach of his contract, and refused to complete the contract. During the whole of the period from Dec. 4, 1927, to July 12, 1928, the worker had been provided with full board and lodging, and at various dates during the said period ex gratia cash advances amounting in the whole to a sum of £9 10s. had been made by the employer to the worker. In addition the employer had paid 9d. per week National Health Insurance contribution for and on behalf G of the worker. The employer had made such ex gratia cash payments as aforesaid on account of such amount as would become due and payable on Nov. 23, 1928, to the worker. If, as contended by the prosecutor, wages were due to the worker in respect of the period during which he was in the employment, namely, from Dec. 4, 1927, to July 12, 1928, the amount so due after allowing for payments made as set out above was £20 8s. 6d.

H The prosecutor contended: (a) that s. 7 (1) of the Agricultural Wages (Regulation) Act, 1924, imposed upon the employer a liability to pay wages to the worker in respect of the period during which he was in the employment of the employer, namely, from Dec. 4, 1927, to July 12, 1928, at a rate not less than the minimum rate laid down by the Orders of the Agricultural Wages Board and the Agricultural Wages Committee; (b) that the employer was not relieved of that liability by reason I of the fact that the worker terminated his employment before Nov. 23, 1928, in breach of his contract; (c) that such wages were due and payable to the worker, and that the employer had failed to comply with s. 7 (1) of the Act of 1924. The employer contended: (a) that at common law he was not liable to pay wages to the worker at all as no wages had accrued due to him at the date of the breach of contract on the part of the worker; (b) that the Agricultural Wages (Regulation) Act, 1924, provided for the fixing of minimum rates of wages in cases where an employer was under a contractual liability to pay wages to a worker in agriculture, but did not impose an obligation to pay wages at the fixed or any rate where there

was no contractual liability to pay wages at all; (c) that since on account of his failure to perform his contract no wages were contractually due to the worker, no offence against s. 7 (1) of the Agricultural Wages (Regulation) Act, 1924, had been committed. A

The attention of the justices was called to *Hampton* v. *Smith* (1). They held that since the worker had on July 12, 1928, failed and refused to complete his contract, no wages were due to him and no offence had been committed under s. 7 (1) of the Agricultural Wages (Regulation) Act, 1924, and they thereupon dismissed the information. The question on which the opinion of the court was desired was whether, on the above statement of facts, the determination of the justices was correct in point of law. B

By the Agricultural Wages (Regulation) Act, 1924: C

"Section 7 (1): Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and if he fails to do so, shall be liable to summary conviction in respect of each offence to a fine. . . . (2) In any proceedings against a person under this section it shall lie with that person to prove that he has paid wages at not less than the minimum rate. (3) In any proceedings against an employer under this section the court shall, whether there is a conviction or not, order the employer to pay in addition to the fine, if any, such sum as may be found by the court to represent the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period. . . . (10) Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void. D E

Section 16 (1): In this Act unless the context otherwise requires . . . The expression 'employment' means employment under a contract of service or apprenticeship, and the expressions 'employed' and 'employer' shall be construed accordingly." F

The order made by the Agricultural Wages Board provided for payment of wages to agricultural workers at not less than the prescribed minimum rates (according to the age of the worker) per week of forty-eight hours in winter and fifty-two-and-a-half hours in summer. G

Hubert Hull, for the prosecutor, referred to *Cutter* v. *Powell* (4), *Churm* v. *Dalton Main Collieries, Ltd.* (2), *Hooley* v. *Butterley Co., Ltd.* (3), and *Jones* v. *Harris* (5).

C. S. S. Burt (*Harold Murphy* with him), for the employer, referred to *Hampton* v. *Smith* (1). H

LORD HEWART, C.J.—This is a Case stated by justices for the North Riding of Yorkshire, which raises an interesting question under the Agricultural Wages (Regulation) Act, 1924. An information was preferred in January, 1929, by the prosecutor against the employer, for that he, on Nov. 23, 1928, being a person who employed John Husband, a worker in agriculture, did not pay wages to him at a rate not less than the minimum rate as fixed under the provisions of the Act and the Orders of the Agricultural Wages Board made under the Act, and the Orders of the Agricultural Wages Committee for the North Riding of Yorkshire. The justices, having heard the information, dismissed it, and the question for this court is whether, in so deciding, they came to a correct determination in point of law. I

The facts, it would appear, were not in dispute. [His Lordship summarised the facts, and continued:] The contention which was urged on behalf of the prosecutor,

A and has been repeated before us, is that sub-s. (1) of s. 7 of the statute of 1924 imposed on the employer a liability to pay wages to the worker in respect of the period during which the worker was in the employment of the employer, namely, from Dec. 4, 1927, till July 12, 1928, at a rate not less than the minimum rate laid down by the Orders of the Wages Board and the Wages Committee; and in like manner it was and is contended that the employer was not relieved of that liability B by reason of the fact that the worker terminated his employment before Nov. 23, 1928, in breach of his contract. By s. 7 (1) of the Act it is provided that:

> "Where any minimum rate of wages has been made effective by an Order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate,"

C and if he fails to do so, he is liable to a penalty; and more than that, it is provided by sub-s. (10) of that section that:

> "Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void."

D The first question which arises is the question whether it is true to say that the agreement for the payment of wages, which is found to have been made in this case, was an agreement in contravention of the Act. In my opinion, it was in no sense in contravention of the Act. So far as the question of amount is concerned, it is expressly found, nor is it sought to be denied, that the lump sum of £48 10s. E for the whole period, considered together with the provision of board and lodging, was such as to amount to a rate of wage in accordance with the statute and the Orders made under it. But it is suggested, though I think only faintly suggested, that the agreement was in contravention of the Act, inasmuch as it contemplated, so far as money is concerned, the payment of a lump sum only at the conclusion of the whole period. If that argument is seriously meant, it seems to me to be F inconsistent with the decision of this court in *Hampton* v. *Smith* (1). In that case the matter arose under very similar words of the Corn Production Act, 1917, which, by s. 4 (1), provided as follows:

> "Any person who employs a workman in agriculture shall pay wages to the workman at a rate not less than the minimum rate as fixed under this Act and applicable to the case, and if he fails to do so, shall be liable on summary G conviction in respect of each offence to a fine. . . ."

That section further provided by sub-s. (3) that any agreement for the payment of wages in contravention of the section should be void. In that case, the respondent at the beginning of January, 1919, had entered into a contract with a man named Allan, whereby he was to employ Allan as a workman in agriculture for the period from Jan. 6, 1919, for one year, at a wage of £20 equivalent to 7s. 8d. a week H together with board and lodging. In fact, Allan served the respondent from Jan. 6, 1919, until Sept. 8, 1919, which was the date of the information, and the information preferred by the appellant in the case was that the respondent on divers days between Jan. 6 and that day in September, 1919, being a person who employed Allan, did not pay wages to Allan at a rate not less than the minimum rate fixed under the statute. In that state of the facts, the justices found in favour of the I employer.

They stated a Case which came before this court, and it was urged against the employer that an offence had been committed at the time when the employer entered into the agreement, inasmuch as it was an agreement to pay less than the minimum wage. It was said that the employer could not set up the contract and allege that under it no payment of wages was due until the end of the year's service, because it was void under sub-s. (3) of the section; and the learned counsel who appeared for the prosecutor said in terms: "The scheme of the Act is that the labourer shall be paid weekly." This court, consisting of Lord Reading, C.J.,

AVORY, J., and SANKEY, J., as he then was, unanimously dismissed the appeal from the justices' decision in favour of the employer. LORD READING, in the course of his judgment, said (122 L.T. at p. 785):

> "The difficulty in the appellant's case is that he can only succeed if the effect of the Corn Production Act, 1917, is to provide that the minimum rate of wages payable per week shall in fact be paid per week. There is all the difference in the world between saying that a man shall be paid at a certain rate per week and saying that he shall be paid weekly at that rate, and this is all the more important when one remembers that, under this class of contract, a general hiring is for twelve months, according to the common law."

In the same case AVORY, J., said (122 L.T. at p. 785):

> "In such a case the question is whether the Act provides that the workman is to be paid his wages weekly, week by week. One cannot find in the Act or in the Orders any indication that the legislature intended to interfere with the right which the employer and the workman have to enter into a contract that the workman shall be engaged for a year and shall be paid at the end of the year, and that the ordinary custom shall prevail of the employer making advances on account of wages. There being no indication of such an intention on the part of the legislature, we are not justified in reading into s. 4 (1) words that are not there. The scheme of the Act and the Orders is simply to provide the rate at which wages are to be paid. It is quite consistent with that scheme that they should be paid every month, every half year, or every year."

That decision, in my opinion, has a direct bearing upon the present case; and in the fact of that decision it is not possible for this court to say that such an agreement as that which is found to have been made in this case was contrary to the statute, inasmuch as it contemplated, so far as money went, the payment only of a lump sum at the end of a comparatively protracted period.

It was urged by counsel for the prosecutor that the attention of the court in *Hampton* v. *Smith* (1) was not directed to two cases under the Coal Mines (Minimum Wage) Act, 1912: *Churm* v. *Dalton Main Collieries, Ltd.* (2) and *Hooley* v. *Butterley Co., Ltd.* (3). However, it does not appear to me that the decisions in those cases, crucial as they were under the statute to which they related, throw much light upon the present problem before us. No doubt, as a result of those cases, it is true to say that where the relation of employer and employed, in a kind of industry to which the statute refers, is proved, it matters not that the mode of payment is circuitous; the worker who is employed is entitled to say: "When you pay me, you shall pay me a rate not less than the statute requires." But that is a very different thing from saying that where there is an agreement between the parties for a rate of payment which is consistent with the requirements of the statute, and the fact of that payment is prevented only by default on the part of the workman who, refusing to obey a lawful order, leaves his employer without notice, the statute nevertheless implies that for the broken period, although he could not sue upon a quantum meruit, never having fulfilled his contract, the statutory rate is applicable. It is one thing to say that where there is no express agreement about the rate of wages, the statute will require the minimum to be paid; it is another thing to say that where the rate of payment agreed is less than the statutory minimum, the statute will make the agreement void and insist upon the minimum; but it seems to me to be a long step from those propositions to say that where there has been an agreement between the parties in conformity with the statute, and the payment is defeated only by a breach of contract on the part of the workman himself, nevertheless there is to be implied from the statute an obligation on the employer to pay for the broken period at the rate which the statute lays down.

I cannot find any such provision in the Act. If it were in the Act it would be a most important provision, and I think, therefore, that there are no materials here upon which we are entitled to say that these justices erred in point of law in

coming to the conclusion at which they arrived in favour of the employer. In these circumstances, it appears to me that this appeal fails.

AVORY, J.—I am of the same opinion.

BRANSON, J.—I agree.

Appeal dismissed.

Solicitors: *Solicitor to the Ministry of Agriculture and Fisheries*; *Ellis & Fairbairn.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

WATTS *v.* BATTERSEA CORPORATION

[COURT OF APPEAL (Scrutton, Greer and Sankey, L.JJ.), January 31, February 1, 1929]

[Reported [1929] 2 K.B. 63; 98 L.J.K.B. 273; 140 L.T. 594; 93 J.P. 137; 45 T.L.R. 224; 73 Sol. Jo. 143; 27 L.G.R. 307]

Housing—"Owner" of premises—Person receiving rack-rent—Rents collected by builder—Net rent after paying outgoings paid by builder to freeholder's widow's solicitor—Position of bank if tenant instructed by freeholder to pay rent into freeholder's account—Public Health Act, 1875 (38 *& 39 Vict., c.* 55), *s.* 4.

Section 4 of the Public Health Act, 1875 [now s. 343 (1) of the Public Health Act, 1936], and s. 141 of the Public Health (London) Act, 1891 [now s. 304 (1) of the Public Health (London) Act, 1936], provided that ". . . 'owner' means the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

The owner of three houses, who had employed a builder to collect the rents for him, died leaving two wills, as to which a probate action was commenced, and eventually settled, between the owner's widow and son, on one side, and his son-in-law, on the other. On the owner's death the son-in-law had directed the builder to continue to collect the rents, and later in the same month the widow's solicitor directed the builder to retain the rents pending the settlement of the dispute. By the settlement of the action the widow and her son became entitled to the rents. The builder asked the widow what he should do, and she referred him to her solicitor. Thereafter, for several years, the solicitor gave all instructions to the builder as to the payments to be made out of the rents, and the builder accounted to the solicitor for the rents and paid him the net balance thereof. The solicitor retained this balance on account of the costs owed to him by the widow in respect of the probate action. In a letter to the builder the solicitor had acknowledged a payment as follows: "Re W. [the late owner] deceased. We are obliged for your cheque for £25 on account of rent herein. Kindly treat this letter as our receipt."

Held (GREER, L.J., dissenting): the solicitor had received the money from the builder as "rent" and as agent for the widow, and so was the "owner" of the three houses within the above definition.

Quære: whether a bank, into which the owner of premises had instructed

the tenant thereof to pay his rent, would be the "owner" within the above definition.

Notes. The definition of "owner" formerly contained in s. 28 (5) of the Housing, etc., Act, 1919, in s. 4 of the Public Health Act, 1875, and in s. 141 of the Public Health (London) Act, 1891, is now contained in s. 39 (2) of the Housing Act, 1957, s. 343 (1) of the Public Health Act, 1936, and in s. 304 of the Public Health (London) Act, 1936. These latter Acts have repealed and replaced the Housing and Public Health Acts referred to below.

Referred to: *Solomons* v. *Gertzenstein, Ltd.*, [1954] 1 All E.R. 1008.

As to the meaning of "owner" for the purposes of the Public Health Acts, see 26 HALSBURY'S LAWS (2nd Edn.) 349, para. 693, note (t), and ibid. 550, para. 1162, note (f); and for cases on the subject, see 38 DIGEST 177 et seq., *191* et seq. For the Public Health Act, 1936, s. 343 (1), see 19 HALSBURY'S STATUTES (2nd Edn.) 495; for the Public Health (London) Act, 1936, s. 304, see 15 ibid. 1033; and for the Housing Act, 1957, s. 39 (2), see 37 ibid. 353.

Cases referred to:

(1) *Peek* v. *Waterloo and Seaforth Local Board of Health* (1863), 2 H. & C. 709; 3 New Rep. 131; 33 L.J.M.C. 11; 9 L.T. 338; 27 J.P. 807; 9 Jur.N.S. 1344; 12 W.R. 252; 159 E.R. 293; 38 Digest 177, *194*.

(2) *Cook* v. *Montague* (1872), L.R. 7 Q.B. 418; 41 L.J.M.C. 149; 26 L.T. 471; 37 J.P. 53; 39 Digest 49, *602*.

(3) *St. Helen's Corpn.* v. *Kirkham* (1885), 16 Q.B.D. 403; 50 J.P. 647; 34 W.R. 440; 26 Digest 551, *2468*.

(4) *Bacup Corpn.* v. *Smith* (1890), 44 Ch.D. 395; 59 L.J.Ch. 518; 63 L.T. 195; 38 W.R. 697; 38 Digest 177, *193*.

(5) *Lyon* v. *Greenhow* (1892), 8 T.L.R. 457; 36 Sol. Jo. 381; 31 Digest (Repl.) 329, *4636*.

(6) *Tottenham Local Board* v. *Williamson* (1893), 62 L.J.Q.B. 322; 69 L.T. 51; 57 J.P. 614; 9 T.L.R. 372; 26 Digest 551, *2470*.

(7) *Broadbent* v. *Shepherd*, [1901] 2 K.B. 274; 70 L.J.K.B. 628; 84 L.T. 844; 65 J.P. 499; 49 W.R. 521; 17 T.L.R. 460; 45 Sol. Jo. 486, D.C.; 36 Digest (Repl.) 342, *833*.

(8) *Metropolitan Water Board* v. *Brooks*, [1911] 1 K.B. 289; 80 L.J.K.B. 495; 103 L.T. 739; 75 J.P. 41; 9 L.G.R. 442, C.A.; 39 Digest 49, *603*.

Decision of the Divisional Court affirmed.

Appeal from the Divisional Court on a Case stated by a Metropolitan police magistrate.

On March 30, 1928, the appellant, Mr. J. Nixon Watts, a solicitor, was summoned by the respondents, the Battersea Borough Council, to answer three several claims of £195 12s., £268 15s. 6d., and £247 16s. 7d., together amounting to £712 4s. 1d., being the expenses incurred by the respondents as the housing authority for the borough of Battersea in executing under the powers given to them by the Housing Acts, hereinafter referred to, at three several dwelling-houses in the respondents' borough, Nos. 18, 19, and 20, Balfour Street, the works necessary to make the same in all respects reasonably fit for human habitation, with interest on the said sums at the rate of 5 per centum per annum from Dec. 30, 1925, being the date of service by the respondents on the appellant of demands for the payment thereof respectively. The learned magistrate ordered the appellant to pay to the respondents the said sums, together with the interest thereon as claimed, but made no order as to costs.

The following facts were admitted as proved:

1. In the year 1921 the said houses were purchased for £100 by Edward James Henry Wallis from the leaseholder under leases expiring in 1956 at the following ground rents: No. 18, £3 10s.; No. 19, £4; and No. 20, £4; total £11 10s. 2. The rateable values of the said three houses were at all material times as follows: No. 18, £13; No. 19, £13; and No. 20, £11; being £37 in all. 3. The rents of the

said three houses were at all material times as follows: No. 18, 12s. 6d. per week (being £32 10s. per annum); No. 19, 12s. 6d. per week (being £32 10s. per annum); and No. 20, 12s. per week (being £31 4s. per annum). 4. The said three houses were situate in the borough of Battersea and were at all material times suitable for occupation by persons of the working classes. 5. The said houses were at all material times let at rack-rents within the meaning of the Acts hereinafter referred to. 6. The said Edward James Henry Wallis died on Feb. 2, 1922, leaving a widow and one son. 7. During his lifetime the said Edward James Henry Wallis employed G. R. Spicer, a builder, to collect the rents of the said houses. 8. By a will dated Jan. 15, 1922, the said Edward James Henry Wallis gave Nos. 18 and 19, Balfour Street to his widow, and No. 20 to his son. By another will dated Jan. 31, 1922, he otherwise disposed of the same. Legal proceedings as to the said wills followed, in which the testator's son-in-law, Lawrence Vivian Clark, was the plaintiff, and the widow was the defendant. In these proceedings the appellant acted as solicitor for the widow. Ultimately they were settled and on Dec. 16, 1922, letters of administration with the said will of Jan. 15 annexed were granted to the widow. One of the terms of settlement was that the said three houses were to be sold and the plaintiff's costs were to be paid out of the net proceeds and that the defendant was to pay her own costs. 9. After the death of the said Edward James Henry Wallis the said G. R. Spicer was verbally directed by the said Lawrence Vivian Clark to continue to collect the rents of the said houses as before. 10. By a letter dated Feb. 23, 1922, the appellant requested the said G. R. Spicer not to "part with any of the rents of the said three houses," as he understood that the said G. R. Spicer collected these and they would "have to be accounted for to the person entitled." 11. As and when the ground rent, taxes, and other outgoings became payable in respect of the said houses, the said G. R. Spicer applied to and obtained instructions from the appellant to pay the same and paid the same out of the said rents. 12. On or about Dec. 15, 1922, the said G. R. Spicer paid the sum of £25 to the appellant and by a letter dated Dec. 15, 1922, and signed over two penny stamps, the appellant acknowledged the said sum in the following terms: "Re Wallis deceased. We are obliged for your cheque for £25 on account of rent herein. Kindly treat this letter as our receipt." 13. By a letter dated July 18, 1923, A. H. Wallis, the son of the said Edward James Henry Wallis, deceased, requested the said G. R. Spicer to forward him an account of the amount paid by him to the appellant and of the amount in hand, and by a letter in reply dated July 19, 1923, the said G. R. Spicer informed the said A. H. Wallis that he had sent his said letter to the appellant and that he could not comply with such request without instructions from the appellant. 14. The said G. R. Spicer forwarded the said letter of July 18, 1923, from the said A. H. Wallis to the appellant. 15. By a letter dated July 24, 1923, the appellant informed the said G. R. Spicer that he had written to the said A. H. Wallis and stated that the said A. H. Wallis was entitled to have an account and requested the said G. R. Spicer to let the appellant have a statement showing the rents received and payments made in respect of each house so that the appellant could ascertain what balance, if any, was due to the said A. H. Wallis. 16. On or about July 31, 1923, the said G. R. Spicer sent to the appellant an account of the rent of one of the said houses with a letter of that date informing the appellant that he was preparing the account of the other two houses and thought that there would be a balance in respect of the said three houses of about £48 less the said sum of £25 advanced to the appellant. 17. On Oct. 29, 1923, the said G. R. Spicer delivered to the appellant an account of the said rents and outgoings and paid to the appellant the balance of £11 18s. 7d. 18. On May 1, 1924, the said G. R. Spicer delivered to the appellant an account of the said rents and outgoings and paid to the appellant the balance, £19 16s. 3d. 19. On Oct. 7, 1924, the said G. R. Spicer delivered to the appellant an account of the said rents and outgoings and paid to the appellant the balance, £3 16s. 8d. 20. The said G. R. Spicer never at any time paid or accounted for any of the said rents to the widow or son of the said Edward James Henry Wallis, deceased, except

on one occasion immediately after the death of the said Edward James Henry Wallis, when he sent one account to her and she referred him to the appellant. 21. The said sums of £25, £11 18s. 7d., £19 16s. 3d. and £3 16s. 8d. so paid by the said G. R. Spicer to the appellant as aforesaid amount to £60 11s. 6d. in all. The appellant's bill of costs against the widow of the said Edward James Henry Wallis, deceased, amounted to £65 12s., so that the sum of £5 0s. 6d. was at the date of the hearing still owing to the appellant in respect of the said costs. 22. The respondents, as the rating authority for the borough of Battersea, addressed to "G. R. Spicer for E. J. Wallis, deceased" notices informing him of the amount of the rates, and that if payments were made by him the respondents would refrain from serving demands for the same upon the occupiers. They addressed to "G. R. Spicer for E. J. Wallis, deceased, estate" their receipts for the rates paid by him. 23. In November, 1924, the medical officer of health to the respondents wrote to the appellant with regard to the condition of the said three houses, and the appellant, on Nov. 29, 1924, wrote to the medical officer, saying: "We have asked our builder, Mr. Spicer, to interview you on our behalf." At the subsequent interview the said G. R. Spicer told the medical officer that he was collecting the rents on the instructions of the appellant. On Dec. 23, 1924, the appellant wrote to the medical officer of health saying that he had been "in communication with the collector for this estate," and adding, "you are, of course, aware that this is a very small estate, and our client, who was the widow of the late owner, Mr. Wallis, has no means," and asked for leniency in the council's requirements. 24. On Feb. 4, 1925, the said three houses were not in all respects reasonably fit for human habitation, and the respondents served upon the appellant three notices in respect of the said three houses under s. 28 (1) of the Housing, Town Planning, &c., Act, 1919, as amended by s. 10 of the Housing, &c., Act, 1923, requiring him as the alleged "owner" within the meaning of that section to execute certain specified works at the houses. The said works were necessary in order to make the said three houses reasonably fit for human habitation. 25. The said notices were not complied with, and the respondents themselves executed the said works and thereby incurred expenses amounting to the sums respectively claimed by the said three summonses. 26. On Dec. 30, 1925, the respondents served on the appellant as the alleged "owner" of the said three houses, within the meaning of the said Acts, three demands for payment of the said three sums and interest as aforesaid. 27. The said demands were not satisfied, and on June 4, 1926, the respondents summoned the appellant as aforesaid for non-payment thereof.

The summonses were adjourned from time to time without being heard, and were finally heard on March 30, 1928, as above stated. The only point argued before the magistrate was whether in the above circumstances the appellant was or was not at any material time the "owner" of the houses within the meaning of the said Acts. The appellant contended that he was not, as he was at all times acting merely as solicitor to the widow as administratrix of the estate of the said Edward James Henry Wallis, and was receiving the said balances in respect of the costs owing to him as such solicitor. The respondents contended that at all material times the appellant was such "owner." The learned magistrate considered that it opened the door to a great injustice, but felt bound by the enactments and cases cited to him to hold that the appellant was at all material times the "owner" of the houses within the meaning of the said Acts.

The statutory definition of "owner" for the purposes of this case has to be extracted from the following enactments: (a) Subsection (5) of s. 28 of the Housing, Town Planning, &c., Act, 1919, was in force at the date of service of the said notices (Feb. 4, 1925), and remained in force until July 6, 1925, when it was repealed and replaced by sub-s. (10) of s. 3 of the Housing Act, 1925. Subsection (5) of the said s. 28 enacted as follows: "In this section 'owner' shall have the same meaning as in the Public Health Act, 1875." Section 4 of the Public Health Act, 1875, enacts as follows:

A "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say . . . 'owner' means the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

B (b) Section 136 of the Housing Act, 1925, repealed s. 28 of the Housing, Town Planning, &c., Act, 1919, but provided: (i) That nothing in that repeal should effect (inter alia) any order made, notice given, or charge effected under any enactment thereby repealed, but that any such order, notice, and charge should have effect as if made, given, or effected under the corresponding provision of the said Act, and might be enforced accordingly; and (ii) that any document referring to any Act or C enactment thereby repealed should be construed as referring to the said Act or the corresponding enactment in the said Act. Subsection (2) of s. 137 of the Housing Act, 1925, enacts as follows: "This Act shall come into operation on the 1st day of July, 1925." Subsection (10) of s. 3 of the said Act enacts as follows: "In this section 'owner' has the same meaning as in the Public Health Acts." Section 135 thereof enacts as follows:

D "In this Act, unless the context otherwise requires . . . 'Public Health Acts' mean as respects London, the Public Health (London) Act, 1891, and the Acts amending that Act, and elsewhere the Public Health Act, 1875, and the Acts amending that Act."

Section 141 of the Public Health (London) Act, 1891, enacts as follows:

E "In this Act unless the context otherwise requires . . . the expression 'owner' means the person for the time being receiving the rack-rent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack-rent."

F The question upon which the opinion of the divisional court was desired was whether, upon the above-stated facts, the learned magistrate came to a correct determination of the question whether the appellant was or was not, at all material times, the "owner" of the said three houses within the meaning of the said Acts.

Naldrett, K.C., and *R. A. Glen* for the appellant, the solicitor.

Stafford Cripps, K.C., and *Russell Gilbert* for the respondents, the local authority.

G The following cases were cited: *Peek* v. *Waterloo and Seaforth Local Board of Health* (1), *Cook* v. *Montague* (2), *St. Helen's Corpn.* v. *Kirkham* (3), *Bacup Corpn.* v. *Smith* (4), *Lyon* v. *Greenhow* (5), *Tottenham Local Board* v. *Williamson* (6), *Broadbent* v. *Shepherd* (7), and *Metropolitan Water Board* v. *Brooks* (8).

The case was heard, by consent, by two judges [SWIFT and ACTON, JJ.], who found that the solicitor had received the monies paid him by Spicer as "rent," H and accordingly affirmed the magistrates' decision that the solicitor came within the statutory definition of "the owner." The solicitor appealed to the Court of Appeal.

Montgomery, K.C., and *Glen* for the solicitor.

Stafford Cripps, K.C., and *Russell Gilbert* for the local authority.

I **SCRUTTON, L.J.**—This is a case of some difficulty and of considerable importance, and I am sorry that there is a difference of opinion in the court. The question arises under the Acts which were passed for, among other purposes, improving the condition and repair of houses suitable for occupation by people of the working classes, and in the Act of 1919, which is the beginning of the series (I do not think the subsequent Acts matter very much), Parliament provided, by s. 28, that if a house, otherwise suitable for occupation by persons of the working classes, was not kept in a condition reasonably fit for human habitation, the local authority might serve a notice on the owner of the house requiring him within not

less than twenty-one days to execute such works as may be necessary to make the house in all respects reasonably fit for human habitation. There was a proviso that if the house was in such a condition that it could not, without reconstruction, be made fit for human habitation, the owner might say, "I will close it," and then there would be no obligation on him to execute repairs or reconstruction. But supposing the owner did not do that, and it was not a question of reconstruction, if the owner did not comply with the requisitions of the local authority, the local authority might execute the works themselves, and any expenses incurred by the local authority under this section could be recovered in a court of summary jurisdiction from the owner, and those expenses were, if not paid, a charge on the premises.

Then came the question, who is the owner? Parliament seemed to have contemplated that it might be difficult for the local authority to find the owner. He may not be in the United Kingdom at all; he may be of such kind of owner that it is difficult to get at, and so the statute defined "owner" (under the earlier Act it is the Public Health Act, 1875, and under the later Act it is the Public Health (London) Act, 1891, but as the two provisions are exactly the same it does not matter which it is under) as meaning

> "the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person."

Parliament might have done several things. It might have said that the agent is to be liable only to the extent of the rent he receives, but Parliament did not say so. Parliament has apparently assumed that the agent paying the money that was claimed from him under this definition would have a legal right of indemnity against the owner, and it does not seem to have considered what would happen if the owner had no money to pay the agent, and consequently, no doubt, this definition may lead to hard cases. It may lead to a case where the agent is made liable for a very considerable sum, much more than the rent he received, and he cannot recover it from the owner because the owner has not got it. That was no doubt a matter that Parliament ought to have considered, that it may lead to hard cases. There is a well-known maxim—I do not know whether it has got into Broome's Legal Maxims—to the effect that hard cases make bad law. It is not for us to legislate because we think that Parliament has used words which plainly create a hardship. We endeavour to avoid hardship if we can, but our business is to interpret the words that Parliament has used and not, under the guise of construing the words, to legislate in a manner in which Parliament does not legislate.

The question therefore arises in this case, as it will in every similar case, was Mr. Watts, the appellant, who has been hit for these expenses, receiving the rack-rent of the lands as agent for any other person?

The three houses in this case, which were obviously small houses in a working-class locality, belonged originally to a Mr. Edward James Henry Wallis, and while he was alive he employed a Mr. Spicer, a builder, to collect the rents of the houses. Mr. Wallis died in February, 1922, and apparently, in the month before he died, he made two contradictory wills; one left two of the houses to his widow and one to his son, the other disposed of the houses in another way which is not stated, but proceedings in probate took place, the appellant, Mr. Watts, in those probate proceedings, acted as solicitor for the widow. It is not stated whether anybody acted as solicitor for the son, but apparently the widow's and the son's interests were the same. The son-in-law was propounding the other will. Ultimately, those probate actions were settled; they were settled on the terms that the two houses should be sold, and out of the proceeds the plaintiff's costs of action were to be paid, the balance of the proceeds were to be divided and paid as to one-third to the son and as to two-thirds to the widow. The son-in-law apparently got his costs out of the estate, or his legal advisers did. The date of that is not given in the exhibit. On the death of Mr. Wallis the son-in-law had directed Mr. Spicer to go on collect-

ing the rents. On Feb. 23, 1922, the appellant, who was solicitor for the widow, gave the very proper instruction to Mr. Spicer not to part with any of the rents but to hold them, as they would have to be accounted for to the person entitled when the probate dispute was settled. The probate dispute was settled, and Mr. Spicer, apparently hearing who were the people who, by the settlement, were entitled to the rents, proceeded to communicate with the widow who referred him to the solicitor, and after that, when any sums were to be paid out of the rents, Mr. Spicer applied to and obtained instructions from the appellant, Mr. Watts, the solicitor, with regard to whether or not he was to pay, and having got instructions from the appellant he paid or did not pay according to the instructions which he received. Further, on the appellant's instructions, Mr. Spicer paid to the appellant the net balance of the rents and rendered him an account of the rents collected. That went on for two or three years.

The question on those facts is: Is the appellant receiving the rack-rent of the lands as agent for any other person? Different minds take different views, and therefore I ought not to say that the thing is clear; I only say that it is clear to me, but possibly what is clear to me is wrong. It seems to me that the appellant, giving instructions with regard to what was to be done with the rents, which instructions were obeyed by Mr. Spicer—giving instructions to Mr. Spicer with regard to the payments which he was to make out of the rents which he collected, and giving instructions to Mr. Spicer to pay to him (the appellant) the balance after making the authorised payments, is receiving the rack-rents. It is perfectly true that he is receiving them on behalf of the widow and her son, but that is receiving them as agent, and he seems to me to be clearly receiving them as agent for another person. The police magistrate has taken that view and the Divisional Court has affirmed his decision.

I am not at all sure that it is not a question of fact, and if it is a question of fact, the police magistrate has found that the appellant received the rents. The reason why I doubt whether it is a question of fact is that there has been in the House of Lords a series of contradictory decisions with regard to what is a question of fact and what is a question of law. Some of the noble Lords, particularly LORD WRENBURY, have taken the view that when there is a statute, it is always a question of law what the statute means; when one has found out what the statute means, it is a question of fact whether or not the particular instance comes within the meaning one has got from the statute. But however simple the words of the statute may be, it is always a question of law what they mean. For instance, if a statute says "pig" it is a question of law what "pig" means, and having found out what "pig" means, it is a question of fact whether a particular animal was a pig. On the other hand, there are noble Lords who take quite a different view of the matter and say that when plain words are used in the statutes, it is a question of fact whether the particular instance under consideration comes within the plain words used and, but for LORD WRENBURY'S views, I should have been disposed to think that it was a question of fact, the fact to be ascertained in this case being whether the appellant was receiving the rack-rents as agent for another person. I should have thought that he was clearly receiving the rack-rents collected by Mr. Spicer, who pays to the appellant the balance of the rents remaining in his hands after making such payments as he—Mr. Spicer—has been instructed by the appellant to make. The rents are clearly received by the appellant for another person, namely, the widow and son who were employing him, and it would seem to be fairly clear that the appellant therefore is a person receiving the rack-rents of land as agent for another person. That is the view taken by the police magistrate. So far as it is a question of fact its conclusion is not appealable. It is the view taken by the Divisional Court, and it is the view which I take. Consequently, so far as it depends on me, I dismiss the appeal with costs.

GREER, L.J.—I regret that there should be a difference of opinion on a question of this sort, but it would not be the first time that there was a difference of opinion

on a question of the construction of a statute, or, indeed, of a contract where those who differ in opinion thought that their view was quite clear. A

In my judgment, the appellant, the solicitor acting for the owners and giving instructions on behalf of the owners to Mr. Spicer, who received the rent, with regard to what he was to do with the money that he received as rent, was not an owner within the definition contained in the section.

I begin by considering the question which is put to the court by the learned magistrate who decided this case. B

> "The question on which the opinion of the court is desired is whether upon the above stated facts I came to a correct determination of the question whether the appellant was or was not at all material times the 'owner' of the said three houses within the meaning of the said Acts, and the court is asked to make such order in the matter as is deemed proper." C

In order to find the facts one has not got to look at the final decision of the magistrate but only at the facts which he has found in the case. One cannot say, because he has found against the appellant solicitor, that therefore one can infer some other finding of fact beyond those which are stated in the case.

The question to be decided depends on the interpretation of the definition of "owner" because it is quite clear that the sums with which this case deals are sums which the local authority is entitled to receive from that person who is the owner within the definition clause and, therefore, one has to consider what is the meaning of the definition clause. Whether one takes it from s. 141 of the Public Health (London) Act, 1891, or from s. 4 of the Public Health Act, 1875, the definition of "owner," that is to say, of the person by whom the local authority is entitled to be paid, is this: D E

> " 'Owner' means [not "includes"] the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." F

It is the person receiving, and, I think, the person receiving from the tenant, the rack-rent of the premises. The object of the definition seems to be, as my Lord has said, to relieve the local authority from searching about to find who may be the owner of the premises. They have merely to find out, as they can readily find out, who is the person to whom the tenant is paying his rent, and having found that it seems to me that the Act of Parliament says that that person, and that person only, G is the owner of the premises for the purposes of the statute. It may very well be that if one finds that that person is a mere agent for somebody else, a clerk or a servant of somebody else, one may say that that somebody else is receiving the rent by the hand of his servant, and it may well be, though it is not necessary to decide it in this case, that if anyone appoints an agent to receive the rent on his behalf one may say that the person appointing the agent to receive the rent on his behalf H is receiving the rent from the tenant. But this is not a case of that kind because I think it is clear from the statement of facts that Mr. Spicer was not the agent of the appellant, the solicitor, but was the agent of the owners of the premises, who were entitled to the rent. Once Mr. Spicer had received the rent, he had received it on behalf of the owners of the premises and had to account to them for it as money had and received. He did not have to account to the appellant except I in so far as the owners told him to account to the appellant, and that would make the account to the appellant an account to the owner and not an account to the appellant as the principal.

It seems to me that it would be a strained construction of the statute to say that any intermediary between the actual receiver of the rent and the owner through whom the money passes on its way to the owner is the "owner" within the meaning of the statute. I think that as soon as the rent was paid to Mr. Spicer there was no more rent to be received by anybody; the rent has been paid and received. It

had to be received by Mr. Spicer on behalf of the owners, and the fact that he passed it to the owners with their consent and on their instructions through the intermediation of their solicitor does not seem to me to make the intermediate agent the principal of Mr. Spicer at all, but only an intermediary agent giving instructions on behalf of the actual receiver of the rent, the owner within the definition in the statute, that is to say, the person receiving the rack-rent of the lands or premises, either on his own account, or as agent or trustee. It is not without importance to observe what Mr. Spicer does with the rent when he gets it. He does not hand over the pounds, shillings and pence he receives. What he no doubt does, and what is apparent in regard to some portion of it, is that he pays the money into his own bank and he draws his own cheque in order to account for the money which he has received on behalf of the owners of the property.

For these reasons I think that the learned judges in the court below and the magistrate took a wrong view of the meaning of this section and applied it to facts to which it was not applicable. I only desire to add one word, and it is this. In my judgment I think SWIFT, J., was right in saying that if the local authority was entitled to succeed in this case, it would follow that there might be three, four, five or more persons receiving the rack-rent within the meaning of this statute, each one of them liable. I am of opinion that the statute does not produce that result. It is a definition of "owner" and it defines "owner" as meaning the person receiving the rack-rent. I think that means the person originally receiving the rack-rent from the tenant. Payment and receipt are correlative terms. The rent was paid when it was handed over to Mr. Spicer; it was received when it was handed over to Mr. Spicer; and there the matter ended so far as payment of rent is concerned. Though I regret that I differ from my Lord, and always with the greatest hesitation do I do so, I think that this appeal ought to be allowed with costs, and the question answered in favour of the solicitor, the appellant.

SANKEY, L.J.—The question for solution in the present case may be stated with great simplicity, and it appears to me to be as follows: Did the appellant, Mr. Watts, receive the rack-rent as agent for the widow who was, if I may so call it for the moment, the actual owner? It appears to me upon a true direction on the law that the answer to that question depends on the facts. No doubt it may be said that the correct inference to be drawn from any set of facts is a question of law, but in this case can it be said, on the facts, that the appellant received the rack-rents as agent for the widow? Turning to the definition itself it will be observed that it does not say " 'Owner' means the person for the time being receiving the rack-rents from the tenant." The words "from the tenant" which are found inserted in other statutes do not appear in this statute. The words are at large and the definition is left at large. I can quite see difficult questions arising on different states of fact, but in my view those difficulties are not so formidable when one considers the true meaning of the words "as agent"—"receiving the rack-rents of the premises in connection with which the word is used . . . as agent or trustee for any other person." Supposing the owner of the house sent his boy of, we will say, fourteen years of age to collect the rents—and many quite humble people in this country own a cottage or two and collect weekly rents—and the boy brought the rents back to his father. I cannot think that there it would be possible to say that the boy received the rents as agent so as to make him owner within the meaning of the definition.

Counsel for the appellant says that some restriction must be placed on the meaning of the definition. I am not quite sure whether it is the scientific way of putting it, but I think it is possible to say that the facts in any particular case would place a restriction on the person or persons who are involved in the case. A very difficult question may arise some day where an actual owner instructs a tenant to pay the rent into his bank. That is a question which I will leave for the determination of my successor. I hope, if I am in existence when the determination is come to on

that question, that I shall have an opportunity of hearing it. For the present I do not know what the answer to that question would be.

We have to consider the facts in the present case in regard to the question: Did the appellant receive the rack-rents as agent for the widow? I will not say that the matter appears perfectly clear to me. I think that the view entertained by SCRUTTON, L.J., appears clear to him, and that the view entertained by GREER, L.J., appears clear to him. I am not quite sure whether I can say that the view appears clear to me, because I think that it is a very difficult question in fact. I look at the facts in this case, especially those set out in para. 4, which reads: "During his lifetime the said Edward James Henry Wallis"—he was the late husband of the widow—"employed G. R. Spicer, a builder, to collect the rents of the said houses." Paragraph 9 says that after the death of Wallis, Spicer was directed by Clark—he was the son-in-law of the testator—to continue to collect the rack-rents of the said houses as before, and he did so. Then I attach great importance to para. 12 and the exhibit which is attached. The paragraph reads as follows: "On or about Dec. 15, 1922, the said G. R. Spicer paid the sum of £25 to the appellant and by a letter dated Dec. 15, 1922, and signed over two penny stamps, the appellant acknowledged the said sum." The acknowledgment is in the exhibit which is a letter written by the appellant to Mr. Spicer. Mr. Spicer had in fact collected the sum of £25 on account of rents and he was remitting that sum to the appellant. On that I suggested to counsel for the appellant that a distinction might be made between the position of the appellant and the position of Mr. Spicer, if one had to sue one or the other. If the widow had to sue Mr. Spicer for the rents which he had collected she would ask for an account of the rents which he had received, and if she had to sue the appellant she would not ask for an account of the rents which had been received, but she would ask for money which had been received to her use. I do not think that that was a correct view to take having regard to this letter which I will now read. The appellant received the sum of £25 and he writes: "Re Wallis deceased. We are obliged to you for your cheque for £25 on account of rent herein. Kindly treat this letter as our receipt." Speaking for myself, I think it is very difficult—having regard to the opinion of GREER, L.J., I am far from saying that it is impossible—in face of that letter to say that the appellant did not receive the rack-rents as agent for the widow. I regard it as tantamount to an admission—"we are obliged for your cheque for £25 on account of rent herein." That appears to me to indicate the true position which the appellant was taking up. He was receiving rent as agent for the widow.

In these circumstances the view which I take of the present case is as follows, that the learned magistrate directed himself properly on the question of law, that there was evidence on which he could find, and, speaking for myself, I think he ought to have found, that the appellant did receive the rack-rent as agent of the widow, and that therefore the magistrate's decision and the decision of the Divisional Court, which is appealed from, are correct. I should be sorry that any question of hardship should induce a court to make bad law or that any hardship should actually be suffered by a gentleman in the position of the appellant, but I am comforted by the reflection that the appellant is by no means without a remedy. One or two remedies were suggested in the course of the argument of which he could properly make use. Whether that is so or not I come to the conclusion that the decision appealed from was correct and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *J. Nixon, Watts & Co.*; *John Poole*, Town Clerk, Battersea.

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

R. *v.* SMETHWICK CONFIRMING AUTHORITY. Ex parte HOLT BREWERY CO., LTD.

[King's Bench Division (Lord Hewart, C.J., Avory and Swift, JJ.), May 3, 6, 1929]

[Reported 98 L.J.K.B. 678; 141 L.T. 586; 93 J.P. 233; 45 T.L.R. 530; 27 L.G.R. 544]

Licensing—Confirming authority—Objection not taken before licensing justices—Adequacy of notices of application for licence or removal—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 33 (3).

A confirming authority has jurisdiction to consider the adequacy of the notices of application for a new justices' licence or for an ordinary removal of a licence, and to hear evidence as to the matter, even though no objection to the adequacy of the notices was made before the licensing justices on the application.

Dictum of Wright, J., in *R.* v. *Pownall* (1), [1893] 2 Q.B. at p. 163, disapproved.

Licensing—Licence—Notice of application—Notice on "church or chapel of the parish or place"—Parish with no parish church, but with unconsecrated church licensed for divine service—Parish within borough containing a parish church and another main church—Notice on borough parish church and other main church only—Sufficiency—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 15 (1) (*b*).

Application was made for the provisional ordinary removal of a justices' licence for the sale of intoxicating liquor to new premises proposed to be situated in a parish where there was no parish church. There was a church in this parish, which had not been consecrated, but which was licensed by the bishop of the diocese for the holding of divine service. On the door of this church no notice of the application for the provisional removal of the licence had been affixed or maintained. The parish was within the borough of S., and notices of the application had been affixed and maintained at the times required by the Licensing (Consolidation) Act, 1910, on the doors of two churches in the borough of S., within the distance of about a mile from the site. One of these churches was the parish church of S. On an application for certiorari to quash the confirmation of the licence authorising the removal it was contended that no notice had been "affixed and maintained . . . on the door of the church or chapel of the parish or place in which the premises are situated, or if there is no such church or chapel on some other public and conspicuous place within the parish or place" as required by s. 15 (1) (b) of the Licensing (Consolidation) Act, 1910 [now s. 5 (1) and Sched. 3, Part 1, para. (1) (b), of the Licensing Act, 1953].

Held: the "place" referred to in s. 15 (1) (b) might be the name of an area larger than the parish; accordingly, the "place" within which the premises were situated was the borough of S., and the notices, having been affixed on both the two main churches of S., had been duly affixed and maintained on the door of the church of the "place" in which the premises were situated within the meaning of the Act.

Notes. The Licensing (Consolidation) Act, 1910, has been repealed and replaced by the Licensing Act, 1953, s. 5 (1) and Sched. 3, Part 1, para. (1) (b) of which are of the same effect as s. 15 (1) (b) of the 1910 Act, s. 10 and s. 27 of which have replaced s. 33 (3) and (4) of the 1910 Act, Sched. 3, Part 3, 1 and 2 of which have replaced s. 25 (3) and (4) of the 1910 Act, and s. 25 (4) of which has replaced s. 26 (5) of the 1910 Act.

As to notice of application for a justices' licence, see 22 Halsbury's Laws (3rd Edn.) 543, para. 1074; and for cases on the subject, see 30 Digest (Repl.) 13–14,

52–67; as to confirmation thereof, see 22 HALSBURY'S LAWS (3rd Edn.) 594; and for cases on the subject, see 30 DIGEST (Repl.) 51–53, *383–396*. For the Licensing Act, 1953, s. 5 (1), s. 10, s. 25 (4), s. 27, Sched. 3, Part 1, Part 3, see 33 HALSBURY'S STATUTES (2nd Edn.), pp. 150, 156, 176, 177, 295–298.

Case referred to:

(1) *R.* v. *Pownall*, [1893] 2 Q.B. 158; 62 L.J.M.C. 174; 70 L.T. 138; 57 J.P. 424; 5 R. 486, D.C.; 30 Digest (Repl.) 51, *389*.

Rule nisi for a writ of certiorari obtained by Holt Brewery Co., Ltd., the objector, calling on the confirming authority for the borough of Smethwick to show cause why an order made by them should not be removed into the High Court and quashed. The order confirmed a licence granted by the licensing justices at the general annual licensing meeting, authorising the provisional ordinary removal of the justices' licence hitherto held by Elsie Russell at premises known as The Castle Inn, Cranford Street, Smethwick, and authorising the applicants, Mitchells and Butlers, Ltd., to hold an excise licence for the sale by retail of intoxicating liquor at a house and premises to be erected at the corner of Abbey Road and Thimblemill Road, in that borough.

The rule was obtained on the following grounds: (i) That the confirming authority declined to hear objection and evidence that the licensing justices had no jurisdiction to grant the removal of the licence, proper notices of application as required by ss. 15 and 26 of the Licensing (Consolidation) Act, 1910, not having been given; and (ii) that the confirming authority considered without evidence (a) the proposed surrender and value of three licences by the applicants, and (b) a petition in support of the application. The house and premises to be erected at the corner of Abbey Road and Thimblemill Road was in the parish of Warley Woods, which, by the Smethwick Corporation Act, 1927, was transferred from the urban district of Oldbury to the borough of Smethwick, except for poor law purposes. For these purposes it remained in the West Bromwich poor law union. At the general annual licensing meeting held on Feb. 13, 1929, the applicants applied for the provisional ordinary removal of their justices' licence. A statutory declaration was filed that the notices required by s. 15 of the Licensing (Consolidation) Act, 1920, had been given. The objector and others opposed the application. No objection was taken by or before the licensing justices as to the publication or adequacy of the notices required by ss. 15, 26, and 33 of the Licensing (Consolidation) Act, 1910. The licensing justices made an order for the provisional ordinary removal of the licence subject to confirmation by the confirming authority. On April 10 the confirming authority met and the confirmation was opposed by the objector. After the case had been heard for some time on the merits, the objector took the point that the notices required under ss. 15, 26, and 33 of the Licensing (Consolidation) Act, 1910, should have been posted on the door of the church of St. Hilda, Warley Woods, and tendered evidence to show that this had not been done. The confirming authority declined to receive the evidence on the ground that they had no jurisdiction to consider the matter as this objection had not been taken before the licensing justices. The church of St. Hilda, Warley Woods, had not been consecrated, but was licensed by the Bishop of the diocese for the holding of divine service. It appeared from affidavits filed in the case that notices of the application had in fact been posted on the doors of Smethwick Parish Church and on the doors of Holy Trinity Church, Smethwick, there having been some doubt as to which of these churches was the parish church of Smethwick. These churches were situated about a mile from the site in Warley Woods, to which it was proposed to transfer the licence. There was also some evidence on the affidavits that the applicants had tendered for the consideration of the justices the proposed surrender and value of three licences, and also a petition on which were signatures in support of and in opposition to the application.

The Licensing (Consolidation) Act, 1910, provided:

"Section 15: (1) A person applying for a new justices' licence must: (a)

advertise notice of his application in some paper circulating in the place in which the premises to which the notice relates are situated, on some day not more than four and not less than two weeks before the application is made, and on such day or days (if any) as may be fixed by the licensing justices; and (b) within twenty-eight days before the application is made cause notice of his application to be affixed and maintained between the hours of ten in the morning and five in the afternoon of two consecutive Sundays on the door of the premises and on the door of the church or chapel of the parish or place in which the premises are situated, or if there is no such church or chapel on some other public and conspicuous place within the parish or place; and (c) not less than twenty-one days before the application is made, give notice in writing of his intention to apply for the licence to one of the overseers of the parish in which the premises to which the notice relates are situated, to the superintendent of police of the district and to the clerk of the licensing justices; . . .

Section 26: The ordinary removal of a justices' licence may be authorised in the following manner: . . . (3) Notice of the application shall be given in the same manner as notice of an application for a new licence. (4) A copy of the notice shall be served on any registered owner of the premises from which the licence is to be removed, and on the holder of the licence unless he is also the applicant; (5) The justices shall not make the order unless they are satisfied that no objection to the removal is made by the owner of the premises from which the licence is to be removed, or by the holder of the licence or by any other persons whom the justices may determine to have the right to object to the removal. Subject as aforesaid, the licensing justices shall have the same power to make an order authorising the removal as they have to grant new licences, but no order shall be valid unless it is confirmed by the confirming authority.

Section 33 (3): A provisional grant and confirmation of a justices' licence shall be subject to the same conditions as to the giving of notices and generally as to procedure as those to which the grant and confirmation would be subject if they respectively were not provisional with this exception, that, where a notice is required to be put up on a door of a house, the notice may be put up in a conspicuous position on any part of the premises. (4) This section shall, with the necessary variations, extend to the provisional grant and confirmation of an authority for the ordinary removal of a justices' on-licence."

Cave, *K.C.*, and *Tucker* showed cause for the confirming authority.
Hurst, *K.C.*, and *A. J. Leng* for the applicants for the licence.
Cassels, *K.C.*, and *C. B. Godfrey*, for the objector, in support of the rule.

LORD HEWART, C.J.—This is a rule nisi for a writ of certiorari to remove into this court a certain order, made on or about April 10 last, by the confirming authority for the county borough of Smethwick under the provisions of the Licensing (Consolidation) Act, 1910. That order confirmed a certain licence granted by the licensing justices for Smethwick at a general annual licensing meeting held on Feb. 13 last, authorising the provisional ordinary removal of the justices' licence formerly held by one Elsie Russell, in respect of certain licensed premises in Cranford Street, Smethwick, known by the sign of The Castle Inn, and authorising Mitchells and Butlers, Ltd., the applicants, to hold an excise licence to sell by retail at a house and premises to be erected on land at the corner of Abbey Road and Thimblemill Road within the county borough any intoxicating liquor which may be sold under a publican's licence for consumption either on or off the premises.

The grounds upon which that rule was asked and obtained were twofold. First, it was said that the confirming authority declined to hear objection and evidence that the licensing justices had no jurisdiction to grant the removal of the licence from The Castle Inn, at Smethwick, to a site at the corner of Abbey Road and Thimblemill Road, proper notices of application as required by ss. 15 and 26 of the Licensing Act, 1910, not having been given. The second ground was that the

confirming authority considered two matters without evidence, namely, first, the proposed surrender and value of three licences by the applicants; and, secondly, a petition in support of the application for the order of removal. The case has been fully argued, and it is quite clear that the ground which is really relied upon is the first of those two grounds, and it involves more than one proposition. It is said that the confirming authority is not entitled to enter into the question of the adequacy of notices where the order asked for has been made by justices apparently having jurisdiction to deal with it. It is said, therefore, on the one side, that in the present case as the objections to the notices were not raised by the licensing justices, the notices must be deemed to have been in order, and the confirming authority ought to proceed with a re-hearing complete in all other respects without inquiring into the question of the adequacy of the notices. In the present case, as it happens, but it was a mere incident of the case, the question as to the adequacy of the notices was raised before the confirming authority only at a very late stage, and if the matter were one of a somewhat different kind there would no doubt be force in the argument that a party having sound objection from the point of view of jurisdiction ought not to sit still and take his chance of succeeding on the merits, and afterwards when he failed on the merits, put forward a point of jurisdiction.

Our attention has been directed to all the relevant authorities, such as they are, but the volume of authority in the matter is meagre. There is a certain dictum by WRIGHT, J., in *R.* v. *Pownall* (1) ([1893] 2 Q.B. at p. 163), which has been referred to again and again in the course of the argument, which indicates a doubt whether the question of the adequacy of the notices in such a case is a matter for the consideration of the confirming authority. When I look at the state of the decided cases and at the provisions of the law under the statute, I myself cannot come to any conclusion except that it is open to the confirming authority to inquire whether the notices are adequate. The question was mooted in the course of the argument whether it was right to raise a point as to adequacy of notice before the confirming authority if in truth and in fact no notice at all had been served in the particular case upon the owner. That seems to me to raise the very crux of the matter, and it is naturally followed by another question: What, for the purposes of this discussion, is the difference between a bad notice and no notice at all? I cannot think, therefore, that the confirming authority are precluded from inquiring into the validity of the notice given, even though the matter had escaped notice or had gone by default before the licensing justices. But to hold that view is by no means to conclude the present question. The whole of the facts have been laid before us, and it has been shown that the notices were given in a certain way. I have come to the conclusion, on careful consideration of what was done and what was required to be done, that the notices were sufficient and satisfactory.

By s. 15 (1) of the Licensing (Consolidation) Act, 1910, it is provided that [His Lordship read s. 15 (1) (a), (b), which are printed supra].

The important words for the purpose of the present controversy are the words "and on the door of the church or chapel of the parish or place in which the premises are situated." Now, in the parish where was the site of the proposed new licensed premises there was no parish church. There was indeed an unconsecrated building called St. Hilda's Church, in Warley Woods. It was not suggested that any notice was fixed upon the door of St. Hilda's Church. But it is argued that this parish is, since the passing of the Smethwick Corporation Act, 1927, within Smethwick, and that in fact the notices were fixed at the proper time and maintained at all proper times upon the doors of two churches in Smethwick, churches between which it is suggested some question might have arisen as to which is really the parish church. Neither of those churches is the church of the parish of Warley Woods—that is quite clear—but Warley Woods is within Smethwick; and we are told, as a matter of interest, that those churches are distant not more than a mile or so from the site referred to.

It was argued, and strongly argued, by counsel for the objector that, as regards

A "parish or place," that which is referred to as "place" must of necessity be territorially a less unit than a parish. I think, with all respect to that argument, that it is not sound. There are various phrases, some of which were referred to in argument, which seem to me to make it clear that the word "place" may well be the name of an area larger than the parish, and a parish may be comprised within a place. It goes without saying that the word "place" is very often used B in a different sense. So there is no ground for believing that the "place" referred to in s. 15 (1) (b) of this statute is of necessity a less unit than that which is referred to in the preceding word "parish."

The position, therefore, was this: there was no parish church of Warley Woods at the material time, and the notices were affixed on both the two main churches of the place, Smethwick, in which these premises were situated. I think, therefore, C that the true conclusion of the inquiry as to the validity of these notices is that they were in order, and that there was no usurpation or excess of jurisdiction (which are the only matters material where certiorari is being considered) on the part of this confirming authority in confirming the order of the justices, though they were competent to entertain the objection to the validity of the notices.

With regard to the two matters comprised in the second ground on which the D rule was asked and granted, those are, I think, admittedly controversial make-weights. It is not really suggested that the proposed surrender by the applicants of certain other licensed premises was not well known to both sides to the discussion. Everybody concerned knew what the houses were; everybody concerned, including the justices, probably had a shrewd notion of the value of those houses, and it seems to me to be a matter not at all of decisive importance that in the E circumstances there was placed before the confirming authority, not indeed a document which purported to show the ascertained present value of those licensed premises, but a mere estimate of the sort of claim which might be made about them if they were, as they have not been, referred for compensation.

The final point is even more of the character of a makeweight. It is that a petition in support of the application was put in, and that some regard was had to F it without detailed evidence as to the mode in which it had been obtained or as to the particular signatures to be found in it. I will only say this, without dwelling further on that point, that it is a common practice that such petitions should be put in. How much attention is paid to them one does not know, but this petition at any rate exhibited this feature, that it seems to have comprised the signatures not only of those who supported but also of those who opposed that which was being G asked for.

In these circumstances, and looking at the whole matter, I have come to the conclusion that this is not a case in which a rule for certiorari should issue for the reason that there was no usurpation or excess of jurisdiction. I think, therefore, that this rule ought to be discharged.

H **Avory, J.**—I am of the same opinion. Taking the grounds on which this rule nisi was granted in the order in which they appear on the rule, I agree as to the first point, that the confirming authority had jurisdiction to entertain the objection which was made as to the notices which are required by ss. 15 and 26 of the Licensing (Consolidation) Act, 1910, notwithstanding that objection had not been taken before the justices; and with great respect I differ from the opinion expressed I obiter by Wright, J., in *R.* v. *Pownall* (1), where he said with unusual hesitation for him, that without positively expressing an opinion as to whether the county licensing committee had any jurisdiction to consider the sufficiency of the notice, "I think it right to say that in my judgment they probably have not." The judgment of Mathew, J., in the same case appears to me to assume the contrary. It was a case where objection had not been taken before the licensing justices to the notice, and the county licensing committee, that is, the confirming authority, entertained the objection in that case, and came to the conclusion that the notice was not good. Mathew, J., held that they were wrong in

that view, and held that the notice was good, and that they ought to have held it to be good, which seems to me to imply that in his view they were competent to entertain the objection; and, as has been pointed out by my Lord, if it be true to say that in no circumstances can the confirming authority entertain an objection to the notices which has not been taken before the licensing justices, it would follow that it could not take notice of an objection that no notice under s. 26 had been served on the registered owner of the premises from which the licence is to be removed, or that it could not take notice of an objection that no notice had been served on the holder of the licence of the premises from which the licence is to be removed. It is, in my opinion, impossible to uphold such a view as that, having regard to sub-s. (5) of s. 26, which provides that the justices, that is, the licensing justices, shall not make the order, that is for the removal, unless they are satisfied that no objection to the removal is made by the owner of the premises or by the holder of the licence. If it should occur in any case that no notice has been given or served on the owner or on the holder of the licence, it follows that the licensing justices would be acting without jurisdiction; I think it is impossible to contend that if the licensing justices acted without jurisdiction the confirming authority, which sits as a court of law, ought not to entertain and cannot entertain the objection that the licensing justices had acted without jurisdiction.

I also agree that in the circumstances of this case, although the confirming authority had jurisdiction to entertain the objection, the notices which in fact were posted were sufficiently exhibited on the church doors of Smethwick.

I would only add, while agreeing entirely with the grounds on which my Lord has based his judgment on this point, that para. (c) of s. 15 (1) provides that "Not less than twenty-one days before the application is made" notice is to be given in writing of the "intention to apply for the licence to one of the overseers of the parish in which the premises to which the notice relates are situated." We are informed that under the new Rating and Valuation Act, 1925, there is no overseer of the parish of Warley Woods to whom such notice could be given, and that it must in those circumstances be given to the council of the borough of Smethwick. I do not think it necessary to add anything on the second and third grounds on which this rule was made, being in entire agreement with the reasons which my Lord has given for saying that they are not sufficient to disturb the jurisdiction of the confirming authority. I agree, therefore, that the rule should be discharged.

SWIFT, J.—I agree, and I have nothing to add.

Rule discharged.

Solicitors: *Peacock & Goddard*, for *Shakespeare & Vernon*, Birmingham; *Johnson & Co.*, Birmingham, for Mitchells and Butlers, Ltd.; *Waterhouse & Co.*, for *Hatwell, Pritchett & Co.*, Birmingham.

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

DAVIES *v.* PROPERTY AND REVERSIONARY INVESTMENTS CORPORATION, LTD.

[KING'S BENCH DIVISION (Talbot and Humphreys, JJ.), April 9, 10, 1929]

[Reported [1929] 2 K.B. 222; 98 L.J.K.B. 515; 141 L.T. 256; 93 J.P. 167; 45 T.L.R. 434; 73 Sol. Jo. 252; 27 L.G.R. 500]

Distress—"Notice thereof"—Certain goods specifically mentioned in inventory—"And all other goods on the premises . . . sufficient to satisfy the amount of the distress"—Distress for Rent Act, 1689 (2 *Wm. & M. sess.* 1, *c.* 5), *s.* 2.

Landlords, by a certificated bailiff, levied a distress, and served on the tenant a notice purporting to have been made under s. 2 of the Distress for Rent Act, 1689, which allows a landlord to sell "where any goods . . . shall be distrained for any rent . . . and the tenant or owner of the goods so distrained shall not within five days next after such distress taken and notice thereof (with the cause of the taking) left . . . on the premises" replevy the goods. Various articles of household furniture were specifically mentioned in the inventory contained in the notice, and after the entries in the inventory the notice concluded with the words: "and all other goods on the premises (unless specially exempt) sufficient to satisfy the amount of this distress and expenses." Various goods of the tenant, including goods actually specified in the notice and goods not so specified, were subsequently sold.

Held: the notice, inasmuch as it left uncertain what goods were taken, was not a sufficient "notice thereof" and so the tenant was entitled to damages for the illegal sale of the unspecified goods.

Kerby v. *Harding* (1) (1851), 6 Exch. 234, followed.

Wakeman v. *Lindsey* (2) (1850), 14 Q.B. 625, explained and distinguished.

Notes. A notice of distress delivered or left by a bailiff must now be in the form of the memorandum prescribed by the Distress for Rent Rules, 1953 (S.I. 1953, No. 1702); and set out in Appendix 2, Forms 1, 2, thereof. These rules were made under the Law of Distress Amendment Act, 1888, s. 8, and 1895, s. 3, but do not affect the principles laid down in this case.

As to contents of a notice of distress, see 12 HALSBURY'S LAWS (3rd Edn.) 132, para. 235; and for cases on the subject, see 18 DIGEST (Repl.) 328–329, *737–747*. For the Distress for Rent Act, 1689, s. 2, see 6 HALSBURY'S STATUTES (2nd Edn.) 145.

Cases referred to:

(1) *Kerby* v. *Harding* (1851), 6 Exch. 234; 20 L.J.Ex. 163; 15 Jur. 953; sub nom. *Kirby* v. *Harding*, 16 L.T.O.S. 504; 15 J.P. 294; 18 Digest (Repl.) 328, *738*.

(2) *Wakeman* v. *Lindsey* (1850), 14 Q.B. 625; 19 L.J.Q.B. 166; 14 L.T.O.S. 373; 15 Jur. 79; 117 E.R. 242; 18 Digest (Repl.) 327, *729*.

(3) *Cole* v. *Davies* (1698), 1 Ld. Raym. 724; 91 E.R. 1383; 21 Digest 475, *562*.

(4) *Walter* v. *Rumball* (1695), 4 Mod. Rep. 385; 1 Ld. Raym. 53; Comb. 336; 1 Salk. 247; 87 E.R. 457; sub nom. *Walter* v. *Rumbald*, 12 Mod. Rep. 76; 18 Digest (Repl.) 327, *725*.

(5) *Swann* v. *Earl of Falmouth* (1828), 8 B. & C. 456; 2 Man. & Ry. K.B. 534; 6 L.J.O.S.K.B. 374; 108 E.R. 1112; 18 Digest (Repl.) 325, *712*.

(6) *Wilson* v. *Nightingale* (1846), 8 Q.B. 1034; 15 L.J.Q.B. 309; 10 Jur. 917; 115 E.R. 1163; 18 Digest (Repl.) 327, *726*.

(7) *Salisbury Supply Co.* v. *Pitkin* (1927), unreported.

Appeal from an official referee.

The plaintiff was the tenant and the defendants were the landlords of a flat in Bloomsbury, London. On May 2, 1927, the landlords, by a certificated bailiff, levied a distress on the premises for rent due on March 25. The tenant was served with a notice purporting to have been made under s. 2 of the Distress for Rent Act, 1689. The notice was in the following terms:

"By virtue of an authority given to me, I have seized and distrained the goods and chattels for the sum of £32 10s., being for arrears of one quarter's rent due at the 25th March last past to the defendants in respect of the aforementioned premises." A

The usual statement followed to the effect that unless the rent and expenses of the distress were paid, or the goods and chattels replevied within five days, they would be sold. A number of goods in the sitting-rooms and bedrooms were mentioned specifically in the inventory. Then followed the words: "The above goods have been removed to No. 13, High Holborn, for sale by auction. H.W.H.D., certificated bailiff." After the entries in the inventory the notice continued: "And all other goods upon the premises (unless specially exempt) sufficient to satisfy the amount of this distress and expenses." On May 20, 1927, various goods of the plaintiff, including goods actually specified in the notice and goods not so specified, were sold. The plaintiff brought an action in which he claimed damages for the illegal sale of the goods not specified, on the ground that in respect of them there had been no sufficient notice satisfying s. 2 of the Distress for Rent Act, 1689. The official referee held that the sale was illegal, on the ground that the notice in question did not satisfy the requirements of the statute. He gave judgment for the plaintiff (the tenant). B C D

The defendants (the landlords) appealed.

J. P. Eddy (*E. Neve* with him), for the landlords, referred to *Cole* v. *Davies* (3), *Walter* v. *Rumball* (4), *Swann* v. *Earl of Falmouth* (5), *Wilson* v. *Nightingale* (6), *Kerby* v. *Harding* (1), *Wakeman* v. *Lindsey* (2), and *Salisbury Supply Co.* v. *Pitkin* (7).

H. Derbyshire, *K.C.* (*N. Fox-Andrews* with him), for the tenant. E

By the Distress for Rent Act, 1689, s. 2:

"Where any goods or chattels shall be distrained for any rent reserved and due upon any demise lease or contract whatsoever and the tenant or owner of the goods so distrained shall not within five days next after such distress taken and notice thereof (with the cause of such taking) left at the chief mansion house or other most notorious place on the premises charged with the rent distrained for replevy the same with sufficient security to be given to the sheriff according to law . . . in such case after such distress and notice as aforesaid and expiration of the said five days the person distraining shall and may . . . cause the goods and chattels so distrained to be appraised . . . and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price can be gotten for the same towards satisfaction of the rent for which the said goods and chattels shall be distrained and of the charges of such distress appraisement and sale leaving the overplus (if any) . . . for the owner's use." F G

TALBOT, J.—This is an appeal from part of the judgment of one of the official referees. He has held that, on a distress levied by the defendant company in respect of the rent of a flat of which they were landlords and the plaintiff tenant, the sale of part of the goods distrained was illegal for want of notice sufficient to comply with the Distress for Rent Act, 1689. H

The plaintiff was tenant to the defendant company of a flat in Bloomsbury. The quarter's rent due at Lady Day 1927, amounting to £32 10s., being unpaid on May 2 of that year, a distress was levied by a certificated bailiff on the premises and a notice, purporting to be the notice required by the Distress for Rent Act, 1689, was in the ordinary course drawn up and served on the tenant. It was in an ordinary form, mostly in print, and acquainted the tenant with the fact that the bailiff had seized and distrained goods and chattels specified in the following inventory; the sum of £32 10s. being stated to be arrears of one quarter's rent due at March 25 last past to the defendants. Then the notice set out the premises, and then added, in the ordinary form: I

A "Further take notice that unless the said rent be paid together with the expenses of distress or the goods and chattels be replevied within five days from the date hereof they will be sold according to law in that case made and provided."

Then followed, below the signature of the bailiff, the inventory which set out various articles of household furniture, adding a note under a later date, namely, B May 10: "The above goods have been removed to No. 13, High Holborn, for sale by auction." That note, again, was signed by the bailiff; and last of all there followed these words: "and all other goods upon the premises unless specially exempt sufficient to satisfy the amount of this distress and expenses." Various goods, including part of those which were specifically mentioned in that notice, and also other goods which were not specifically mentioned, were accordingly sold C on May 20, and the amount due for rent was realised by that sale and paid to the landlords, and also the expenses were realised. The point raised in this action is that, so far as relates to the goods not mentioned by name in this notice, that sale was illegal, because no notice of the distress, so far as those goods are concerned, had been given to satisfy the requirements of the Distress for Rent Act, 1689.

It is well known that that Act was passed in the interests of landlords, to remedy D the difficulty in which they were or to add to their facilities for recovering rent by enabling them to do that which, before the Act was passed, they could not do, namely, sell goods taken in distress. Before that Act, all the right they had was to retain them as pledges, as the preamble says, for enforcing the payment of the rent; and the preamble goes on to add that "persons distraining have little benefit thereby"; and it was probably in order to give them some benefit that this Act E was passed. [His Lordship read the section, which is printed, supra, and continued:] It is obvious, therefore, that it is a condition precedent to the right of the landlord to avail himself of the indulgence given by this statute, that he should have done what the statute requires. Its object is perfectly plain, namely, that the goods shall not be sold until the owner of the goods or the tenant of the premises shall have had an opportunity of replevying and giving proper security.

F The question, therefore, is whether the notice which has been given in this case, the material parts of which I have read, is a notice of distress—the words of the Act being "notice thereof"—within the meaning of the Act of Parliament. The learned official referee has decided that with regard to goods which are covered only, if they are covered at all, by the words at the foot of the notice "and all other goods upon the premises unless specially exempt sufficient to satisfy the amount G of this distress and expenses," this is not a good notice within the statute. It is not a good notice, in his opinion, of the goods taken, and the statute requires it to be a notice of those goods.

It is obvious that if this matter were res integra this is a question which might permit of very considerable debate, and it might well be said that there are two alternative views in regard to what the statute means, the first being that every H article distrained and intended to be sold or in regard to which the power of sale is claimed or reserved, should be specified in the way in which things are specified in a detailed inventory. I gather from counsel for the tenant that that was made law, or was thought to be the law, or at any rate was decided to be law at nisi prius, in two cases before *Wakeman* v. *Lindsey* (2), to which I will come in a I moment. That would be one view. Of course, that would be the most complete and businesslike way of giving the tenant or the owner of the goods, as the case may be, exact notice of what goods of his, or what goods on the premises in the case of a tenant, are in peril. The alternative view would be that it is not necessary to give a detailed inventory or a detailed description of anything, but that it is enough to say: "I have distrained all the goods on the premises and they will be sold if you do not replevy them." That may be the law, but the matter is one which has not been argued and which may arise some other time. It might be said that those are the two alternative views and that one or the other must be adopted, and it is obvious that there are arguments for and against both, both on

the actual wording of the statute—which is, perhaps, the only thing that can be considered—and on the convenience and reasonableness of the matter. A

The embarrassment which has been caused here is that there are two cases which have dealt with this precise point. When I say this precise point I refer to the meaning of the words "notice thereof" in the 1689 Act. There are two cases in which the courts—both courts of great authority—have had to consider whether a notice very much resembling in general form the notice in this case was a sufficient compliance with the statute. B

The cases are *Wakeman* v. *Lindsey* (2) and *Kerby* v. *Harding* (1). In *Wakeman* v. *Lindsey* (2) the action was, as it is here, for damages for an illegal sale of goods distrained, and on the ground, as here, that the notice did not cover the goods sold. The form of the notice is set out in 14 Q.B. at p. 627. After a very short inventory the whole of which was this: "Tap room, one clock and weights, etc., etc."— C presumably the property was a public house, but at any rate it had a tap room and a clock—the notice continued: "and any other goods and effects that may be found in and about the said premises"; then there is a comma, for what it may be worth; then, "to pay the said rent and expenses of this distress." The case was tried by ERLE, J. (afterwards Chief Justice), and it was submitted that the notice was defective and legally no notice; [there was another objection which I need not D mention;] and on that point the learned judge is recorded to have agreed with the counsel on the other side, and to have held that the notice was sufficient in law. It was assumed, as has been pointed out in the argument which we have heard from the learned counsel for the landlords, that in the court of Queen's Bench in which the rule was moved and granted the intention was to distrain everything on the premises, and I should think there is no doubt that it was. The court evidently E felt very great difficulty about the case, and I should gather from the judgments that it was new and surprising to them that a notice in this form should be adopted. PATTESON, J., who was a judge of very great experience and learning, uses the expression (14 Q.B. at p. 631): "The wording of this form is extraordinary," and he criticises it. Then he says:

> "Perhaps the fair interpretation may be all that are there, and if in fact the F broker has taken everything without exception, the practice may be very bad and loose, but I cannot say that it vitiates the sale."

COLERIDGE, J., was equally doubtful about it, and perhaps still more so. He says (14 Q.B. at p. 632):

> "I have felt doubt, and I decide with reluctance. The object of the Statute 2 G William and Mary, c. 5, s. 2, was that the party distrained upon should have notice of what was taken,"

and he says that in his opinion the language of the notice in that case was not fair notice. He goes on, as did PATTESON, J., to say, in favour of the notice, if one may use the expression, that it may be assumed that the notice means all the goods that are on the premises, and that the tenant knows sufficiently what they H are, and to say "all," is enough; and that he did not feel justified in laying down that in such a case there must be a specification. He decided with very great hesitation and evidently with great disapproval of the form which had been adopted. ERLE, J., who tried the case, was the last judge to give judgment, and he also expresses his dislike of the form of words. He says (14 Q.B. at p. 633): I

> "There is evil in the use of such forms; yet there may be more if a landlord is held liable to an action for the use of words somewhat too general, and if it is rendered necessary that at the time of making a distress everything must be brought out for the purpose of being described and numbered."

Then his final words are very material, I think, because they illustrate or define the difference between this case and *Kerby* v. *Harding* (1). He says:

> "The word 'all' does give a description; so far that, if all be more than is required, the landlord is in peril for having taken too much."

"The word 'all' does give a description"; that is, of course, perfectly true in a sense; that is to say, however tedious the process may be, if one says all the goods on the premises have been taken, then it is only a question of going through them one by one and it can be found exactly what has been distrained.

Then we come to the other case, *Kerby* v. *Harding* (1). It is upon this case that the learned Official Referee has decided the case which is now before us, and in his opinion—and perhaps there are not many opinions on a point in a case which are entitled to more weight—that case is indistinguishable from the case which is now before the court. That was an action, in substance, for selling goods without a proper notice under the statute. The words of the notice, which are all set out in 6 Exch. at p. 235, are very like the words in *Wakeman* v. *Lindsey* (2), but they are different. They are general words after some particular chattels enumerated and described,

> "and all other goods chattels and effects on the said premises that may be required in order to satisfy the above rent together with all the expenses."

This case was tried before PARKE, B. It is needless for me to say anything about the authority of PARKE, B., but he tried the case and he also gave the considered judgment of the court upon the rule. What happened at the trial was this. The landlord said that *Wakeman* v. *Lindsey* (2) was an authority in favour of the sufficiency of the notice and that it was precisely in point; and so fine is the distinction between the two cases that PARKE, B., upon that authority being cited to him, ruled that the notice was sufficient; and it was upon that, and upon another ground which I need not mention, that the rule nisi for a new trial on the ground of misdirection was obtained, the jury having found a verdict for the defendant. In the report of the argument, it appears that the same points were discussed there as have been discussed here. The learned counsel who appeared in support of the rule had to deal, of course, with *Wakeman* v. *Lindsey* (2), and he said this (6 Exch. at p. 238):

> "The case of *Wakeman* v. *Lindsey* (2) when examined will be found very distinguishable from the present. The notice there included all the goods on the premises, whilst the present notice leaves the particular goods seized in uncertainty."

That was the argument, and that, in substance, is the ratio of the decision given by the court. I pause for a moment to call attention to the very great authority of this case, which is a decision on the precise point raised in the present appeal. There was the decision of *Wakeman* v. *Lindsey* (2) on facts so similar that at the trial PARKE, B., accepted it as decisive of the case before him. That ruling was challenged before the Court of Exchequer, at which PARKE, B., it appears, was presiding; at any rate, he was a member of the Court and delivered the judgment. Having heard this matter fully argued—and of course there had been much more opportunity of considering it than there had been at nisi prius—he came to the conclusion that he had been wrong in following *Wakeman* v. *Lindsey* (2), and that *Wakeman* v. *Lindsey* (2) was distinguishable from the case then before the court. One can hardly imagine a stronger decision, because not only is there the great authority of the Court of Exchequer of 1851, but there is the fact that PARKE, B., who was certainly one of the most learned and accurate judges who ever sat in an English court, came to the conclusion, on argument, that he had been wrong in his direction at nisi prius, and gave judgment making the rule absolute for a new trial. I think the grounds upon which he did that are stated, as they always are in PARKE, B.'s judgments, with perfect lucidity and freedom from ambiguity. He had to deal there with the words which I have already read:

> "and all other goods, chattels and effects that may be found in and about the said premises, that may be required in order to satisfy the above rent together with the expenses."

I will read three or four passages from the judgment which show, I think perfectly

clearly, the decision which the court gave, and the reasons for that decision. PARKE, B., says (6 Exch. at p. 241): A

> "Upon consideration we think that the terms of the notice are too vague and do not point out any certain goods chattels or effects except those which are before enumerated which are the subject of the distress."

Then he calls attention to the statute, and a little lower down he says: B

> "It appears to us the statute not only requires the cause of taking to be mentioned, but also a notice to be given 'thereof,' that is of the distress taken, which must include everything taken."

Then he refers to the fact that before the statute no notice at all was necessary, and he goes on: C

> "This statute clearly requires some notice of the taking, and we think that according to the reasonable construction of the statute, the notice ought to inform the tenant or the person whose effects are taken, by expressing what are the goods taken and also what is the amount of rent in arrear. The general description 'any other goods chattels and effects on the premises or in and about the premises,' according to the decision of the Queen's Bench is sufficient." D

That is, I think, if I may presume to say so, a perfectly accurate description of the decision in *Wakeman* v. *Lindsey* (2). Whether the court were right or wrong in reading the notice there as having that meaning is another matter and quite unnecessary for us to consider here, but it is quite clear that they decided that it was a good notice because they construed the notice as meaning that; and if it did so mean, in the words of ERLE, J., the word "all" does itself give a description which covers everything that is on the premises; and that, PARKE, B., says in *Kerby* v. *Harding* (1) was the decision in *Wakeman* v. *Lindsey* (2) (6 Exch. at p. 241): E

> "But this notice does not impound all the goods on the premises but only the goods, chattels, and effects that may be required in order to satisfy the rent mentioned in it. This notice leaves it uncertain what goods are taken; and therefore we think that it is not sufficient and that the subsequent sale of any of the articles not included nominatim in the inventory itself is an illegal sale for which the defendants are responsible." F

It leaves it uncertain what goods are taken; that is to say, the tenant or the owner of the goods is unable to put his hand on any particular chattel and say either: This is taken or This is not taken. G

There is no doubt—it is sufficiently obvious from the argument to which I have listened—that these two cases leave the law in a somewhat unfortunate and, it might be said, in a somewhat inconvenient condition; but if the ordinary principles upon which cases are to be weighed are to be observed it is impossible to see how light can be more decisively obtained from a decision than from the decision of *Kerby* v. *Harding* (1), not only, as I have said, is it a case of the very greatest authority, but it deals specifically with the case which is compared with it and which appears on its face to be in conflict with it, and states in perfectly clear terms—terms which nobody can misunderstand—what the difference between them is. In my opinion, it being quite clear that we ought to follow *Kerby* v. *Harding* (1) in those circumstances if it is in point, the only question is whether it can be distinguished from the case before us. Of course, as I think BRAMWELL, B., used to say, unless the words are absolutely the same, some ground of distinction can always be suggested, but the question is whether there is really any ground of distinction. The words in *Kerby* v. *Harding* (1) are: H I

> "All other goods, chattels and effects on the said premises that may be required in order to satisfy the above rent together with all the expenses."

A The words here are:

> "And all other goods upon the premises unless specially exempt sufficient to satisfy the amount of this distress and expenses."

The words are not the same but for my part I can see no distinction in meaning between "all goods that may be required in order to satisfy the rent" and "all B goods upon the premises sufficient to satisfy the amount of this distress." They mean precisely the same thing; and if it be true, as PARKE, B., said, or as the Court of Exchequer said, that the notice in *Kerby* v. *Harding* (1) left it uncertain what goods are taken, so, in my opinion, does the notice here. I should like to add that it appears, when one comes to read his judgment, that the learned Official Referee from whom this appeal comes, after carefully considering the case, and I C should think with no very great desire to hold this notice bad if he could help it, considered that the case was absolutely indistinguishable from *Kerby* v. *Harding* (1). That is certainly a fact which adds greatly to the confidence which I feel in coming to the same conclusion.

The only other matter which I need mention is *Salisbury Supply Co.* v. *Pitkin* (7), which was decided by the late SALTER, J., and myself, and which the learned D counsel for the landlords happened to know because he was counsel in that case also. I was reminded, when the judgments in that case were read, that I was very doubtful indeed in regard to the decision. That was a case in which a very small amount was at stake, and if I had formally dissented, inasmuch as it was an appeal from the County Court and inasmuch as SALTER, J., thought that the County Court judge was wrong, the effect would have been that the judgment E would have stood, contrary to SALTER, J.'s clear opinion that it was wrong. I thought that on the whole I ought to agree with SALTER, J.; I think that what I said was that my doubts were not sufficient to make it right to dissent formally; at any rate I was very doubtful about the case. Really it is unnecessary to go into that case. It is quite true that it might well have been argued if it was material—I do not recollect at the moment whether it was or not—whether the F notice in question was a sufficient notice within the statute of William and Mary. Though we have only the judgment to decide upon, I am confident that the point was not argued, and I am perfectly confident that *Kerby* v. *Harding* (1) was never mentioned. Whether or not, if it had been, there was a way of distinguishing the words there, I think it exceedingly doubtful, but I do not think it could be seriously suggested that that decision, which dealt with a great variety of points G but not with this point, could possibly justify us or even induce us to consider a departure from the decision in *Kerby* v. *Harding* (1), if the facts in that case are indistinguishable from the case here, as, in my opinion, they clearly are.

In my opinion the learned Official Referee was perfectly right; I agree with every word of his judgment; I certainly agree with the whole of the substance of it and the appeal must be dismissed with costs.

H **HUMPHREYS, J.**—I concur, and I do so upon the ground stated in the judgment of the learned Referee, where he says:

> "I confess, having considered the form of this notice and the form and the reasoning in *Kerby* v. *Harding* (1) as expressed in PARKE, B.'s judgment, I cannot differentiate the notice in this case from the notice in that case."

I If the decision in *Kerby* v. *Harding* (1), which was a considered decision of the full court, consisting of some of the most eminent judges who have graced the Bench of England, is to be re-considered, it having been delivered in the year 1851, at least it cannot be re-considered by this court to-day. I entirely agree with my Lord that we are bound to follow that case. Therefore the only question that I think we are at liberty to consider in spite of, if I may be permitted to say so, the exceedingly able argument of counsel for the landlords, is this: Is it possible to distinguish the notice given in this case from the terms of the notice which was decided to be a bad notice in *Kerby* v. *Harding* (1)? My view of the two cases,

which are certainly the most important cases which have been referred to here, quite shortly is this. In *Wakeman* v. *Lindsey* (2) it was assumed that the person who distrained intended to distrain upon all the goods that were upon the premises, and as between the landlord and the tenant the court came to the conclusion, though with considerable hesitation, that the expression, "any other goods and effects that may be found in and about the said premises," was an indication that all the goods which in fact were upon the premises were then seized; and the court held—and I think that this is the only decision in that case—that if a notice states sufficiently clearly that the seizure is a seizure of all the goods upon the premises, it is not necessary to set the goods out in detail in the form of an inventory or otherwise. Then came *Kerby* v. *Harding* (1), and the distinction which was drawn by PARKE, B., in his judgment and taken by all the judges who agreed in that judgment, between the notice in that case and the notice in *Wakeman* v. *Lindsey* (2), consisted of the introduction of four words in the notice in the later case. Those four words are the words, "that may be required"; so that the notice read as being a notice that there had been taken in distress "all other goods, chattels and effects on the said premises"—so far it was clearly an intimation that the distress extended to all the goods, but it continued, "that may be required in order to satisfy the above rent." That decision of *Kerby* v. *Harding* (1) is a decision, as I read it, to the effect that because of those words the notice in that case was not a notice which made it sufficiently certain what goods are taken. To use the language of the judgment itself: "This notice leaves it uncertain what goods were taken and therefore we think it is not sufficient."

In this case it has been pointed out by counsel for the landlords, and I was impressed by his argument, that what may be described as the objectionable words in *Kerby* v. *Harding* (1) are not to be found in the notice in this case, the material words of which are, "all other goods upon the premises unless specially exempt sufficient to satisfy the amount of this distress and expenses." I have, I confess, endeavoured to distinguish the words in this case from the words in the notice in *Kerby* v. *Harding* (1), but, like my Lord, I have found myself unable to say that the language of the notice in the case under consideration is different. The words, of course, are different, but the language seems to me to be the same. I therefore agree with the learned Referee, who gave judgment, as his judgment states, upon the ground, and the sole ground so far as this point is concerned, that it is impossible to distinguish *Kerby* v. *Harding* (1) from the case under consideration.

Appeal dismissed.

Solicitors: *Hicks, Arnold & Bender*; *Warren & Warren.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

A

RAMDUTT RAMKISSEN DAS *v.* E. D. SASSOON & CO.

[Privy Council (Lord Atkin, Lord Salvesen and Sir John Wallis), November 13, 15, 1928, January 24, 1929]

[Reported 98 L.J.P.C. 58; 140 L.T. 542; 45 T.L.R. 205]

B *Arbitration—India—Limitation of time—Admissibility of defence—Indian Limitation Act (No. IX of 1908), Sched. I, art. 115, s. 14.*

In mercantile references to arbitration it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence, e.g., that of the Statute of Limitations, C which would have been open in a court of law can be equally proponed for the arbitrator's decision unless the parties have agreed to exclude that defence.

The Indian Limitation Act, 1908, therefore, **held** to apply to arbitration proceedings instituted in India. By s. 14 of that Act, in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding shall be excluded D where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it. When, therefore, a claim, founded on the same cause of action, had been prosecuted with due diligence and in good faith before an arbitrator who from defect of jurisdiction was found not competent to exercise jurisdiction in the matter,

E **Held:** the period during which the determination of the claim had so been delayed must be excluded when considering the power of a second arbitrator to adjudicate on the matter.

Notes. Considered: *Namlooze Vennootschap Handels-en Transport Maatschappij Vulcaan* v. *Ludwig Mowinckels Rederi A/S.* (1937), 42 Com. Cas. 200. Referred to: *Chandris* v. *Isbrandtsen Moller Co., Inc.*, [1950] 2 All E.R. 618.

F As to mercantile references, see 2 Halsbury's Laws (3rd Edn.) 35, 36; and for cases see 2 Digest (Repl.) 462–464.

Cases referred to:

(1) *Re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1899), 68 L.J.Q.B. 252; 80 L.T. 116; 15 T.L.R. 154, D.C.; 2 Digest (Repl.) 463, *279.*

G (2) *Aubert* v. *Maze* (1801), 2 Bos. & P. 371; 126 E.R. 1333; 2 Digest (Repl.) 681, *1955.*

(3) *Jager* v. *Tolme and Runge and London Produce Clearing House, Ltd.*, [1916] 1 K.B. 939; 85 L.J.K.B. 1116; 114 L.T. 647; 32 T.L.R. 291, C.A.; 2 Digest (Repl.) 474, *340.*

H (4) *Cayzer, Irvine & Co., Ltd.* v. *Board of Trade* (1925), 95 L.J.K.B. 134; 136 L.T. 7; 42 T.L.R. 163; 70 Sol. Jo. 347; [1925] W.N. 295; 160 L.T.Jo. 490, D.C.; reversed, [1927] 1 K.B. 269; 95 L.J.K.B. 1054; 136 L.T. 7; 42 T.L.R. 731; 70 Sol. Jo. 875; 31 Com. Cas. 315; 162 L.T.Jo. 93, C.A.; affirmed sub nom. *Board of Trade* v. *Cayzer, Irvine & Co., Ltd.*, [1927] A.C. 610; 96 L.J.K.B. 872; 137 L.T. 419; 43 T.L.R. 625; 71 Sol. Jo. 560; 32 Com. Cas. 351, H.L.; 2 Digest (Repl.) 463, *280.*

I **Appeal** from an order of the High Court of Calcutta in its civil appellate jurisdiction affirming an order made by the same court in its ordinary civil jurisdiction.

The appellants and respondents were merchants in Calcutta. Between September, 1913, and December, 1914, the respondents, as purchasers, entered into eleven contracts with the appellants which contracts were all in a form approved by the Calcutta Baled Jute Trade Association. The contracts were for the purchase of certain quantities of jute for a certain specified standard of quality for shipment to England. On arrival in England the jute turned out to be not of the specified standard of quality agreed upon, and a considerable part of it was invoiced back to

the appellants and re-sold by them at lower prices, but with regard to the remainder the respondents suffered a heavy loss. Disputes having arisen between the parties a demand for compensation for breach of contract was made on the appellants, who refused to consider it. The matter went to arbitration pursuant to the clause in that behalf which was contained in each of the contracts. The respondents appointed an arbitrator to act on their behalf on July 15, 1915, and as the arbitrator appointed by the appellants had withdrawn, and they made no further appointment, the respondents' arbitrator acted as single arbitrator and made an award in September, 1916. On Jan. 8, 1917, the appellants brought a suit for a declaration that the award was void and inoperative on the ground that the appointment as sole arbitrator was illegal. On April 7, 1920, the judge of first instance upheld the award, but on appeal to the High Court of Calcutta this judgment was reversed, and ultimately an appeal by the present respondents to the Privy Council was dismissed. On Dec. 13, 1922, the respondents again appointed an arbitrator. The appellants declined to appoint on the ground that the alleged claims were barred by limitation. Ultimately, the matter in dispute was referred to two arbitrators, who awarded damages, and at the same time stated a Special Case for the opinion of the court whether the defence of limitation could be raised on these matters, and, if so, whether the claim was barred. Both courts at Calcutta held (i) that the defence of limitation could be raised, and (ii) that in the circumstances of the case the respondents' claim was not barred by limitation.

Schedule I, art. 115, of the Indian Limitation Act, 1908, provides that "for compensation for the breach of any contract, express or implied," the period of limitation should be three years, and by s. 14 (1):

> "In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a Court of Appeal, against the defendant shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

De Gruyther, *K.C.*, and *Wallach* for the appellants.
Dunne, *K.C.*, and *Hyam* for the respondents.

Jan. 24. **LORD SALVESEN.**—This is an appeal from an order of the High Court of Judicature at Fort William in Bengal, dated Nov. 8, 1926, which on appeal confirmed an order passed by the said High Court in its original jurisdiction on April 19, 1926, and dismissed the appellants' application to have an award set aside and taken off the file.

Under various contracts between Sept. 16, 1913, and March 2, 1914, the appellants sold to the respondents certain quantities of jute. The contracts were all in a form approved by the Calcutta Baled Jute Trade Association and contained an arbitration clause such as is usual in mercantile contracts at the present day. The reference is in the widest form and submits to arbitration

> "any disputes arising out of or in any way relating to this contract or to its construction or fulfilment between the parties hereto and whether arising before or after the date of expiration of this contract."

The clause also imports the rules and byelaws of the association which provide machinery for carrying out the reference in the event of one of the parties failing to appoint an arbitrator within forty-eight hours after having been called upon to do so. As the respective deliveries of jute sold under the contracts were made, questions arose as to the quality of the goods supplied by the appellants and the respondents had to submit to large deductions in respect of alleged inferiority of quality. The cause of action arose at different times, but it is not material to consider the exact dates as the respondents showed due diligence in making their claims, for these were formulated in July, 1915, when a demand for compensation for breach of contract was made on the appellants, who refused to consider same.

On July 15, 1915, the respondents appointed an arbitrator to act on their behalf and called upon the appellants to appoint an arbitrator on their behalf, which after some delay they did in December, 1915. The appellants were, however, obviously not anxious that the arbitration should be proceeded with, and they endeavoured to obtain delay in every way that was open to them. Their arbitrator, Babu Gossain, refused to meet with the respondents' arbitrator, Mr. Allen, and ultimately Mr. Allen retired from the reference on March 7, 1916, and Mr. Singleton was appointed as arbitrator on behalf of the respondents in his place. The latter was equally unsuccessful in his efforts to get Babu Gossain to meet him, and after many excuses the latter, on July 30, 1916, withdrew from the matter. On July 27, 1916, the respondents wrote to the appellants a letter, referring to the retirement of Babu Gossain, and adding:

> "we, therefore, call upon you to appoint an arbitrator to act on your behalf in the place of Babu Gossain within forty-eight hours, failing which we shall apply to the Baled Jute Association to make an appointment on your behalf in accordance with byelaw 15 of the Association."

To this letter the appellants replied on July 31 as follows:

> "The time limit under the Indian Arbitration Act is over, and we regret that we cannot agree to further extension of time. Regarding your suggestion that you will ask the chairman of the association to appoint an arbitrator, we beg to point out that the chairman has no authority to override the provision of the Indian Arbitration Act. Further, we hold that the dispute to settle which this arbitration was agreed upon does not come under the terms of the Allied Baled Jute Association Contract so the chairman cannot exercise his right under the contract."

To this letter the respondents replied rejecting the contentions of the appellants and calling upon them to appoint an arbitrator to act on their behalf within seven clear days from the date of their letter, in default of which they stated that they would appoint their own arbitrator as sole arbitrator in the reference in accordance with the provisions of the Indian Arbitration Act, s. 9 (b). As the appellants made no further appointment, the respondents appointed Mr. Singleton to act as sole arbitrator, which he accordingly did, and in the end made an award of Rs. 68,574. His award, which was dated Sept. 28, 1916, was duly filed and a warrant was issued directing the sheriff to levy the amounts awarded by seizure of the appellants' goods, and this was done. The appellants thereafter, on Jan. 8, 1917, brought a suit for a declaration that Mr. Singleton's awards were void and inoperative on the ground that his appointment as sole arbitrator was illegal. On April 7, 1920, the judge of the first instance upheld the award, but on appeal to the High Court at Fort William this judgment was reversed and an appeal taken by the present respondents to the Privy Council was dismissed.

These proceedings occupied a considerable time. It was not until Dec. 13, 1920, that the decision of the High Court was pronounced, and the decision of the Judicial Committee of the Privy Council was only issued on July 20, 1922. Taking either of these dates, much more than three years had elapsed from the date when the cause of action had arisen. On Dec. 13, 1922, the respondents again demanded from the appellants the amount which they claimed under the eleven contracts, and on Dec. 28 appointed Mr. W. G. Dredge as arbitrator. The appellants declined to appoint an arbitrator on the grounds that the alleged claims were barred by limitation. On March 16 the chairman of the Baled Jute Association nominated Mr. D. S. Henderson to act as arbitrator with Mr. Dredge. The appellants thereupon on April 10, 1923, applied to the High Court for an order reviewing the various submissions to arbitration. After sundry procedure a consent order was made on Aug. 15, 1923, that the matter in dispute be referred to the arbitration of the two arbitrators appointed to

> "deal with the matter and to make their award in the said reference and at the same time to state a Special Case for the opinion of this court (the High Court)

on the legal question of whether the defence of limitation can be raised in these matters, and, if so, whether the claim is barred." A

The arbitrators, having awarded a sum of Rs. 98,258–11–3, stated a Case in accordance with the High Court's order. This was decided on March 3, 1926. The High Court held that the arbitration proceedings had been in fact instituted on July 15, 1915, and, therefore, within the period of three years prescribed by the Limitation Act. It is from this order that the appeal has now been brought. B

The first question of law which arises is the important general one—whether the Indian Limitation Act, 1908, applies to arbitration proceedings. The relevant section of that Act is s. 3:

"Subject to the provisions contained in s. 4 to s. 25 inclusive, every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by Sched. I shall be dismissed, although limitation has not been set up as a defence." C

Their Lordships will consider subsequently what effect, if any, is to be given to ss. 4 to 25, but it is admitted that art. 115 of Sched. I is that which applies to the subject-matter of the present suit. It is expressed as follows: "For compensation for the breach of any contract expressed or implied not in writing registered and not herein specially provided for," and the period of limitation is three years. It will be observed that s. 3 has in view primarily suits, appeals, and applications made in the law courts and makes no reference to arbitration proceedings. Their Lordships were not referred to any case decided in India as to whether this clause can be extended by analogy to arbitration proceedings, but similar language is employed in the English Statute of Limitations, and the question has been considered and decided in one case in England. This is *Re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1). In that case it was held by the Divisional Court, consisting of BRUCE and RIDLEY, JJ., that D E

"a submission to arbitration does not per se exclude the right of either party to raise the defence of the Statute of Limitations, but if it be intended to exclude such a defence an express term to that effect must be imported into the agreement of submission." F

In his judgment, BRUCE, J., said:

"There is nothing in the submission to take away the right of the Tyldesley company to raise any defence in relation to their liability to damages. It seems to me unreasonable that parties to a submission should be precluded from raising the defence of the Statute of Limitations, unless a provision to that effect be drawn up and embodied in the submission." G

Previous to that decision there had been general statements in other cases which lay down more clearly the principle upon which the decision must be taken to have proceeded. In *Aubert* v. *Maze* (2) (2 Bos. & P. at p. 375) CHAMBRE, J., said: "There is no doubt that an arbitrator is bound by the rules of law like every other judge," and in *Jager* v. *Tolme and Runge and London Produce Clearing House, Ltd.* (3), SWINFEN EADY, L.J., said ([1916] 1 K.B. at p. 953): H

"the council (that was the council of the London Produce Clearing House) are to give a decision—they are to decide—and in the absence of fuller and wider powers expressly given that means to decide according to the legal rights of the parties." I

The decision in *Tyldesley's Case* (1) was cited in a recent case that came before the King's Bench Division—*Cayzer, Irvine & Co., Ltd.* v. *Board of Trade* (4). In the course of his judgment, ROWLATT, J., before whom the case first came, said that

"the Statute of Limitations (1623) does not in terms apply to arbitrations. It does not affect the debt. It only limits the remedy, and therefore it seems to me that in an arbitration it is a question of construction whether the submission requires the arbitrator to follow the analogy of the statute."

In the Court of Appeal LORD HANWORTH, M.R., found it unnecessary to consider this question, which, as he observed, involved the point whether *Tyldesley's Case* (1) was correctly decided. SCRUTTON, L.J., reserved to himself liberty to consider "when the case arises whether it was rightly decided" and ROMER, J., also reserved his opinion upon that point. The case was taken to the House of Lords. VISCOUNT CAVE, in giving judgment, said:

> "I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in the case of *Re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1) that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation. A decision against that view might seriously prejudice the practice of referring disputes to arbitration; and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred."

None of the other judges who took part in the decision of that case found it necessary to express any definite opinion upon the point, although for the purposes of the decision they were content to assume it. Such being the state of the authorities (the paucity of which may be explained by the fact that where contracts contain an arbitration clause the parties usually contemplate that their dispute will be disposed of), their Lordships are of opinion that the law was correctly laid down in *Tyldesley's Case* (1). Although the Limitation Act does not in terms apply to arbitrations, they think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a court of law can be equally proponed for the arbitrator's decision unless the parties have agreed (which is not suggested here) to exclude that defence. Were it otherwise a claim for breach of a contract containing a reference clause could be brought at any time, it might be twenty or thirty years after the cause of action had arisen, although the legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law courts. Their Lordships are, accordingly, of opinion that the first question of law must be answered in the affirmative.

The next question which arises is whether limitation applies in the present case so as to bar the claim of the respondents under the award which they have obtained. The judges of the High Court held that the arbitration proceedings which resulted in the award now under consideration were in effect a mere continuation of the former proceedings which had been instituted on July 15, 1915, but which proved abortive through want of jurisdiction of the arbitrator appointed. Their Lordships are unable to agree in this view. They think that these proceedings came to an end with the decision of the single arbitrator whose award was ultimately set aside and that the proceedings instituted at a later date after the decision in the Privy Council had been announced cannot be regarded as a mere continuation of the first proceedings. It is quite clear that where a suit has been instituted in a court which is found to have no jurisdiction and it is found necessary to raise a second suit in a court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits were identical. The hardships that might arise in such a case have, however, been expressly provided for by the sections to which reference will now be made.

The Indian Limitation Act, unlike the corresponding English Act, contains an elaborate code of provisions which deal, inter alia, with the mode of computing the period of limitation prescribed for any suit, &c., and also with the exclusion from the period of limitation of time which has been occupied in legal proceedings. The clause specially founded on s. 14 (1) is as follows:

> "In computing the period of limitation prescribed for any suit, the time

during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

There is a similar provision as to "applications" and appended to the section there is this explanation: "For the purposes of this section, a plaintiff or an appellant resisting an appeal shall be deemed to be prosecuting a proceeding." It may be assumed that it had been ascertained before these provisions were formulated that there was a serious risk of injustice arising if the period of limitation, which is in many cases shorter than in England, should be too strictly applied. In Indian litigation it is consistent with the experience of their Lordships that the time necessary for the decision in a suit may be of much longer duration than one is accustomed to in the courts of Great Britain. Hence the necessity for some provision to protect a bonâ fide plaintiff from the consequences of some mistake which had been made by his advisers in prosecuting his claim.

Holding, as they did, that the proceedings before the second arbitrators were merely a continuance of the first arbitration, it became unnecessary for the learned judges of the High Court to deal with the question. It had, however, been dealt with by GREAVES, J., in the application which the appellants made to revoke the submission to the arbitrators and to restrain the present respondents from taking arbitration proceedings thereunder. He said:

"It remains for me to decide whether in computing the period of limitation the time occupied in prosecuting the proceedings above referred to is to be excluded. It is urged that having regard to the wording of s. 14 of the Limitation Act this section cannot apply. This argument, however, does not seem to me to be well founded. If limitation, as I think it does, applies in arbitration proceedings, the law of limitation applicable is that laid down in the Limitation Act, 1908, which is expressed to apply to suits, appeals and certain applications to courts. If, therefore, this Act is to be applied to arbitration proceedings notwithstanding the words above referred to, I see no reason why s. 14 of the Act should not apply. If it is said that the wording of the section is not apposite to arbitration proceedings it could equally be said that the wording of the Act itself is not apposite. In my view, therefore, . . . in computing the period of limitation the time occupied in the proceedings which ended in the decision of the Judicial Committee is to be excluded."

Their Lordships are in agreement with the reasoning of the learned judge. Arbitrations under the Indian Arbitration Act are not prosecuted by filing suits and preferring appeals from the decrees in such suits, but by procuring awards and filing them in court and resisting applications to set them aside. In their Lordships' opinion the analogy of the Indian Limitation Act requires that an arbitrator should exclude the time spent in prosecuting in good faith the same claim before an arbitrator who was without jurisdiction. The Limitation Act has no application in terms to arbitration proceedings, and as GREAVES, J., has pointed out, if the words "suit instituted, appeal preferred, and application made" in s. 3 are to be applied to arbitration proceedings, it seems to follow that the same interpretation must be put upon them in s. 14 and that civil proceedings in a court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the courts of law to be the judges of the dispute between them. There is no question here that the respondents were prosecuting with due diligence their claim against the appellants and that the second arbitration was founded on the same cause of action and was prosecuted in good faith before the previous arbitrator who from defect of jurisdiction was found not competent to exercise jurisdiction in the matter. If the period in question during which the respondents' claim was held up because of the proceedings instituted for the purpose of setting aside the first award and in obtaining final judgment on that question is excluded from the period of

limitation, there can be no doubt that the respondents here were within the period prescribed. The result is that the anomaly is avoided of there being a different period of limitation in certain cases where a dispute has been referred to arbitration from that which is applied to disputes dealt with in the ordinary courts. For these reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs to the respondents.

Appeal dismissed.

Solicitors: *W. W. Box & Co.*; *Sanderson, Lee & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re HOME AND COLONIAL INSURANCE CO., LTD.

[CHANCERY DIVISION (Maugham, J.), May 10, 14, 15, 16, 29, 30, June 27, 28, July 31, 1929]

[Reported [1930] 1 Ch. 102; 99 L.J.Ch. 113; 142 L.T. 207; [1929] B. & C.R. 85]

Company—Winding-up—Liquidator—Admission of proof—Standard of care and diligence required—Misfeasance—Quantum of compensation payable to company—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 215.

By s. 215 of the Companies (Consolidation) Act, 1908 [see now s. 333 of the Companies Act, 1948]: "Where in the course of winding-up a company it appears that . . . any past or present . . . liquidator . . . has misapplied . . . any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of . . . any creditor or contributory, examine into the conduct of the . . . liquidator . . . and compel him to repay or restore the money or property . . . or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication . . . as the court thinks just."

A liquidator, in the matter of admitting proofs, is not in practically the same position as an insurer so that, in any event and all circumstances, he is liable if a debt is subsequently shown to have been wrongfully admitted, but a high standard of care and diligence is required from a liquidator. He is able to obtain, whenever it is expedient, the assistance of solicitors and counsel, and, a most important consideration, he is entitled, in every case of serious doubt or difficulty in relation to the performance of his statutory duties, to submit the matter to the court and obtain its guidance. In the present case it was the duty of the liquidator carefully to investigate the validity of a proof for a very large sum put in by a creditor. That duty he did not discharge, and it was **held** that he could not wholly escape liability by pointing out that the contributories, the creditors, his solicitors, and other persons with whom he came in contact during the liquidation failed to give him a warning. "He chose to navigate in these narrow seas, to him unaccustomed and unknown, without either chart or pilot, and for this temerarious conduct he must bear the responsibility."

Observations on the amount of compensation payable under s. 215 (supra) by a liquidator proved to have been guilty of misfeasance.

Company—Winding-up—Liquidator—Article of association—Indemnity to "director or other officer of the company for loss in execution of duties"—Liquidator not included.

An article of association of a company provided that "no director or other

officer of the company'' should be liable for any loss occasioned by any error of judgment or oversight on his part, or for any other loss, damage, or misfortune whatever which should happen in the execution of the duties of his office, or in relation thereto, unless the same happened through his dishonesty.

Semble: the article related to the duties and liabilities of directors and other officers while the company was a going concern and not to a liquidator.

Insurance—Marine insurance—Expression in ''policy of sea insurance''—Essential to validity—Stamp Act, 1891 (54 & 55 *Vict.*, *c.* 39), *s.* 93 (1), *s.* 97—*Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 22, *s.* 91 (1) (*a*).

The provision of s. 93 (1) of the Stamp Act, 1891, that a ''contract for sea insurance shall not be valid unless the same is expressed in a policy of sea insurance,'' having regard to the penalties imposed by s. 97 of the Act for entering on any contract for sea insurance unless the insurance is expressed in a policy of sea insurance duly stamped, is tantamount to a provision that such a contract is null and void.

Per MAUGHAM, J.: But for the provisions of s. 91 (1) (a) of the Marine Insurance Act, 1906, that nothing in that Act should affect the provisions of the Stamp Act, 1891, I should be disposed to hold that the provision of s. 22 of the Marine Insurance Act [that a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with the Act] amounted to a statutory interpretation of s. 93 of the Stamp Act so that, in substance, the invalidity of a contract for sea insurance not expressed in a policy was no more than an invalidity as regards admissibility in evidence.

Notes. Referred to: *American Foreign Insurance Association* v. *Davies*, *American Foreign Insurance Association* v. *I.R.Comrs.*, *Davies* v. *Home Assurance Co.*, *Davies* v. *St. Paul Fire and Marine Insurance Co.* (1950), 32 Tax Cas. 1.

As to the position and duties of a liquidator, see 6 HALSBURY'S LAWS (3rd Edn.) 578–605. 621, 622, 669–672; and for cases see 10 DIGEST (Repl.) 912 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452. As to the validity and form of marine policies, see 22 HALSBURY'S LAWS (3rd Edn.) 11–15; and for cases see 29 DIGEST 63 et seq. For Stamp Act, 1891, see 21 HALSBURY'S STATUTES (2nd Edn.) 610; and for Marine Insurance Act, 1906, see ibid., vol. 13, p. 14.

Cases referred to:

(1) *Re National Benefit Assurance Co., Ltd., Ex parte English Insurance Co., Ltd.*, [1928] Ch. 74; 97 L.J.Ch. 28; 138 I.T. 122; 44 T.L.R. 14; 71 Sol. Jo. 880, C.A.; affirmed sub nom. *English Insurance Co., Ltd.* v. *National Benefit Assurance Co., Ltd. (Official Receiver)*, [1929] A.C. 114; 98 L.J.Ch. 1; 140 L.T. 76; [1928] B. & C.R. 67, H.L.; 10 Digest (Repl.) 1170, *8141*.

(2) *Re Windsor Steam Coal Co.* (1901), *Ltd.*, [1929] Ch. 151; 98 L.J.Ch. 147; 140 L.T. 80, C.A.; 10 Digest (Repl.) 1047, *7258*.

(3) *Royal Exchange Assurance Corpn.* v. *Sjoforsakrings Akt. Vega*, [1902] 2 K.B. 384; 71 L.J.K.B. 739; 87 L.T. 356; 50 W.R. 694; 18 T.L.R. 714; 9 Asp.M.L.C. 329; 7 Com. Cas. 205, C.A.; 29 Digest 64, *238*.

(4) *Fisher* v. *Liverpool Marine Insurance Co.* (1874), L.R. 9 Q.B. 418; 43 L.J.Q.B. 114; 30 L.T. 501; 22 W.R. 951; 2 Asp.M.L.C. 254, Ex. Ch.; 29 Digest 66, *249*.

(5) *Re Law Car and General Insurance Corpn., Ltd.*, [1911] W.N. 91; 55 Sol. Jo. 407; affirmed, [1911] W.N. 101; 131 L.T.Jo. 596, C.A.; 29 Digest 48, *109*.

(6) *Eastern Carrying Insurance Co.* v. *National Benefit Life and Property Assurance Co., Ltd.* (1919), 35 T.L.R. 292; 2 Digest (Repl.) 221, *324*.

(7) *A.-G.* v. *Forsikringsakt. National (of Copenhagen)* (1924), 93 L.J.K.B. 679; 131 L.T. 39; 40 T.L.R. 639; 88 J.P.Jo. 312, C.A.; affirmed sub nom. *Forsikringsakt. National (of Copenhagen)* v. *A.-G.*, [1925] A.C. 639; 94 L.J.K.B. 712; 133 L.T. 151; 41 T.L.R. 473; 69 Sol. Jo. 543; 30 Com. Cas. 252, H.L.; 10 Digest (Repl.) 1151, *8001*.

(8) *Re Harrington Motor Co., Ex parte Chaplin*, [1928] Ch. 105; 97 L.J.Ch. 55; 138 L.T. 185; 44 T.L.R. 58; 72 Sol. Jo. 48; [1927] B. & C.R. 198, C.A.; 10 Digest (Repl.) 932, *6378*.

(9) *Insurance Co. of North America* v. *North China Insurance Co.* (1898), 15 T.L.R. 101; 4 Com. Cas. 67, C.A.; 29 Digest 120, *727*.

(10) *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch.D. 140; 40 L.T. 666; 27 W.R. 713, C.A.; 10 Digest (Repl.) 1103, *7617*.

(11) *Re Anglo-Moravian Hungarian Junction Rail. Co., Ex parte Watkin* (1875), 1 Ch.D. 130; 45 L.J.Ch. 115; 33 L.T. 650; 24 W.R. 122, C.A.; 10 Digest (Repl.) 921, *6290*.

(12) *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557; 43 L.J.Ch. 699; 31 L.T. 5; 22 W.R. 810, L.JJ.; 10 Digest (Repl.) 903, *6137*.

(13) *Knowles* v. *Scott*, [1891] 1 Ch. 717; 60 L.J.Ch. 284; 64 L.T. 135; 39 W.R. 523; 7 T.L.R. 306; 10 Digest (Repl.) 1047, *7257*.

(14) *Pulsford* v. *Devenish*, [1903] 2 Ch. 625; 73 L.J.Ch. 35; 52 W.R. 73; 19 T.L.R. 688; 11 Mans. 393; 10 Digest (Repl.) 1060, *7361*.

(15) *Home and Colonial Insurance Co.* v. *London Guarantee and Accident Co.* (1928), 45 T.L.R. 134; 73 Sol. Jo. 60; 34 Com. Cas. 163; Digest Supp.

(16) *Re Norske Lloyd Insurance Co., Ltd.*, [1928] W.N. 99; 10 Digest (Repl.) 1170, *8142*.

(17) *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87, C.A.; 42 Digest 759, *1858*.

(18) *Laycock* v. *Pickles* (1863), 4 B. & S. 497; 3 New Rep. 73; 33 L.J.Q.B. 43; 9 L.T. 378; 10 Jur.N.S. 336; 12 W.R. 76; 122 E.R. 546; 12 Digest (Repl.) 653, *5075*.

(19) *Camillo Tank Steamship Co., Ltd.* v. *Alexandria Engineering Works* (1921), 38 T.L.R. 134, H.L.; Digest Supp.

(20) *Cocking* v. *Ward* (1845), 1 C.B. 858; 15 L.J.C.P. 245; 135 E.R. 781; 12 Digest (Repl.) 185, *1267*.

(21) *Ashby* v. *James* (1843), 11 M. & W. 542; 12 L.J.Ex. 295; 152 E.R. 920; sub nom. *Ashley* v. *James*, 1 L.T.O.S. 170; 12 Digest (Repl.) 656, *5089*.

(22) *Rose* v. *Savory* (1835), 2 Bing.N.C. 145; 1 Hodg. 269; 2 Scott, 199; 4 L.J.C.P. 275; 132 E.R. 57; 12 Digest (Repl.) 655, *5085*.

(23) *Owens* v. *Denton* (1835), 1 Cr.M. & R. 711; 5 Tyr. 359; 4 L.J.Ex. 68; 149 E.R. 1266; 12 Digest (Repl.) 521, *3921*.

(24) *Joseph Evans & Co.* v. *Heathcote*, [1918] 1 K.B. 418; 87 L.J.K.B. 593; 113 L.T. 556; 34 T.L.R. 247, C.A.; 12 Digest (Repl.) 655, *5084*.

(25) *Re Van Laun, Ex parte Chatterton*, [1907] 2 K.B. 23; 76 L.J.K.B. 644; 97 L.T. 69; 23 T.L.R. 384; 51 Sol. Jo. 344; 14 Mans. 91, C.A.; 4 Digest 326, *3058*.

(26) *Re National Funds Assurance Co.* (1878), 10 Ch.D. 118; 48 L.J.Ch. 163; 39 L.T. 420; 27 W.R. 302; 9 Digest (Repl.) 526, *3464*.

(27) *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882), 21 Ch.D. 492; 47 L.T. 638; 31 W.R. 177, C.A.; 9 Digest (Repl.) 537, *3531*.

(28) *Re Sunlight Incandescent Gas Lamp Co.*, [1900] 2 Ch. 728; 69 L.J.Ch. 873; 83 L.T. 406; 16 T.L.R. 535; 10 Digest (Repl.) 1053, *7303*.

Adjourned Summons.

C. May, a creditor of the Home and Colonial Insurance Co., Ltd., by this summons claimed a declaration (i) that H. E. Barham, the liquidator, had been guilty of misfeasance and breach of trust in admitting claims for £89,100, and paying £38,172 13s. 2d. in respect thereof; and (ii) that he was liable to repay this sum.

It appeared from the evidence that in September, 1916, the company, one of whose objects was to insure against marine risks, was incorporated as a private company with a capital of £100, which, in November, was increased to £100,000,

divided into 100,000 shares of £1 each, of which 28,492 had been issued, some not fully paid. By an agreement made on Nov. 9, one Walrond, a partner in the firm of Harris, Marrian & Co., insurance brokers, was appointed director and chairman and his firm was appointed managers of the business with absolute discretion as to accepting risks and re-insuring risks, being paid a commission on the net premiums of the company, which at first was at the rate of 7½ per cent. By an agreement under seal made between Harris, Marrian & Co., for and on behalf of the company (therein called the participator), and the London Guarantee and Accident Co., therein called the London Guarantee, it was provided (inter alia):

"(a) The participator should be entitled to and should accept a quota participation of all and every risk, after deduction of amounts locally re-insured, accepted by the marine underwriting department of the London Guarantee upon any of the marine insurances or risks more particularly specified in art. 1 of the said agreement, and the expression 'marine insurances' as used in that treaty should include all forms of marine or transit or other risks or marine or transit or other war risks which were or might be insured by the said marine underwriting department.

(b) The participation should be equal to 100 per cent. of the shares retained by the London Guarantee at their own risk of all marine insurances accepted on and after Jan. 1, 1918, and the liability of the participator should commence automatically at the same time as that of the London Guarantee and any cover given directly or indirectly by the London Guarantee should immediately become binding upon the participator.

(c) The London Guarantee should not be obliged to furnish the participator with any particulars in regard to risks accepted and the participator should be entitled to receive monthly statements of premiums and claims paid only.

(d) The participator should be entitled to a proportionate part of the premiums and other benefits received and should bear a proportionate part of the losses and other expenses incurred by the London Guarantee in respect of marine insurance business as more particularly specified in the said agreement but the whole control of the business should be committed to the London Guarantee who should receive the commission specified in the said agreement.

(e) The said agreement might be terminated by either party by notice but such notice should not affect the liability of the participator for any current or unexpired risks accepted thereunder until the expiry thereof."

The London Guarantee having incurred heavy losses in respect of marine insurance business, a large sum was claimed from the company. The agreement was terminated on Dec. 31, 1920. The company not being able to satisfy the claims of the London Guarantee, an extraordinary general meeting was held in October, 1922, and it was resolved that it should be voluntarily wound-up, the respondent, H. E. Barham, a chartered accountant, being appointed liquidator. The claim of the London Guarantee was £89,100, inclusive of current and unexpired risks, and £5,600, which included substantial sums for directors' fees, and £2,470, said to be due to Harris, Marrian & Co. under the agreement of Nov. 9. Apart from this claim, the Home and Colonial Insurance Co., Ltd., was solvent. The liquidator made calls on those shares which were partly paid, satisfied himself that the correct proportions of losses and premiums had been duly debited and credited to his company, agreed the claim at the sum of £89,100, and paid dividends of £38,172 13s. 2d., the first at 3s. in the £ on Dec. 17, 1924, and the final on March 8, 1927, amounting together to 8s. 6 15/16d. in the £. A sum of £2,408 10s. 7d. was also paid by him as dividends to other creditors and claimants. The final general meeting was held on May 31, 1927. On June 1, 1927, the liquidator made his return to the Registrar of Companies and thereupon the company was deemed to be dissolved on Sept. 1, 1927. Early in 1928 the attention of the liquidator was called to *Re National Benefit Assurance Co., Ltd., Ex parte English Insurance Co., Ltd.* (1), and he was advised that the claim of the London

Guarantee ought not to have been allowed. The court thereupon, on motion on behalf of the liquidator, annulled the dissolution and the company brought an action against the London Guarantee to recover the sums paid. This was dismissed with costs on the ground that none of the sums had been paid under a mistake of fact.

Lionel L. Cohen, K.C., and *H. J. P. Hallett*, for the applicant, referred to *Re Windsor Steam Coal Co.* (2), and submitted that a liquidator may be liable for payment wrongly made without negligence.

Wilfrid A. Greene, K.C., and *E. G. Palmer*, for the respondent, the liquidator, referred to *Royal Exchange Assurance Corpn.* v. *Sjoforsakrings Aktiebolaget Vega* (3), *Fisher* v. *Liverpool Marine Insurance Co.* (4), *Re Windsor Steam Coal Co.* (1901), *Ltd.* (2), *Re Law Car and General Insurance Corpn., Ltd.* (5), *Eastern Carrying Insurance Co.* v. *National Benefit Life and Property Assurance Co., Ltd.* (6), *A.-G.* v. *Forsikringsakt. National (of Copenhagen)* (7), *Re Harrington Motor Co., Ex parte Chaplin* (8), *Insurance Co. of North America* v. *North China Insurance Co.* (9), *Re London and Caledonian Marine Insurance Co.* (10), *Re Anglo-Moravian Hungarian Junction Rail. Co., Ex parte Watkin* (11), *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (12), *Knowles* v. *Scott* (13), *Pulsford* v. *Devenish* (14).

Lionel L. Cohen, K.C., in reply, referred to *Home and Colonial Insurance Co.* v. *London Guarantee and Accident Co.* (15), *Re Norske Lloyd Insurance Co., Ltd.* (16), *Groves* v. *Lord Wimborne* (17).

Wilfrid A. Greene, K.C., as to account stated, referred to *English Insurance Co., Ltd.* v. *National Benefit and Assurance Co., Ltd.* (1), *Re National Benefit Assurance Co., Ltd., Ex parte English Insurance Co., Ltd.* (1), *A.-G.* v. *Forsikringsakt. National (of Copenhagen)* (7), *Laycock* v. *Pickles* (18), *Camillo Tank Steamship Co., Ltd.* v. *Alexandria Engineering Works* (19), *Cocking* v. *Ward* (20), *Ashby* v. *James* (21), *Rose* v. *Savory* (22), *Owens* v. *Denton* (23), *Evans & Co.* v. *Heathcote* (24).

Lionel L. Cohen, K.C., cited *Camillo Tank Steamship Co.* v. *Alexandria Engineering Works* (19).

Cur. adv. vult.

July 31. **MAUGHAM, J.,** read a judgment in which he reviewed the facts, found that the claim of the London Guarantee was invalid in law, and continued: Unhappily the liquidator, who is an able and experienced chartered accountant, had had practically no experience in or contact with marine insurance matters. He did not know, nor did he inquire, whether any policies had been issued in regard to the re-insurance under the participation agreement. He took no direct advice on the question of the validity of the claim from either solicitor or counsel. He was quite unaware that any point of law was involved. In complete good faith and apparently without any misgiving he allowed the proof of the London Guarantee, whereas he should have rejected it.

The claim on the present summons is supported on alternative grounds. First, it is said that the duty of the liquidator in a voluntary liquidation to pay creditors and to distribute the surplus assets is a statutory duty which, apart from negligence, is broken by paying moneys to persons who have no legal claim. Secondly, and in the alternative, it is contended that in the circumstances of the present case the liquidator was in fact guilty of negligence in admitting so large a proof in such a case without legal advice and without the approval of the court. For the respondent a number of points are raised. First, the main proposition is wholly disputed. Secondly, on the facts to be mentioned later it is denied that the liquidator was guilty of negligence. Thirdly, art. 157 of the articles of association is relied on. Fourthly, it is contended that, even if the whole claim ought not to have been allowed, yet the London Guarantee could have sustained a valid claim under an account stated for £54,684. And finally it is urged that the present application is made under the summary jurisdiction of the court conferred by s. 215 of the Companies (Consolidation) Act, 1908 [see now s. 333 of the Companies Act, 1948],

and that the court has a discretion as to the "compensation" which should be allowed, a discretion which, in the special circumstances of the present case, ought to be exercised in favour of the liquidator. I should add that further defences based on ss. 30 and 61 of the Trustee Act, 1925, are, perhaps with some optimism, reserved for the consideration of the House of Lords.

Before dealing with these points I think it will be desirable to state the further facts which are relied on by the respondent on the question of negligence. Shortly after the incorporation of the company the respondent's firm had been appointed to act as the auditors, and the respondent in that capacity had obtained a general knowledge of the company's affairs, and, in particular, of the course of business in relation to the participation agreement. Before the passing of the extraordinary resolution to wind-up, negotiations had proceeded between Mr. Walrond, as chairman of the company, on the one hand, and the London Guarantee, on the other, with the object of finding a scheme by which the winding-up might be avoided. During the autumn of 1921 these negotiations were continued on behalf of the company by the respondent at the request of the directors. No suggestion was made to him that the claims of the London Guarantee were in any respect invalid, and that there was from a legal point of view no reason for a liquidation, since by repudiating such claims the company would become perfectly solvent. The negotiations, however, broke down, and in August, 1922, it was intimated by letter that the London Guarantee would prefer the company to be wound-up, and the necessary resolution was passed on Oct. 3. On Oct. 18 the first meeting of creditors was held under s. 188 of the Companies (Consolidation) Act, 1908 [see now s. 293 of Companies Act, 1948], and at this meeting the respondent as liquidator pointed out that the insolvency of the company was caused by the participation agreement, and that the losses under that agreement would amount to something like £87,000. He also pointed out that included in the assets of the company was a sum of some £15,000 due by the General Produce Insurance Co. under another participating agreement. The approximate statement of affairs showed total unsecured creditors of £92,000, of which the bulk consisted of the claim of the London Guarantee. The alleged creditors present were three in number, namely, Mr. Walrond, who had a claim for director's fees; Mr. Butcher, who represented the London Guarantee; and Mr. Frank Marrian, another member of the firm of Harris, Marrian & Co., who was supposed to have a claim for commission under the management agreement. On May 2, 1924, there was a contributories' meeting, at which six persons were present, who held between them about half of the issued shares of the company. At this meeting the liquidator stated that the chief creditor was the London Guarantee, whose claim under the participation agreement in respect of losses amounted at Dec. 31, 1923, to £83,945, subject to further claims yet to come in. On Sept. 17, 1925, a further meeting of contributories was held. The liquidator explained the position. He stated that he had collected by means of calls some £5,600, and that claims in the liquidation had been admitted totalling £93,305. He had paid dividends on the claims of unsecured creditors of 3s., 2s., and 1s., making a total of 6s. in the £. He had entered into an agreement with the General Produce Insurance Co., compromising their debt (so called) of £16,090 at £11,625, and he had received £3,000 on account. The final meeting of the contributories was held on May 31, 1927. Four persons were present. The respondent submitted his final accounts, which were approved by the meeting, and he reported that the claim of the London Guarantee had involved lengthy investigations of accounts and protracted negotiations. The contributories voted to him at this meeting the balance of his remuneration. It may be observed here that not one of the contributories at any time suggested to the liquidator any doubt as to the validity of the claim of the London Guarantee, though some of them were persons experienced in the business of marine insurance.

The General Produce Insurance Co. had entered into a participation agreement with the company under an agreement dated May 21, 1918, whereby the company ceded to the General Produce Insurance Co. one-fifth of its risks under the partici-

pation agreement of Jan. 30, 1918, with the London Guarantee, subject to the like terms and conditions as were contained in that agreement. Claims under this agreement were, of course, open to the same objections as have been pointed out in regard to claims under the original participation agreement, but no point of this kind was ever raised by or on behalf of the General Produce Insurance Co. That company, however, was not in liquidation. After some negotiations by the liquidator with a view to ascertaining or settling the amount payable by the General Produce Insurance Co., a compromise agreement was entered into on July 24, 1925, providing in substance for the payment by instalments by the General Produce Insurance Co. of a sum amounting to £11,625. It should be added that the substance of this compromise had been brought before the registrar on a summons supported by two affidavits made by the liquidator, in which express reference was made to the participation agreements. By an order of the registrar dated June 22, 1925, it was ordered that the liquidator be at liberty to release the General Produce Insurance Co. "from their present liability" to the company upon the General Produce Insurance Co. making the payments contemplated by the proposed compromise agreement, but in default of payment of any one instalment, what was described as the "present liability" of the General Produce Insurance Co. was to continue. No question was raised before the registrar as to the validity of the claim against the General Produce Insurance Co., and the only question submitted to him was one relating to the amount of the sum payable under the compromise.

There was another incident of the same nature. On March 1, 1919, the company had entered into what is described as an "excess re-insurance contract" with Sterling Offices, Ltd., on behalf of the Essex Union Co., the Norske Lloyd Insurance Co., and the London Guarantee. The contract covered vessels dispatched on and after Jan. 1, 1919, and before Dec. 31, 1919, and it was subsequently extended to cover the year 1920. Claims under this contract against the company were open to the same objection of invalidity. Nevertheless, no question of that kind was raised. In October, 1922, the accounts were made up, and they showed that the company then owed in respect of this contract some £250. A compromise was suggested by Mr. Van der Linde, the liquidator of the Norske Lloyd Co. and a joint liquidator of the Essex Union. The respondent liquidator provisionally agreed to admit proofs of debt of the three companies at the sum of £100 each, upon the terms that they should have no further claim against the company. This compromise was subject to the sanction of the court, which was applied for by originating summons dated July 4, 1923, supported by two affidavits of the liquidator, one of which exhibited the excess re-insurance contract. The registrar, by order dated Aug. 3, 1923, gave the liquidator liberty to admit proofs of debt on the terms suggested. The only point raised before the registrar was again the question of quantum.

In January, 1927, the liquidator was anxious to pay a final dividend to the creditors, and, accordingly, arrived at a provisional compromise with the London Guarantee by which their claim, which by that date amounted to £88,761, was to be definitely fixed at £89,100. By letter of Jan. 25, 1927, to the solicitors acting for the respondent liquidator in the winding-up, the liquidator informed the solicitors of the facts and requested them to arrange for the consideration of the matter by the court with a view to the approval of the proposed compromise. By a letter of Jan. 26, 1927, these gentlemen informed the liquidator that they did not consider it necessary in the circumstances to obtain the court's approval to the addition of the sum of £238 13s. to the amount already agreed of £88,761, and stated that as liquidator he had full power to compromise the claim. Accordingly, the liquidator abstained from obtaining the approval of the court in this matter. The solicitors acting for the liquidator in the winding-up in all these transactions were, no doubt, aware that the liquidation was being caused by reason of claims under marine re-insurance treaties, and that the liquidator was himself claiming against the General Produce Insurance Co. for sums due under a marine re-insurance treaty. They never suggested to the liquidator that there was any

doubt as to the validity of claims under such treaties. On the other hand, they were never asked to consider the question, nor whether the proof of the London Guarantee was a valid one, nor whether there was any ground on which it could be disputed. The liquidator, in fact, never told his solicitor that no policies had been issued in connection with any of these matters. His own phrase in cross-examination before me is this: "The two of us," that is to say, he and his solicitor, "always talked together as though there was no question of validity or invalidity." There was no question raised with regard to the policies. He says: "My mind was a blank in regard to the policies and no consideration turned upon the policies in my mind." In giving evidence in the action before WRIGHT, J., he candidly stated that he would have paid the claim of the London Guarantee whether there were policies or not.

The question as to the liability of a liquidator, who has, without negligence, allowed the proof of a person who has no legal claim, was left open by the Court of Appeal in the recent case of *Re Windsor Steam Coal Co.* (1901), *Ltd.* (2). That case was one in which negligence in the liquidator had been clearly established, so that it was not necessary to decide the legal question; but the observations of the learned judges certainly do not encourage the proposition that the liquidator is a mere agent liable only if negligence of a gross kind is established. I should hesitate a long while before deciding that a voluntary liquidator is personally liable, if, notwithstanding every care on his part, he admits a proof which is ill-founded. The statutory duties cast upon him involve the getting in of the property and applying such property in satisfaction of the liabilities pari passu, and subject thereto the distribution of the balance among the members. The liquidator may exercise the powers of the court of settling a list of contributories and of making calls, and he must pay the debts of the company and adjust the rights of the contributories: see s. 186 of the Companies (Consolidation) Act, 1908 [see now s. 303 of the Companies Act, 1948]. The Winding-up Rules recognise that the liquidator, who has to examine every proof of debt lodged with him and the grounds of the debt, may be wrong; and provision is made for an appeal to the court, who may reverse or vary the liquidator's decision. The claim of a creditor may be based upon disputable matters of fact, as well as difficult questions of law. Moreover, the duty of getting in the property of the company cannot be an absolute duty, since such property may be irrecoverable. I do not, therefore, accept the view that the liquidator in the matter of admitting proofs is practically in the same position as an insurer so that, in any event, and in all circumstances, he is liable if a debt is subsequently shown to have been wrongly admitted. On the other hand, I think there can be no doubt that, in the circumstances of the case, a high standard of care and diligence is required from a liquidator in a voluntary winding-up. He is, of course, paid for his services; he is able to obtain, wherever it is expedient, the assistance of solicitors and counsel; and, which is a most important consideration, he is entitled, in every case of serious doubt or difficulty in relation to the performance of his statutory duties, to submit the matter to the court and to obtain its guidance. Now it is well known that the business of marine insurance in this country is regulated by Acts of Parliament, and is of a highly technical character, and those who have any practical acquaintance with the business as carried on in London are well aware that in certain respects the statutory provisions relating to marine insurance are disregarded. The participation agreement itself suggests the fact. The practice of granting p.p.i. policies without regard to the provisions of the Marine Insurance Acts is notorious. And there are other methods in use by underwriters which are known to result in obligations only enforceable on moral grounds. I have come to the conclusion that, having regard to the magnitude of the claim, in addition to the considerations I have mentioned, it was the duty of the liquidator carefully to investigate the validity of the proof put in by the London Guarantee. This duty he did not discharge, and I do not think he can wholly escape liability by pointing out that other persons—the contributories, the creditors, his solicitors, and other persons—with

whom he came into contact during the liquidation—failed to give him a warning. He chose to navigate in these narrow seas, to him unaccustomed and unknown, without either chart or pilot; and for this temerarious conduct he must bear the responsibility.

I will now deal with the special defence under art. 157 of the articles of association of the company, a matter which can, I think, be disposed of briefly. It is well settled that the articles of a company do not, and, indeed, cannot, constitute a contract between the company and the directors or other officers of the company. In the case of a director it is, no doubt, easy on the facts as they generally exist, to infer an agreement between him and the company that he will serve on the terms of the articles. In the present case there is no evidence whatever that the respondent was appointed to be liquidator on the condition that art. 157 should apply; and I should not readily infer that shareholders would be desirous of appointing a paid liquidator on the terms that, provided only that he is honest, he is not to be liable for the grossest negligence, idleness, or incapacity. It becomes, therefore, unnecessary to determine the question whether a liquidator comes within the words "other officer of the company" used in the article. I doubt it. Articles 156 and 157 are, I think, to be construed together, and they seem to relate to the duties and liabilities of directors and other officers whilst the company is a going concern.

> "Article 156. Every director, manager, secretary, and other officer or servant of the company shall be indemnified by the company against, and it shall be the duty of the directors out of the funds of the company to pay all costs, losses, and expenses which any such officer or servant may incur or become liable to by reason of any contract entered into or act or deed done by him as such officer or servant or in any way in the discharge of his duties. The directors may execute, in the name and on behalf of the company, in favour of any director or other person who may incur or be about to incur, any personal liability for the benefit of the company, such mortgages of the company's property (present and future) as they think fit, and any such mortgage may contain a power of sale and such other powers, covenants, and provisions, as shall be agreed on.
>
> Article 157. No director or other officer of the company shall be liable for the acts, receipts, neglects, or defaults of any other director or officer, or for joining in any receipt or other act for confirming or for any loss or expense happening to the company through the insufficiency or deficiency of title to any property acquired by order of the directors for or on behalf of the company, or for the insufficiency or deficiency of any security in or upon which any of the moneys of the company shall be invested, or for any loss or damage arising from the bankruptcy, insolvency or tortious act of any person with whom any money securities or effects shall be deposited or for any loss occasioned by any error of judgment or oversight on his part, or for any other loss, damage, or misfortune whatever which shall happen in the execution of the duties of his office, or in relation thereto, unless the same happens through his own dishonesty."

Moreover, it seems hardly possible that art. 157 can afford any protection to a liquidator in proceedings for the benefit of creditors of the company, since the liquidator has a statutory duty towards them which the article cannot affect; and this forms an additional reason for not extending the article to the acts of a liquidator.

I will deal next with the contention—added by amendment after the case had been opened—that the London Guarantee could, in any event, have put in a valid proof for the sum of £54,684 on an account stated. In the final conclusion at which I have arrived, this question has no practical importance; but since the case may go further, I think it right to express my opinion upon it. The question whether there was such an account stated is itself not free from difficulty. The London Guarantee forwarded quarterly statements of account under the participation

agreement to the company, and requested the company to confirm the accounts and so remit a cheque for the amount due. The company, in acknowledging the statements, stated that they "noted the figures" for which they were "obliged," but they did not in terms confirm the accounts. They did, however, enter the precise substance of the accounts in their books. At the end of the year 1921 the amount claimed by the London Guarantee as owing by the company was the sum of £54,684 12s. 5d., and this balance was accepted as correct by the company in the sense that it was entered in their books as a credit to the London Guarantee. So far there is, I think, no account stated between the parties; but by a letter dated July 28, 1928, written by Messrs. Carnaby, Harrower, Barnham & Co.—the liquidator's firm—to Messrs. Gardiner & Co., the solicitors to the London Guarantee —with the express authority of Messrs. Harris, Marrian & Co., the managers of the company—it was stated that at Dec. 31, 1921, the outstanding liabilities of the company to the London Guarantee were approximately £60,000 "including £54,684" due to the London Guarantee. This letter was, in my opinion, binding on the company, and I think, in view of the circumstances, that it has the effect of causing the accounts rendered in respect of the period up to Dec. 31 to be an account stated. Accordingly, if such an account can form a valid cause of action, even though all the items are disputable, it may be that the London Guarantee could have proved for the sum in question; and I will proceed to consider whether, on the assumption that there was such an account stated, the sections of the Stamp Act and the Marine Insurance Act do not preclude any claim upon that basis.

The first thing to be determined is the nature of the invalidity arising from the provisions of s. 93 of the Stamp Act. But for the provisions of s. 91 (1) (a) of the Marine Insurance Act, 1906, that nothing in that Act should affect the provisions of the Stamp Act, 1891, I should be disposed to hold that the provision of s. 22 of the Marine Insurance Act amounted to a statutory interpretation of s. 93 of the Stamp Act, so that, in substance, the invalidity of a contract for sea insurance not expressed in a policy was no more than an invalidity as regards admissibility in evidence. On consideration I think that s. 91 of the later Act precludes me from coming to such a conclusion, and that I am bound to construe s. 93 of the Stamp Act without regard to the provisions of the later Act. On that footing, I must hold that the provision of s. 93 of the Stamp Act, 1891—that a contract for sea insurance shall not be valid unless the same is expressed in a policy of sea insurance—having regard to the various penalties imposed by s. 97 of the Act, is tantamount to a provision that such a contract shall be null and void. It would have been easy, if desired, to have adopted the language used in s. 14 (4) of the Act, and to have provided that the contract should not in any civil proceedings "be given in evidence or be available for any purpose whatever." It seems to have been thought that nothing short of a provision that a contract for sea insurance should be invalid unless expressed in a policy, would be a sufficient protection of the revenue. Not only is the contract invalid, but the assurer who takes credit in an account for any premium for any sea insurance, or who takes upon himself any risk unless the insurance is expressed in a policy, is guilty of an "offence" for which he incurs a penalty. The broker or agent concerned in the matter has no legal claim to any charge for brokerage or commission, and any money paid to him in respect of such charge remains the property of his employer: see s. 97 (1) and (2). It seems to follow that each entry on each side of the account delivered by the London Guarantee to the company under the participation agreement was an entry in respect of an offence within the Act. It is, no doubt, well settled that where

> "there is a real account stated, called in old law an insimul computassen, that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck [I am using the language of BLACKBURN, J., in the well-known case of *Laycock and Pickles* (18)] the

A consideration for the payment of the balance is the discharge of the items on each side."

BLACKBURN, J., adds:

"It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is B not necessary in order to make out a real account stated, that the debts should be debts in præsenti, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient."

It is contended on behalf of the respondent that there was here a clear moral obligation on each side, and that this brings the case within the statement of C BLACKBURN, J., even if the participation agreement was wholly null and void.

I do not think it necessary to go through and comment on all the cases that were cited to me on this topic, for I am not content to follow the observations of the Court of Appeal in *Joseph Evans & Co.* v. *Heathcote* (24). It is true that on the facts in that case the court held that the plaintiffs were entitled to recover upon an account stated; but the learned judges, in order to arrive at that conclusion, D considered it necessary to examine the question whether the agreement between the parties was void or whether it was only such a contract that it could not be directly enforced. PICKFORD, L.J., expressly says:

"I do not think that, where a contract from its nature can give rise to no valid claim, a claim upon it can be used to found an action upon an account E stated."

This dictum is exactly in point. BANKES, L.J., comes to this conclusion:

"The position of the agreement sued on, therefore, under these Acts, is that it is neither void nor voidable, and there is nothing in the Act which prevents the court from accepting the debt created under the agreement as a proper foundation for an account stated."

F SCRUTTON, L.J., cites with approval a passage from the judgment of TINDAL, C.J., in *Cocking* v. *Ward* (20) in the following terms:

"The principle may not perhaps be applicable to cases where it can be shown that the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as by those against usury G or gaming, but we think it applies to cases where the only objection is that the original debt might not have been recoverable from the deficiency of legal evidence to support it,"

and SCRUTTON, L.J., then goes on to point out that since 1871 a contract in restraint of trade between members of a trade union is no longer void but is not directly enforceable. I conclude from these observations that where an agreement is wholly H void and a fortiori where the entry into it, or the taking credit in account in respect of it, is an "offence," items alleged to be due under such an agreement cannot properly be used to found an action on an account stated. Moreover, in the present case, there is another serious objection to the claim on an account stated, based upon the special position of a liquidator. It is settled law that no judgment recovered against a bankrupt, and no account stated with him, can I deprive the trustee in bankruptcy of his right to investigate the nature and grounds of the claim made against the bankrupt's estate: *Re Van Laun* (25). Rule 103 of the Winding-up Rules, 1909, is practically identical with r. 22 in Sched. II to the Bankruptcy Act, 1883, which was relied on by the Court of Appeal in that case. I am of opinion that the position of a liquidator, when examining a proof for the purpose of admitting it or rejecting it in a winding-up, is for this purpose exactly the same as that of a trustee in bankruptcy. The result is, that on this ground also, I think, a proof based on the suggested account stated ought to have been rejected.

The respondent is, therefore, in my judgment, liable as for misfeasance in the terms of s. 215 of the Companies (Consolidation) Act, 1908 [Companies Act, 1948, s. 333], and the last, and, in my view, the most important question that arises is as to the amount which he should be ordered to repay or to contribute "by way of compensation" in respect of the misapplication of the money of the company. The section replaces with modifications, unimportant in the present case, s. 10 of the Companies (Winding-up) Act, 1890, which in turn replaced s. 165 of the Companies Act, 1862. It gives a summary jurisdiction against delinquent directors and officers; the court may "examine into their conduct" and compel them to repay moneys misapplied or retained or for which they are liable with interest at "such rate as the court thinks just," or "to contribute such sums of money to the assets of the company by way of compensation . . . as the court thinks just." The question is whether the amount of compensation is—at least to some extent—a matter for the discretion of the court. It is clear, I think, that the language is carefully chosen. It would have been much simpler to provide, if that had been the intention, that the officer should pay such damages as the company or its contributories shall have sustained. The Act gives after winding-up new rights which did not exist before winding-up; but the section creates no new rights, though it gives power to enforce the new rights created by the winding-up: see *Re National Funds Assurance Co.* (26). On the other hand, the section does give a summary remedy of a special kind in cases of breach of trust or misfeasance by an officer, and its special character is illustrated by the circumstance that the section requires the court to examine into the conduct of the person attacked, and by the fact that no set-off or cross-claim against the company is allowed: *Re Anglo-French Co-operative Society, Ex parte Pelly* (27). The result of this, of course, is that the amount becoming due under the section has to be paid in full, whilst a valid claim by the officer in question against the company can only be the subject of proof. It may be added that the respondent is not entitled to security for costs, as he would be in an action by an insolvent company, nor is he entitled to discovery in the ordinary way.

On the whole, I think, and I am supported by the authority of the late WRIGHT, J., that the exceptionally able draftsman of the Companies Act, 1862, had in mind the possibility that circumstances might arise which would make it unjust and inequitable to require payment of the total amount which the company might perhaps recover in an action against the director or other officer concerned. In the present case it must be admitted that creditors of the company have a contractual right to be paid the amount of their debts; and it is difficult to see how, apart from a personal estoppel which has not been established, the respondent, having wrongly paid away large sums out of the available assets, can resist an order which will enable the lawful creditors to be paid in full, even though the claims of some of them may not be of a meritorious character. Such creditors would, in my opinion, have a right to obtain leave to sue in the name of the company to recover from the liquidator an amount equal to the amount of their debts not yet discharged, and he could not defend himself by urging that some of them should have warned him of the risks he was running in not investigating the legal validity of claims under a marine re-insurance treaty. There was, I think, no duty of that kind cast upon the creditors. But the position of the shareholders of the company seems to me to be widely different. They must be taken to have been aware that the business of the company in the main was that of marine re-insurance under what was described as a participation agreement. The facts were disclosed in the annual reports and at the general meetings held on March 21, 1918, and on April 7, 1919. Profits were earned under this agreement, and the company's position was thought to be excellent till the general meeting of May 7, 1920, when the chairman pointed out that the recent figures rendered by the London Guarantee were extremely unsatisfactory. The agreement itself, which, of course, had been approved by directors elected by the shareholders, points clearly to the fact that the business involved was based on honourable understanding, not on legal obligation. The

A arbitration clause, as I have pointed out, directs the arbitrators to turn a blind eye to the law. I do not think I should be justified in drawing the inference that the directors and shareholders as a whole were entirely ignorant of the relevant provisions of the Stamp Act and the Marine Insurance Act. The probability is, and since not one of them was called as a witness the matter rests on probability, that like most persons engaged or concerned in marine insurance business they knew B there were some sections in the Acts of Parliament regarded by underwriters as obnoxious, and that they were content to ignore them. In any case I am bound, I think, to treat the directors and shareholders alike as being not ignorant of the law, but as persons who, to use Lord Atkin's graphic phrase, were "outlaws moving outside the pale": *English Insurance Co., Ltd.* v. *National Benefit and Assurance Co., Ltd.* (*Official Receiver*) (1). Having so carried on business during C the years 1918, 1919, and 1920, the shareholders found themselves liable in honour to pay, out of and to the full extent of their assets, to the London Guarantee, sums exceeding £72,000, with a certainty that when all claims against that company had been investigated the total amount due would largely exceed that sum. If the directors or the managers had sought to repudiate this claim they could never, in the marine insurance world, have held up their heads again. I do not know D whether there were any shareholders who, if the matter had been fully explained to them before the liquidation, would have voted for repudiation. I am convinced that the large majority would have preferred the honourable course. At any rate, the shareholders approved the course taken by their chairman and manager, Mr. Walrond, in negotiating for a settlement with the London Guarantee; and when such negotiations failed the shareholders who attended the meeting of Oct. 3, 1922, E passed a unanimous vote in favour of an extraordinary resolution to wind-up. If the company could not by reason of its liabilities continue to carry on business, it was because, and only because, the liability in honour to the London Guarantee was being treated as binding. On any other footing the company was more than solvent. Liquidation was only necessary as an expedient for satisfying this liability pari passu with the others so far as the assets of the company could extend. In F effect, the passing of the resolution amounted to a mandate from the shareholders to the liquidator to treat the claim of the London Guarantee as valid. It is, however, urged that the liquidator, who has paid large dividends to the London Guarantee as having a valid claim, ought to repay the whole amount, with the result that not only will creditors be paid in full, but that shareholders will receive considerably more than par in respect of their shares. But the directors and G managers and shareholders have had all the satisfaction, and I should imagine all the advantages, of having acted honourably up to the date of the resolution to wind-up. It would seem unlikely that persons, who would have scouted the notion of not keeping faith as re-insurers of risks deliberately undertaken, can see no objection to making a liquidator liable for having, though in ignorance, acted honestly on their behalf. A claim on that footing is one which the court ought H not to regard with favour.

It is urged that the shareholders might have obtained leave to sue the liquidator in the name of the company and that in such a proceeding the liquidator would have to account for the whole of the dividends wrongly paid. I doubt whether the premise is sound. It must be remembered that before liquidation a shareholder has no right against the company to receive the value of his shares, and that in a I liquidation his right is only a right to receive a dividend in the surplus assets (if any) resulting from the winding-up. His position is widely different from that of a creditor with a legal right against the company. If, then, a shareholder were to apply in such a case as the present, creditors having been paid in full, for leave to use the name of the company to sue the liquidator, I conceive that, the facts having been disclosed, such an order might well be refused. However that may be, I have only to deal with the present application under a section which, in my view, confers on the court a discretion. The matter, as I have said, is not free from authority.

A similar question came before WRIGHT, J., in 1900 in *Re Sunlight Incandescent Gas Lamp Co.* (28). On that occasion it was sought to make two directors of the company, Mr. Duncan and Mr. Wethered, accountable for (i) a sum of £420 paid out of the assets of the company to Duncan as an underwriting premium on a policy of insurance, and (ii) a sum of £210 paid out of the assets to Wethered as a like premium. The policy was one granted by both gentlemen to secure the company against the reversal of a judgment given in the Queen's Bench Division in an action brought by the company against the Incandescent Gaslight Co. Duncan and Wethered, being directors of the company, were clearly liable to account to the company for any profit made by them by virtue of this transaction. In the event, the Incandescent Gaslight Co. abandoned the appeal which they had lodged, and Duncan and Wethered became entitled to and received the premiums. No authority had been given by the shareholders of the company to the directors to enter into the transaction. On the other hand, the transaction was carried out in good faith and in the interests of the company. All the directors were aware of and fully concurred in what was done; and it appears to have been disclosed at a general meeting after the transaction was complete that Duncan and Wethered had given the insurance in question, though the amount of the premiums was not mentioned. In these circumstances, and all creditors having been paid, the learned judge had to determine whether on a misfeasance summons Duncan and Wethered could be made jointly and severally liable to repay the amount of the premiums with interest. He observed that all the shareholders, with three exceptions, repudiated the proceedings and had intimated that they did not desire to have the money repaid. He then continued as follows:

> "The exceptions were Mr. Morris, his son, and another shareholder who has transferred his shares. Under these circumstances, if there had been any unsatisfied creditors, and the present proceedings had been by action instead of summons, there might be no answer to the claim. But the question arises upon a summons taken out under s. 10 of the Companies (Winding-up) Act, 1890 [predecessor of s. 333 of the Act of 1948]. That section is carefully worded. It seems to me that that section gives a wide discretion to the court, and I think that the discretion ought to be exercised in this case by not making an order for payment, having regard to the fact that most of the shareholders do not want the money and would return it, if paid to them, to these directors, and that the other shareholders knew of what had been done. I think, therefore, that there ought to be no order in the present case. I cannot, however, give these directors their costs because they ought in my judgment to have made a more full and detailed disclosure. The liquidator will be entitled to take his costs out of the assets."

This authority has never, so far as I know, been questioned, and I accept it as being based on a correct interpretation of the language of the misfeasance section. It is true that it can only be in very exceptional circumstances that the court can be called upon to exercise its discretion in favour of an officer of a company in a case of wrongful misapplication or retention of money, misfeasance or breach of trust. But on the whole and after careful consideration of all the facts I think that such circumstances exist here. In my judgment the sum which the respondent ought in justice to contribute by way of compensation to the assets of the company is such an amount as will enable all the creditors of the company to be paid in full with interest at 5 per cent. If necessary there will be an inquiry as to this amount. The respondent must also pay the costs.

Solicitors: *William A. Crump & Sons*; *Lawrence Jones & Co.*; *William Charles Crocker*.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

HYMAN *v.* HYMAN

[House of Lords (Viscount Hailsham, L.C., Viscount Dunedin, Lord Shaw, Lord Buckmaster and Lord Atkin), March 12, 14, April 30, 1929]

[Reported [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; 45 T.L.R. 444; 73 Sol. Jo. 317; 27 L.G.R. 379]

Divorce—Maintenance of wife—Deed of separation providing maintenance by husband—Covenant by wife not to seek further maintenance—No provision for termination of deed on divorce—Subsequent divorce—Petition for maintenance—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190 (1), (2).

The power of the court under s. 190 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925 [now s. 19 (2) and (3) of the Matrimonial Causes Act, 1950] to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but also of the public, and a wife cannot by her own covenant in, e.g., a deed of separation preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction.

Gandy v. *Gandy* (1) (1882), 7 P.D. 168, criticised.

Notes. Section 190 (1), (2), (4), s. 192, and s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925, have been replaced by s. 19 (2), (3), s. 20 (1), (2), s. 22 (1), (2), s. 25, and s. 28 of the Matrimonial Causes Act, 1950.

Explained: *May* v. *May*, post, p. 484. Considered: *L.* v. *L.*, [1931] P. 63; *Lambert* v. *Lambert*, [1936] 3 All E.R. 20; *H.*—— v. *H.*——, [1938] 3 All E.R. 415; *Adams* v. *Adams*, [1941] 1 All E.R. 334. Applied: *Gaisberg* v. *Storr*, [1949] 2 All E.R. 411. Considered: *Ross* v. *Ross*, [1950] 1 All E.R. 654. Applied: *Bennett* v. *Bennett*, [1951] 1 All E.R. 1088; *Combe* v. *Combe*, [1951] 1 All E.R. 767. Followed: *Tulip* v. *Tulip*, [1951] 2 All E.R. 91. Considered: *Shott* v. *Shott*, [1952] 1 All E.R. 735. Applied: *Simmonds* v. *Simmonds*, [1955] 2 All E.R. 481. Considered: *Russell* v. *Russell*, [1956] 1 All E.R. 466. Referred to: *Papadopoulos* v. *Papadopoulos*, [1930] P. 55; *Russell* v. *Russell*, [1934] All E.R.Rep. 569; *Mann* v. *Mann*, [1936] 1 All E.R. 952; *Mills* v. *Mills*, [1940] 2 All E.R. 254; *Bennett* v. *Bennett*, [1952] 1 All E.R. 413; *Goodinson* v. *Goodinson*, [1954] 2 All E.R. 255; *National Assistance Board* v. *Parkes*, [1955] 3 All E.R. 1.

As to applications for permanent maintenance, see 12 Halsbury's Laws (3rd Edn.) 430 et seq.; and for cases see 27 Digest (Repl.) 234–236, 611 et seq. For Matrimonial Causes Act, 1950, see 29 Halsbury's Statutes (2nd Edn.) 388.

Cases referred to:

(1) *Gandy* v. *Gandy* (1882), 7 P.D. 168; 51 L.J.P. 41; 46 L.T. 607; 30 W.R. 673, C.A.; 27 Digest (Repl.) 235, *1887*.
Gandy v. *Gandy* (1885), 30 Ch.D. 57; 54 L.J.Ch. 1154; 53 L.T. 306; 33 W.R. 803; 1 T.L.R. 520, C.A.; 27 Digest (Repl.) 237, *1910*.

(2) *Hyman* v. *Hyman*, *Hughes* v. *Hughes*, [1929] P. 1; 98 L.J.P. 1; 139 L.T. 416; 93 J.P. 3; 44 T.L.R. 664; 72 Sol. Jo. 435; 26 L.G.R. 471; 66 L.Jo. 10; [1928] W.N. 181, C.A.

(3) *Morrall* v. *Morrall* (1881), 6 P.D. 98; 50 L.J.P. 62; 47 L.T. 50; 29 W.R. 897; 27 Digest (Repl.) 235, *1886*.

(4) *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, [1897] P. 138; 66 L.J.P. 69, 76; 76 L.T. 409; 45 W.R. 567; 13 T.L.R. 366; 41 Sol. Jo. 559, C.A.; 27 Digest (Repl.) 234, *1885*.

(5) *Benyon* v. *Benyon and O'Callaghan* (1876), 1 P.D. 447; 45 L.J.P. 93; 24 W.R. 950; 27 Digest (Repl.) 650, *6126*.

(6) *Besant* v. *Wood* (1879), 12 Ch.D. 605; 40 L.T. 445; 23 Sol. Jo. 443; 27 Digest (Repl.) 236, *1894.*

(7) *Lord St. John* v. *Lady St. John* (1803), 11 Ves. 526; 32 E.R. 1192, L.C.; 27 Digest (Repl.) 215, *1718.*

(8) *Bateman* v. *Countess of Ross* (1813), 1 Dow, 235; 3 E.R. 684, H.L.; 27 Digest (Repl.) 243, *1956.*

(9) *Wilson* v. *Wilson* (1848), 1 H.L.Cas. 538; 12 Jur. 467; 9 E.R. 870, H.L.; 27 Digest (Repl.) 220, *1757.*

(10) *Hunt* v. *Hunt* (1862), 4 De G.F. & J. 221; 31 L.J.Ch. 161; 5 L.T. 778; 26 J.P. 243; 8 Jur.N.S. 85; 10 W.R. 215; 45 E.R. 1168, L.C.; 27 Digest (Repl.) 291, *2369.*

(11) *Worsley* v. *Worsley and Wignall* (1869), L.R. 1 P.D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 17 W.R. 743; 27 Digest (Repl.) 245, *1980.*

(12) *Charlesworth* v. *Holt* (1873), L.R. 9 Exch. 38; 43 L.J.Ex. 25; 29 L.T. 647; 22 W.R. 94; 27 Digest (Repl.) 229, *1837.*

Appeal from an order of the Court of Appeal (Lord Hanworth, M.R., Scrutton, Greer and Sankey, L.JJ.; Lawrence and Russell, L.JJ., dissenting).

By a deed of separation dated Sept. 20, 1919, the husband covenanted that he would pay sums of £200 and £2,000 respectively to the wife and, further, a weekly sum of £20 free of income tax, and the wife covenanted that neither she nor any person on her behalf would thereafter seek to compel the husband to allow her any alimony or maintenance beyond the said sums of £200 and £2,000 and the weekly sum of £20. The husband paid the two sums of £200 and £2,000 and regularly made the weekly payment of £20. On January 25, 1927, the wife obtained a decree nisi for the dissolution of the marriage on the ground of the husband's adultery and on Feb. 7 she filed a petition for permanent maintenance. On April 28 the husband filed an answer, relying on the provisions of the deed. On Oct. 31 an order was made that the question of the effect of the deed be set down for hearing as a separate issue. On March 27, 1928, Hill, J., decided that the wife was not precluded by the deed from prosecuting her claim for maintenance. On appeal by the husband it was held by a majority of the Court of Appeal (Lord Hanworth, M.R., and Scrutton, Greer and Sankey, L.JJ), affirming the decision of Hill, J., that a contract by a wife for valuable consideration by which she agreed not to take proceedings to compel her husband to allow her support, maintenance, or alimony, or to allow her any alimony beyond a stipulated amount, which contained no provision for its termination on the marriage tie ceasing to exist, was not binding upon the wife after she had obtained a decree absolute for divorce, as the discretion and jurisdiction of the Divorce Court under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, could not be barred or fettered by any previous agreement between the parties. Lawrence and Russell, L.JJ., were of opinion that the wife was barred from petitioning for maintenance under her covenant in the deed not to take proceedings to compel her husband to allow her support, maintenance or alimony as no implication could be inferred to limit the application of the covenant to such time only as the marriage should continue to subsist, and the wife ought not to be allowed to approbate and reprobate the deed by accepting its benefits while married and repudiating her obligations under it, whether such repudiation took place because she had obtained a decree for judicial separation or because she had obtained a decree absolute. The appeal was, accordingly, dismissed, and the husband appealed to the House of Lords.

Sir Herbert Cunliffe, K.C., and *H. Durley Grazebrook* for the husband.

Sir Walter Schwabe, K.C., *Sir James O'Connor, K.C.*, and *Geoffrey C. Tindale* for the wife.

Cur. adv. vult.

VISCOUNT HAILSHAM, L.C.—This is an appeal from an order of the full Court of Appeal in England dismissing an appeal from an order of Hill, J., made in a divorce suit brought by the wife against the husband whereby the learned

judge decided that the wife was not precluded from prosecuting her claim for maintenance by reason of the terms of a deed of separation entered into between the parties in the year 1919.

The parties were married on Sept. 14, 1912, and cohabited for some years; there is no issue of the marriage. On Sept. 20, 1919, a deed of separation was executed between the husband, of the first part, the wife, of the second part, Walter Hyman, who is the husband's brother, of the third part, and two trustees, of the fourth part. By the said deed, the husband covenanted for himself, his executors and administrators that he would pay two sums of £200 and £2,000 respectively to the wife, and that in addition he would pay to her a weekly sum of £20 free of income tax for her separate use and benefit and for her maintenance during her life. The payment of the £2,000 and of the clear weekly sum of £20 was guaranteed by Walter Hyman by cl. 2 of the deed. By cl. 3 of the deed, the wife and the trustees covenanted that neither the wife nor any person on her behalf should at any time thereafter molest or disturb the husband, by any means, either by taking out citation or process or by instituting any action in England or elsewhere, or in any other manner, compel the husband to cohabit with the wife, or endeavour to enforce any restitution of conjugal rights or to compel the husband to allow the wife any alimony or maintenance further than the said weekly sum of £20 and the aforesaid sums of £200 and £2,000. The two sums of £200 and £2,000 were duly paid and the husband has regularly made the payment of the weekly sum of £20.

At the time of the deed of separation the husband was living in adultery with another woman and he continued to live in adultery after the date of the deed. On July 18, 1923, the Matrimonial Causes Act of that year became law whereby for the first time a wife was given the right to obtain a divorce solely on the ground of adultery by her husband. On Jan. 11, 1926, the wife filed her petition for divorce on the ground of the husband's adultery during the two preceding years. On Jan. 25, 1927, a decree nisi was pronounced, and on Feb. 7, 1927, the wife filed a petition for permanent maintenance. On April 28, 1927, the husband swore his answer to the petition and relied on the provisions of the deed of separation. On Oct. 31, 1927, an order was made that the questions arising on the deed of separation be set down for hearing as a preliminary issue, and on Feb. 10, 1928, the issue came on for hearing before Hill, J., who adjourned the hearing in order that the wife might apply to make the decree nisi absolute. On Feb. 27, 1928, the decree was made absolute, and on March 27, 1928, Hill, J., delivered judgment in the issue and ordered that the wife was not precluded from prosecuting her claim for maintenance by reason of the deed of separation. In giving this decision, the learned judge followed the decision of the President of the Probate, Divorce and Admiralty Division in *Hughes* v. *Hughes* (2) which had been given on the previous day. The appeals in *Hughes* v. *Hughes* (2) and in the present case were argued before the full Court of Appeal, and on June 18, 1928, that court ordered that both appeals should be dismissed and gave leave to appeal to your Lordships' House. Lawrence, L.J., and Russell, L.J., dissented from the view of the majority of the court.

The decision of the Court of Appeal was based partly on the ground that the deed of separation, on its true construction, ceased to operate when the relation of husband and wife ceased to exist, and, therefore, that there was no agreement by the wife not to bring her petition for maintenance before the court. If this contention be well founded, the obvious result is that the appeal must fail. But the majority of the Court of Appeal further reached their decision upon the ground that, even if the wife had covenanted in express terms not to bring the present petition, she could not be bound by such a covenant so as to preclude the exercise by the court of its statutory power to award maintenance. This second ground of decision obviously raises a question of far-reaching importance, and if it be correct, it is sufficient to decide the appeal.

For the purposes of my opinion in the present case, I am prepared to assume that the wife's covenant in the deed of separation does bear the wide construction

put upon it by the husband and does amount to a covenant not to bring the petition for maintenance, which is the subject-matter of the present proceedings. The point to be determined upon this hypothesis is whether such a covenant is effective to preclude the wife from prosecuting her claim. It is convenient to turn first of all to the language of the statute. By s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided:

"(1) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable . . . and may, if it thinks fit, suspend the pronouncement of the decree until the deed or instrument has been duly executed. (2) In any such case as aforesaid the court may, if it thinks fit, by order either in addition to or instead of an order under sub-s. (1) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable."

There follow provisos for the variation or discharge of the order. Sub-s. (4) is in the following terms:

"Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just."

These provisions are a re-enactment of provisions first appearing in the Matrimonial Causes Act, 1857, as modified by later Acts in 1866 and 1907; and the question which your Lordships have to determine must, in my opinion, depend upon the view taken by your Lordships as to the true meaning and effect of this section.

Before 1857 it was not competent for any court to dissolve a marriage validly contracted; in order to effect such a dissolution it was necessary to have recourse to an Act of Parliament. In 1857 the legislature for the first time gave to the courts the power to dissolve the marriage tie by a decree of divorce. Such a decree does not merely affect the relationship of the husband and the wife one to another, but it also changes the status of each of them. In my view, the effect of the section to which I have called attention is to give power to the court as incidental to the exercise of these powers and as a condition of their exercise to compel the husband to make adequate provision for the support of the wife. Such a provision is made, not solely in the interests of the wife, but also in the interests of third parties who may deal with the wife or who may, as in the case of poor law guardians, become responsible for her sustenance [see now Public Assistance Act, 1948]. If this be the proper inference from the language of the statute, I am prepared to hold that the parties cannot validly make an agreement either (i) not to invoke the jurisdiction of the court, or (ii) to control the powers of the court when its jurisdiction is invoked.

In the present case, the husband agreed to make a large money payment at the date of the deed of separation and agreed to make a substantial weekly payment for the maintenance of his wife during her life; and, as an additional advantage, the wife obtained the guarantee of Mr. Walter Hyman for the due observance of these obligations. But your Lordships are not now being invited to consider whether the provision in the deed of separation is adequate; the only question which is before your Lordships' House is whether or not the existence of the wife's covenant in the deed of separation precludes her from making any application for maintenance. For this purpose it can make no difference whether the consideration given by the husband was adequate or not; the question of principle would be the same if there had been no weekly payment provided at all. In my opinion, the fact that the deed of separation has been entered into by both parties, the fact that it was executed by the wife voluntarily and upon independent legal advice, the

A fact that the wife was prepared to accept the provision then made as adequate at the time, the benefits which she obtains in the shape of the guarantee by Mr. Walter Hyman and in the continuance of the weekly payments after her husband's death, all form part of that conduct of the parties which by the express terms of the statute is to be taken into account by the court in determining what it thinks reasonable. It may very well be that when the facts come to be investigated, the B court will say that a sum of this magnitude, so secured, voluntarily accepted as a sufficient maintenance ten years ago, and faithfully paid ever since is a sufficient provision, and that the court will not deem it to be reasonable to order any further payment to be made: this is not the question which your Lordships are considering. The only question which the order appealed against determines is that the existence of the covenant in the deed of separation does not preclude the wife from making C an application to the court; this by no means implies that, when the application is made, the existence of the deed or its terms are not most relevant factors for consideration by the court in reaching a decision.

Your Lordships will observe that I have, so far, based my opinion on the language of the statute without reference to any reported decisions; but counsel for the husband called your Lordships' attention to several cases, and it is necessary now D to examine those cases and to see whether the view which I have formed upon the language of the statute must be modified in the light of those decisions. A large number of authorities were brought to the attention of your Lordships, most of which are discussed in the very exhaustive judgments in the Court of Appeal; but there are three cases which require particular attention, namely: *Morrall* v. *Morrall* (3), *Gandy* v. *Gandy* (1), and *Bishop* v. *Bishop* (4).

E In *Morrall* v. *Morrall* (3) a wife by a deed of separation had agreed to accept certain sums as provision for her support, and had covenanted not to commence or prosecute any suit or other proceeding for compelling her husband to allow her any support, maintenance or alimony whatsoever, except the sum stipulated in the deed. At a subsequent date the wife discovered that her husband had been guilty of incestuous adultery and obtained a decree for the dissolution of the marriage. F SIR JAMES HANNEN, P., held that notwithstanding the deed she was entitled to the usual order for permanent maintenance. The learned President says in his judgment (6 P.D. at p. 100):

> "When she has established that her husband has been guilty of incestuous adultery, a state of things arises not in contemplation when the deed was executed, and the wife is not restrained by the deed. Circumstances now G justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit, and amongst them to an allowance based upon her husband's actual income."

In *Gandy* v. *Gandy* (1) a wife and a husband had executed a separation deed by which the husband agreed to allow to the wife £250 a year and to maintain the H two youngest children, who were not given into her custody, and the wife covenanted not to take any proceedings to compel the husband to allow her any larger amount of alimony. Subsequently, the husband committed adultery, and the wife obtained a decree for judicial separation and an order for the custody of the two youngest children. The wife applied for alimony, and SIR JAMES HANNEN, P. (following an earlier decision of his own in *Benyon* v. *Benyon* (5)), held that I she was entitled to an inquiry as to the husband's means, and that she was not precluded by her covenant from making the application. The husband appealed to the Court of Appeal, and the Court of Appeal reversed the President's decision. SIR GEORGE JESSEL said that in his view the court could not interfere with such a contract except when one of the parties to the contract had so acted as to disentitle him to rely upon the contract at all, and that the subsequent misconduct of the husband did not entitle the wife to repudiate the contract into which she had entered, which was, therefore, still binding. COTTON, L.J., said that, in his opinion, the conduct of the husband since the deed was not such as, having regard

to what was known to the wife at the time she entered into the deed, to disentitle him from relying on the deed. The learned lord justice goes on to deal with *Morrall* v. *Morrall* (3), and he distinguishes it in this way (7 P.D. at p. 175):

> "There, there was a deed of separation with a provision as to what maintenance the wife was to have. She subsequently ascertained that the husband was living in incestuous adultery. It may well be that such gross misconduct, misconduct of a nature so entirely different from that which the parties were providing for when they entered into the deed of separation, might prevent the husband from in any way relying on that deed, and might render it just that the bargain made by the wife for maintenance should be disregarded on an application to the court for alimony. Here, in my opinion, the circumstances are not such as to entitle the wife to disregard her bargain."

LINDLEY, L.J., says (7 P.D. at p. 175):

> "This being only a suit for judicial separation, the power of the Divorce Court over these deeds is much less than it would be after a decree for dissolution of marriage. It is a much more restricted jurisdiction and power, and it appears to me that the cases, of which *Morrall* v. *Morrall* (3) is one, where the Divorce Court has dealt with separation deeds after decrees for dissolution of marriage, are rather misleading, when they are applied, or sought to be applied, in a case where the court has no such extensive jurisdiction."

In *Bishop* v. *Bishop* (4) the facts were that by an agreement for separation made between husband and wife on the withdrawal of the wife's petition for divorce, the wife agreed to accept from the husband a specified sum for maintenance to be paid in any event, whether the marriage should thereafter be dissolved or not. The agreement contained no express stipulation not to petition for permanent maintenance. The wife brought a fresh petition for divorce, based on the misconduct of the husband after the date of the agreement, and obtained a decree. She thereupon filed a petition for permanent maintenance, and the husband set up the agreement as a bar. SIR FRANCIS JEUNE, P., held that the agreement was not a bar to the petition, and his judgment was upheld in the Court of Appeal. The judgment of the Court of Appeal was delivered by LINDLEY, L.J., and *Gandy* v. *Gandy* (1) was carefully examined and distinguished. The learned lord justice points out that in that case ([1897] P. at p. 162) "nothing was decided respecting any of the statutory powers of the Divorce Court in suits for dissolution of marriage." And again ([1897] P. at p. 163), he says:

> "the case being one of dissolution of marriage, and not of judicial separation, *Gandy* v. *Gandy* (1) is not in point, except in so far as it negatives any implied condition of continued chastity. The present case must turn on the power of the Divorce Court on a dissolution of marriage to compel a husband to provide for his divorced wife, and to make orders for the maintenance and education of the children,"

and after referring to the statute, he says ([1897] P. at p. 164):

> "As regards permanent maintenance, s. 32 of the Act of 1857 [which is reproduced in s. 190 (1) of the Act of 1925—now s. 19 (2) of the Matrimonial Causes Act, 1950] is very wide indeed, and it would not be right for this or any court to put a narrow construction upon it, or to fetter in any way the court or judge intrusted with its application in cases of divorce. The section says that regard is to be had to the wife's fortune, to the ability of the husband, and to the conduct of the parties. The appellant contends that all these matters are to be disregarded, and attention is only to be paid to the terms of the separation deed. This cannot be right. . . . We are not aware of any authority since the Divorce Act which shows that a covenant by a husband or wife not to sue the other for a divorce grounded on future misconduct is valid, and we doubt whether an express covenant not to sue for increased alimony in the event of such a divorce could be recognised. There is no express covenant

to that effect in the present case; and a covenant of such very questionable validity certainly cannot be implied. In other words, the wife cannot be held to have precluded herself by her agreement from invoking the aid of the court to obtain further maintenance in the events which have happened."

Your Lordships will have noticed that the decisions in *Morrall* v. *Morrall* (3) and in *Bishop* v. *Bishop* (4), so far as they are relevant, tend to confirm the opinion which I had formed from the language of the statute and to support the view that a covenant not to invoke the jurisdiction of the court to order permanent maintenance in a suit for dissolution of marriage is not a bar to such an application being made. But counsel for the husband relied strongly upon *Gandy* v. *Gandy* (1). He argued that the Court of Appeal in *Gandy* v. *Gandy* (1) was mistaken in supposing that the jurisdiction of the court in suits for judicial separation was less than it would be after a decree for dissolution of marriage. He urged that the considerations which are expressed in sub-s. (1) of s. 190 as matters to be taken into account by the court are the very matters which it had been the established practice of the ecclesiastical courts to take into account in awarding alimony in suits for judicial separation; he said that there was no difference in meaning between what the court "deems reasonable" in sub-s. (1), and what the court "thinks just" in sub-s. (4). He pointed out that, although *Gandy* v. *Gandy* (1) had subsequently been considered in another suit between the same parties, there was nothing in the second decision to shake the authority of the first, and he said that the principle of the first decision was inconsistent with the decision in the present case and therefore that the present appeal ought to succeed. I confess that the argument so presented appeared to me a very formidable one. Your Lordships did not think it necessary to call upon counsel for the wife, and it may be that there are distinctions between *Gandy* v. *Gandy* (1) and the present case to which our attention has not been directed, and that the fact that in *Gandy* v. *Gandy* (1) the court had only decreed judicial separation, whereas in the present case it had dissolved the marriage altogether, may make such a difference in principle as to render the two cases distinguishable. But if the two cases cannot be distinguished, then, in my opinion, the result is that *Gandy* v. *Gandy* (1) must be held to have been wrongly decided. However this may be, it is sufficient for the decision of the present case to hold, as I do, that the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but also of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction. In my opinion, this appeal fails and should be dismissed with costs, and I move, your Lordships, accordingly.

VISCOUNT DUNEDIN concurred.

LORD SHAW.—The parties in this case were married on Sept. 14, 1912. There are no children of the marriage. On Sept. 20, 1919, they executed a deed of voluntary separation. By that deed the husband covenanted for himself, his executors, and his administrators to pay to his wife certain sums down and a further sum of £20 per week during her life. It was by this deed of separation provided that:

"Neither the wife the said May Hyman, nor any person on her behalf, shall at any time hereafter molest or disturb the said Maurice Percy Hyman by any means, either by taking out citation or process or instituting any action in England or elsewhere or in any other manner compel the said Maurice Percy Hyman to cohabit with her or endeavour to enforce any order for restitution of conjugal rights, or to compel the said Maurice Percy Hyman to allow her any alimony or maintenance further than the said weekly sum of £20 and the aforesaid sums of £200 and £2,000."

On Jan. 11, 1926, the wife petitioned for a divorce on the ground of her husband's

adultery, and she obtained a decree nisi on Jan. 25, 1927, which was made absolute on Feb. 27, 1928. A

The question in the case is whether the covenant by the wife not to take proceedings to compel her husband to allow her any alimony or maintenance beyond the amount stipulated in the deed is still binding upon the wife after she has obtained a decree for divorce. Conversely put, the question is whether it is still open to her to petition for maintenance under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. By s. 190 (1) it is provided: B

> "The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable. . . ." C

As showing the range and scope of the duties vested in the court, it may be expedient to quote certain further provisions of the Act. Section 192 is as follows:

> "The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this subsection notwithstanding that there are no children of the marriage." D E

The court is further vested with power to vary orders. By s. 196 it is provided that:

> "The court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the court thinks just." F

Had the arguments in this case not roamed very wide, it would have been needless to observe that this is not a case as to judicial separation, or any application for alimony following therefrom, or as to restitution of conjugal rights; it is G simply an application for alimony following a dissolution of the marriage by divorce. In various cases much argument has been had as to the rights of an applicant for judicial separation who was already under contract of voluntary separation. That is not the situation of the wife in the present case, which is different, and has been over and over again distinguished by the courts, from a case of an application following divorce. H

The substance of the statutory provisions cited from the Judicature Act, 1925, had already appeared in previous statutes. The language of the earlier portion of s. 190 is a repetition of s. 32 of the Matrimonial Causes Act, 1857. No further tracing of the legislative history is necessary. The power given to the court depends fundamentally on the language of s. 190 of the Act of 1925.

I am humbly of the opinion that the court granting divorce is charged and I charged fully under that section with the power of settling the allowance to the wife and that it is not precluded from discharging that duty by the existence of the provisions of a voluntary deed of separation between the parties. Upon that subject I am in entire agreement with the judgment of my noble and learned friend on the Woolsack. The ruling provision—s. 190, above quoted—empowers the court, if it thinks fit, "on any decree for divorce or nullity of marriage" to make an order securing to the wife such a gross sum of money or annual sum of money for any term not exceeding her life, "as having regard (1) to her fortune, if any, (2) to

A the ability of her husband, and (3) to the conduct of the parties" the court may deem reasonable. Not only is the power given to the court, but the scope of the power and the considerations which are to be taken into account when it is exercised are set out by statute. I do not think it to be competent for us to limit or restrict that power which is thus given unambiguously and definitely. Nor is it legitimate for a court of law to be swayed from such a construction by a consideration of B authorities applicable to previous legislation, although that legislation was in similar terms. In short, this is the simple case—over and over again affirmed by this House—that the statute must be taken to mean what it says, and that there is much danger in allowing invasion of its terms followed by subsequent invasions succeeding the first until the virtue of the statute is emasculated.

It seems, however, to me to be impossible to avoid the wider discussion which C took place in the course of the able and careful argument for the appellant and upon which the dissentient judgments in the Court of Appeal were founded. I have had the advantage and pleasure of perusing the opinion of the Lord Chancellor, and I may say that I am at one with him in his analysis of the authorities, so much so that I think it unnecessary, in view of his pronouncement, to trouble the House with a judgment which I had prepared upon that subject. It may be, however, D that our views do not exactly coincide as to *Gandy* v. *Gandy* (1), and in that situation I am venturing to deal particularly with that case and also with the underlying principle applicable to the whole situation. I do not conceal from your Lordships that I think the judgment of the Court of Appeal in the first case of *Gandy* v. *Gandy* (1) was—I say so quite boldly—an erroneous judgment. It was contrary to that of Sir James Hannen, whose decision appears to me to be upon E the authorities which he cited and upon principle essentially sound. I will quote one or two sentences from that judgment which appear to me to have expressed the law of England with accuracy at the time they were spoken, and undoubtedly to express the law of England to-day. *Gandy* v. *Gandy* (1) was a case in which a voluntary separation under agreement had been made by the married parties, and thereafter the wife obtained a decree for judicial separation in consequence of the F husband's adulterous misconduct. It was not a case like the present, where in respect of that misconduct a divorce had been obtained. Probably enough the misconduct was not accompanied with cruelty, and so the right to sue for such a remedy at that date was not in the wife. That difference—between applications for alimony in divorce cases and in separation cases—was over and over again noted G by the judges of the Court of Appeal themselves in *Gandy* v. *Gandy* (1); but *Gandy* v. *Gandy* (1) has always somehow played a formidable part in the discussions as to alimony even in divorce cases. The reason for that has, so to speak, been brought up to date and forcibly stated by Lawrence, L.J., in his dissent in the present cases ([1929] P. at p. 55):

> "The conclusions of the Court of Appeal in the first case of *Gandy* v. *Gandy* H (1), therefore, may be summarised as follows: That a wife's covenant not to endeavour to compel the husband to allow her any further alimony or maintenance is a valid covenant binding on her; that no dum casta clause will be implied in a separation deed, and consequently that the husband can enforce the covenant, notwithstanding his subsequent adultery, which does not amount to such gross misconduct on his part as to disentitle him to relief in a Court of I Equity; and that the fact that the wife has obtained a decree for judicial separation, with the result that the spouses are no longer living apart by agreement but by the decree of the court, upon the making of which the court has a statutory power to make such order for alimony as it thinks just, affords no ground for enabling the court to disregard the wife's covenant. In my judgment, these conclusions and the reasons upon which they are founded apply just as much to a case like the present where the wife has obtained a decree for divorce as they do to the case where the wife has obtained a decree for judicial separation."

This appears to make the way of error luminous. *Gandy* v. *Gandy* (1) is assumed to be sound, and not only sound but to have such soundness and fundamental principle as to enable it to be quoted effectively not in a separation case but in a divorce case; and with the result that it contracts parties to a divorce case out of the provisions of an Act of Parliament, and impedes and cripples the power of courts of law in settling alimony in such cases upon the grounds comprehensively and definitely set forth by statute. In my opinion, the whole of this reasoning is a mistake. But I think it right to begin at the beginning by saying that I do not think that *Gandy's Case* (1) was rightly decided, and I am pretty well assured in that opinion by the course of subsequent English decisions. SIR JAMES HANNEN, P., declined to accept the argument even in a separation case that a married person was bound by a voluntary contract from asking a judicial remedy both of separation and of allowance of alimony. Quoting from his own judgment in *Benyon* v. *Benyon* (5), he says (7 P.D. at p. 81) it would be of evil example and morally dangerous if the wife's pecuniary position could not be altered by reason of her adultery subsequent to her husband's acceptance of an allowance. "In this changed condition of things," he says, "I think the husband is entitled to ask for a larger allowance than he agreed to accept at the time of the separation." He then refers to *Morrall* v. *Morrall* (3), to which he adheres, *Morrall* v. *Morrall* (3) being a case in which a decree of the dissolution of the marriage had been pronounced. Thereupon he adds these sentences (7 P.D. at p. 821):

> "It was argued that these cases are not applicable, because in each of them the marriage of the parties was dissolved, and thus a change of their status was effected. But if the reasons on which my judgment in those cases rests are well founded, I am quite of opinion that they are equally applicable where the wife has become entitled to a decree of judicial separation. . . . After much consideration, I remain of opinion that to adopt the opposite conclusion would not only be to make the general words of the contract extend to a state of things not in the contemplation of the parties, but would lead to results in a high degree prejudicial to morality, it would be in effect to hold that a husband who has entered into an agreement with his wife to live apart, making her a certain allowance, obtains thereby a licence to commit adultery for the rest of his life without subjecting himself to any liabilities beyond those imposed by the deed. It appears to me that in all cases such as this it is implied in the contract contained in the deed that it has reference only to the parties living separated, and not to their living apart in a state of adultery."

As will be seen presently, I go further and hold that the words in this opinion which suggest the possible idea that the parties were openly consenting in their voluntary deed to a known life of adultery being continued, are no argument in defeat of the principle of rejecting such a deed as a bar to the performance of its statutory duties by the court. I think, on the other hand, that the deed so proponed as expressive of such knowledge and consent, is more subject to objection and repudiation than the other. I shall recur to the topic presently.

The gist of the Court of Appeal's decision of the first *Gandy Case* (1) is plainly stated by JESSELL, M.R., (7 P.D. at p. 172):

> "In the case of dissolution of marriage the court has had conferred upon it the right to vary not only post-nuptial but ante-nuptial settlements, and to deal with them in any way which may be thought just and expedient. But in the case of judicial separation, there being no such power, the deed remains binding. The wife is entitled to the annuity secured her by the deed, the husband is liable to pay the annuity. . . . Why should the court interfere with the contract? I see that the learned judge put it on the ground of public policy. I have explained more than once, and especially in a case which has been referred to by the learned judge himself of *Besant* v. *Wood* (6), that there is no reason more dangerous to give, and no reason on which such difference of opinion exists, as public policy. He has said, 'If you do not allow the wife

A to ask for increased alimony in such a case as this you allow the husband to commit adultery with impunity.' I am by no means prepared to say that this remark is correct. It is not impunity merely because he is not obliged to pay more money. I do not consider that payment of alimony is the only punishment for adultery if the word 'punishment' should be used in connection with it. It appears to me a very strong thing to say that by his committing an B act which does not affect the wife either directly or indirectly her rights to participate in his fortune should be altered. . . . It seems to me that, having regard to the relative positions of the husband and wife, there has not been misconduct on the part of the husband so affecting the position of the wife as to entitle her to repudiate the contract she entered into, therefore the contract is still binding and the appeal must be allowed."

C I respectfully disagree with such doctrine. The wife in the case figured cannot legitimately be treated as merely repudiating the voluntary contract of separation. The violator of the essence of such contract, the true repudiator, was the husband himself, and it is the wife's position to found upon his conduct amounting to such repudiation. There are two ways of it. The contract either contemplated, or it did not, adulterous conduct subsequent to its date. If it did not, such conduct, not D in contemplation and not provided for, opens legitimately and effectively the attack upon the continuance of the contract as mutually binding. If, however, it did contemplate such misconduct, and this whether expressly or by implication, then, in my opinion, it was a contract immoral in its nature, opposed to the fundamental sanctity of marriage and contrary to the law of England. It was a species of condonation ab ante. Such a condonation is unknown to the law. Were it sup- E ported, it would be equivalent, not to condonation; condonation is of the past. It would be equivalent to an indulgence for the future—an indulgence obtained or purchased for mutual convenience or for money—that the marriage tie should be maintained and yet its obligations defied. This indulgence is claimed in the name of the sanctity of contract. But, in my opinion, the law of England would not uphold the sanctity of any contract the plain object and effect of which is to F undermine the sanctity of marriage, for this would be contrary to and subversive of one of the fundamental elements upon which society itself is based. *Gandy* v. *Gandy* (1) has been a confusing and troublesome decision, and it has been roughly handled by the courts, and such weight as it ever had has, in my opinion, long been lost. I refer particularly to *Bishop* v. *Bishop*, *Judkins* v. *Judkins* (4), both of which are rightly and highly approved by the majority judges below, and I note G with respectful agreement the review of the cases in the judgment by the Master of the Rolls.

In the judgment in *Hughes* v. *Hughes* (2), Lord Merrivale, P., puts the point alluded to above thus ([1929] P. at p. 10):

> "No doubt an express undertaking by a wife, in this country, that she would H not sue her husband for maintenance if he should be guilty of adultery would be held to taint with immorality the contract of which it should be found to have formed part."

I agree with that, and Lord Merrivale would no doubt assent to the view, which I think also sound, that this would apply whether the undertaking was expressed or was inferred by implication.

I The true principle is that whenever the aid of a court is invoked to grant a judicial allowance and there is presented to it an agreement as in bar of the exercise of the right or the discharge of the duty under statute, then the court is bound to look at such an agreement and to decline to be turned from the performance of its judicial duty or the exercise of its judicial rights when the agreement so tabled is of a nature repugnant to and defiant of those obligations which are inherent in the sanctity of marriage itself. To hold otherwise would bring the law into confusion and courts into contempt, for, as already indicated, it would be using courts of law for purposes essentially subversive of society. It will be seen that the principle,

so put, applies all round, that is to say, not only to applications for alimony in case of divorce, but in those also of judicial separation. The authors of the Gandy doctrine themselves confined it to the latter and disclaimed its application to the former. Yet here it is again—and in a divorce case application. I will not further dwell upon the merits of *Gandy* v. *Gandy* (1): it had none. Nor could I be even now sure of its final disappearance. For nothing will apparently avail—not the judgment of this House, not even the words of an Act of Parliament—to stay the spade of the legal resurrectionist.

LORD BUCKMASTER.—The facts in this case are plain and need no repetition. The judgment appealed from can be supported on either one of three independent grounds: (i) That the covenant by the wife in cl. 3 of the deed not to take steps to compel the husband to allow her any "alimony or maintenance" beyond the covenanted sums did not apply to her rights arising on divorce; (ii) that the covenant, if applicable to divorce, was void in law as contrary to public policy; and (iii) that it was impossible by covenant to exclude the statutory rights in favour of the wife arising on divorce. The first of these points is special to this case and a decision resting upon it alone would leave the general and important question untouched. None the less, I think it well to say that, in my opinion, the wife's contention upon it is right.

At the date of the deed, after the separation of the parties, previous cruelty not being suggested, divorce was at the wife's instance impossible, except upon grounds which, apart from bigamy, are so revolting and fortunately so rare that it may be safely assumed they were outside the consideration of the parties. At the date of the deed, therefore, so far as the wife's position was concerned, the only contemplated dissolution of the marriage was by death. It would, therefore, be indeed an astonishing thing if the wife's covenant were to be construed as relating to a set of circumstances that no one thought would arise. Nor is there anything in the covenant that could properly apply to a condition of divorce except the two words alimony or maintenance which strictly refer to the names used in the statute for the allowance made to a woman, as to alimony, while the marriage tie continues, and as to maintenance when it is unloosed. To my mind this fact is wholly insufficient to displace the considerations to which I have called attention. If this clause was intended to operate on (a) the husband committing bestiality, bigamy, rape, sodomy or incest—the only grounds on which the wife could, after separation, obtain divorce; or (b) an enlightened legislature at an unknown date enabling a woman to obtain divorce on the ground of adultery alone, it was, in my opinion, necessary that it should be plainly expressed by words or irresistible inference, and this the deed has wholly failed to do—the phrase "alimony or maintenance" is, in my opinion, a legal pleonasm rather than a legal exactitude.

On the first point, therefore, I think the appeal fails. The second case is more difficult. *Gandy* v. *Gandy* (1) is a clear authority for the proposition that provisions in a deed framed so as to operate after the commission of adultery are not ipso facto void. It is unnecessary to examine this authority, but I think this doctrine must be very narrowly confined. A deed based upon a contemplated adultery would, I apprehend, be certainly bad, and so also would be a deed so framed as upon its face to show that adultery would bring a positive advantage to the wrong-doer. It is not, in my opinion, necessary to proceed further and examine if *Gandy* v. *Gandy* (1) is good law, since I agree with the view expressed by LINDLEY, L.J., in *Bishop* v. *Bishop* (4), in a passage already quoted, and I should hesitate a long time before I differed from a considered opinion expressed by that learned judge, but in this case hesitation is unnecessary. In 1857 divorce was for the first time placed within the jurisdiction of the courts. Before that date it was only obtainable by Act of Parliament and in such Act it was competent to introduce whatever provisions Parliament thought fit for protecting or penalising either party. Divorce wholly differs from any form of separation. Judicial separation, which has been the subject of much learned and weighty censure, is nothing but enforcing

through an order of the court an arrangement which the parties could—were they willing—equally effect for themselves; it merely makes in the form and with the force of a decree an arrangement for the parties to live apart, but divorce destroys the whole relationship and only by re-marriage can it be restored. It is, in my opinion, associated with and inseparable from the power to grant this change of status that the courts have authority to decree maintenance for the wife. And in the exercise of this authority they are in no way bound by the contracts made between the parties though, as pointed out by the Lord Chancellor, the consideration of all contractual rights possessed by the wife must be borne in mind.

LORD ATKIN.—It is unnecessary to recapitulate the facts. We have to deal with a separation deed, a class of document which has had a chequered career at law. Not recognised by the ecclesiastical courts, such contracts were enforced by the common law. Equity at first frowned: LORD ELDON doubted, but enforced them, cf. *Lord St. John* v. *Lady St. John* (7) and *Bateman* v. *Countess of Ross* (8), and see the arguments of Sir Fitzroy Kelly and Mr. Turner and of Mr. Bethell in *Wilson* v. *Wilson* (9) (1 H.L.Cas. at pp. 550–553 and 564–565). Finally, they were fully recognised in equity by LORD WESTBURY'S leading judgment in *Hunt* v. *Hunt* (10), in which he followed LORD COTTENHAM'S decision in *Wilson* v. *Wilson* (9), where his argument for the respondent had prevailed. Full effect has, therefore, to be given in all courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial courts seems to suggest that at times they are still looked at askance, and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement, of whose nature, indeed, they sometimes partake. As in other contracts stipulations will not be enforced which are illegal either as being opposed to positive law or public policy. But this is a common attribute of all contracts, though we may recognise that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy.

Endeavouring, therefore, to apply the ordinary law of contract to the agreement in question, as at present advised, I should find it difficult to agree with the view that has found favour with some of the learned judges below that on the true construction of the contract it is only intended to operate during the joint matrimonial life of the parties, so that its provisions terminate on divorce. This construction appears to be untenable in view of the fact that the husband's covenant for payment expressly binds his executors, and necessarily, and, no doubt, intentionally, operates after his death during the life of the widow. I may add that this separation deed appears to be in a usual form; and it would be an unfortunate result if this House had been compelled to come to the conclusion that agreements so drawn ceased to operate on dissolution of marriage. There must be many cases of wives who have obtained divorces who still draw the separation allowance who would find it difficult or impossible now to obtain a maintenance order for the same or any amount. It would also in the case of such deeds be impossible to obtain any variation of them as marriage settlements, for they would have ceased to operate with the dissolution of the marriage. The practice has been to regard them for this purpose as continuing after the divorce: see *Worsley* v. *Worsley and Wignall* (11), though, no doubt, in that case there were express provisions that the deed should continue to operate after the death of the husband.

I also have difficulty in accepting the view which found favour with other of the learned judges below that the agreement was dissolved by what is now known as "frustration." I am in some doubt as to the event which is said to produce this result—whether it is the passing of the Matrimonial Causes Act, 1923, or the commission by the husband of adultery since the passing of the Act or the decree absolute which dissolved the marriage. If the last, then a subsequent divorce would dissolve and have dissolved all separation deeds, whether before or after the

Matrimonial Causes Act, whether the parties so desired or not. I myself cannot think that the event of divorce is something so unforeseen, or the continuance of the marriage tie so essentially a condition of the contract, that the dissolution of the marriage can properly be treated as automatically dissolving the provisions for paying the allowance. I find myself the less able to believe that the law should now impute this implied condition to the parties, or impose it on the contract, whichever be the correct formula, when I find that fifty-four years ago in *Charlesworth* v. *Holt* (12) the Court of Exchequer held the contrary; and that separation deeds must have been drawn on this footing ever since. For myself I am satisfied that the words of the wife's covenant not to compel an allowance of further alimony or maintenance indicate that the parties' advisers had the possibility of divorce in their minds, the two words being especially appropriate to judicial separation, on the one hand, and divorce, on the other. And on this point *Worsley* v. *Worsley and Wignall* (11) to which I have referred above is a relevant authority.

If, on the other hand, the frustration is confined to this particular case and the unforeseen event of the passing of the Act of 1923, I cannot think that this alteration of the law can have the destructive effect on the contract which is suggested. All that the Act did was to enable the wife to obtain a dissolution for simple adultery which before she could only obtain for adultery together with some additional fact. But before the Act and during the separation deed the existing law provided grounds for divorce which might have resulted, had the facts been so, in a dissolution of this marriage—incestuous adultery, bigamy, adultery with cruelty and, indeed, all the other grounds other than adultery with desertion. It seems to me unreasonable to think that the separation deed remained operative if effect was given to the existing law, but that the basis of the contract fell away if divorce became easier, some of the grounds still remaining the same. The change in the law did not make the performance of the contract either impossible or more difficult. Indeed, it did not necessarily affect it at all. In view of the effect of the doctrine of frustration in the automatic destruction of contracts in spite of the will of the parties, and of the caution which is required before applying still more before extending the doctrine, I should be reluctant to decide this case against the wife on this ground, though as we have not heard her I do not express a final opinion upon it.

I think, however, that the wife is entitled to succeed upon another ground. Her marriage has been finally dissolved upon her petition. The legislature has invested the matrimonial courts in such a case with powers to make such provision for the future maintenance of the wife as the court may think reasonable. Some powers were given by the Matrimonial Causes Act, 1857: they have been extended by the Acts of 1866 and 1907, and are now contained in ss. 190–192 of the Judicature Act, 1925. The necessity for such provisions is obvious. While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife who can pledge his credit for necessaries as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay her an agreed allowance or fails to make her any allowance at all: or if she lives apart from him under a decree for separation he fails to pay the alimony ordered by the court. But the duty of the husband is also a public obligation and can be enforced against him by the State under the Vagrancy Acts and under the Poor Relief Acts [see now National Assistance Act, 1948, s. 42]. When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears. In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse to the poor law authorities. In my opinion, the statutory powers of the court to which I have referred were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support. If this be true, the powers of the court in this respect cannot be restricted by the private agreement of the parties. Quilibet potest

renunciare juri pro se introducto. Lord Westbury in *Hunt* v. *Hunt* (10) says (4 De G.F. & J. at p. 233):

> "I beg attention to the words 'pro se' because they have been introduced into the maxim to show that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation."

To apply another maxim, Privatorum conventio juri publico non derogat. In my view, no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife, "having regard to her fortune, if any, to the liability of her husband and to the conduct of the parties." The wife's right to future maintenance is a matter of public concern which she cannot barter away. This is not to say that in any particular case the court must make an order: still less that in this case it must do so. I could well understand the court coming to the conclusion that the parties' pre-estimate of the wife's reasonable needs was judicious; and that the allowance, continuing as it does after the husband's decease and being independent of any fluctuations in the amount of his fortune, needed no supplement. But the present objection of the husband to the court considering the matter at all, in my opinion, cannot prevail.

In argument *Gandy* v. *Gandy* (1) was pressed upon us as an authority of the Court of Appeal upholding the validity of a covenant in similar terms in a case where the wife had obtained a decree for judicial separation. In that case the argument against the validity of the covenant seems to have proceeded on the grounds accepted by Sir James Hannen, P., that the deed was subject to an implied condition that neither party should commit adultery, or that the conduct of the husband in committing adultery was a repudiation of the deed which the wife could accept, or that, if this were not so, the deed was a licence to commit adultery and so would be void as being against public policy. The Court of Appeal, in my judgment rightly, rejected all these contentions. The particular ground that the wife could not make a valid agreement to prevent the court from considering a claim for future alimony on the ground that she might thereby be depriving herself of any support does not appear to have been considered by the court. It is, I think, sufficient to say that there is such an obvious distinction between judicial separation and divorce, between the continuance of the marriage tie and its dissolution and the rights of the spouses in the two events that the decision may possibly be supported notwithstanding our conclusion in the present case. In view of the course of the discussion about this case I do not feel justified in saying more than it may hereafter be distinguished. If it prove incapable of distinction, so far as it conflicts with the decision in this case it must be considered to be overruled. I am of opinion that this appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *John B. and F. Purchase & Clark*; *Heywood & Ram.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

A

FRENKEL *v.* MACANDREWS & CO., LTD.

[House of Lords (Lord Buckmaster, Viscount Dunedin, Viscount Sumner, Lord Blanesburgh and Lord Warrington), January 31, February 1, March 11, 1929]

[Reported [1929] A.C. 545; 98 L.J.K.B. 389; 141 L.T. 33; 45 T.L.R. 311; 34 Com. Cas. 241; 17 Asp.M.L.C. 582]

B

Shipping—Deviation—Customary deviation from direct route—Knowledge of parties.

By a bill of lading dated April 11, 1927, the appellant shipped at Malaga 24 barrels of olive oil in the respondents' steamship, *C.* The bill of lading provided: "Shipped . . . in the steamship *C.*, with destination to Liverpool, with liberty to touch at any ports whatsoever, although they may be outside the route . . ." On leaving Malaga the ship went to Cartagena, encountering on the way heavy weather with the result that the barrels were sprung and the oil lost. She then called at other ports on the Mediterranean east of Malaga, and then turned and sailed for Liverpool. The respondents' steamers were accustomed to go from Liverpool up the Mediterranean coast, picking up a cargo from port to port, either as they journeyed easterly up the coast or as they journeyed back, and then to return to Liverpool. On some voyages they would call at Malaga before visiting ports further east; on others they would call at Malaga on the way home. The respondents advertised in each case whether a ship calling at Malaga was going to Liverpool "via Levante" or "directo." In the present case the *C.* had been advertised as going "via Levante." On a claim for damages for the loss of the oil the plaintiff contended that it had been lost during an unwarranted deviation from the contract voyage.

C D E

Held: the "route" mentioned in the bill of lading meant the customary route taken by the respondents' ships; the respondents were entitled to show by evidence what alternative routes their ships were accustomed to follow; the evidence showed that the route to be followed in the present case had been brought to the notice of the appellant or his agents and that it was one of the alternative routes habitually adopted by the respondents' ships; and, therefore, there had been no improper deviation and the appellant was not entitled to recover.

F

Decision of Court of Appeal (1928), 139 L.T. 327, affirmed.

G

Leduc v. *Ward* (1) (1888), 20 Q.B.D. 475, and *Glynn* v. *Margetson & Co.* (2), [1893] A.C. 351, explained and distinguished.

Notes. Considered: *Reardon Smith Lines, Ltd.* v. *Black Sea and Baltic General Insurance Co., Ltd.*, [1939] 3 All E.R. 444; *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corpn. of Panama*, [1956] 1 All E.R. 209. Referred to: *The Torni*, [1932] All E.R.Rep. 374; *Vsesojuznoje Objediheni Soufracht* v. *Temple Steamship Co.* (1945), 173 L.T. 373; *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corpn.*, [1956] 3 All E.R. 957.

H

As to deviation, see 30 Halsbury's Laws (2nd Edn.) 293 et seq.; and for cases see 41 Digest 483 et seq.

Cases referred to:

I

(1) *Leduc* v. *Ward* (1888), 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 36 W.R. 537; 4 T.L.R. 313; 6 Asp.M.L.C. 290, C.A.; 41 Digest 485, *3172*.

(2) *Margetson* v. *Glynn*, [1892] 1 Q.B. 337; 61 L.J.Q.B. 186; 66 L.T. 142; 8 T.L.R. 244, C.A.; affirmed sub nom. *Glynn* v. *Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 7 Asp.M.L.C. 366; 1 R. 193, H.L.; 41 Digest 311, *1715*.

(3) *Evans, Sons & Co.* v. *Cunard Steamship Co., Ltd.* (1902), 18 T.L.R. 374; 41 Digest 486, *3175*.

(4) *W. R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha* (1925), 7 Fed. Rep. (2 d) 889.

(5) *Rosenberg Bros. & Co.* v. *United States Ship Board E.F. Corpn.* (1925), 7 Fed. Rep. (2 d) 893.

(6) *James Morrison & Co., Ltd.* v. *Shaw, Savill and Albion Co., Ltd.*, [1916] 2 K.B. 783; 86 L.J.K.B. 97; 115 L.T. 508; 32 T.L.R. 712; 61 Sol. Jo. 9; 13 Asp.M.L.C. 504; 22 Com. Cas. 81, C.A.; 41 Digest 486, *3176*.

(7) *Hadji Ali Akbar & Sons, Ltd.* v. *Anglo-Arabian and Persian Steamship Co., Ltd.* (1906), 95 L.T. 610; 22 T.L.R. 600; 10 Asp.M.L.C. 307; 11 Com. Cas. 219; 41 Digest 500, *3286*.

Appeal from an order of the Court of Appeal (Scrutton, Greer and Sankey, L.JJ.) (139 L.T. 327).

The plaintiff was the owner of 134 barrels of olive oil shipped on the defendants' ship *Cervantes* at Malaga under two bills of lading, dated April 11, 1927, one for 110 barrels for delivery via Liverpool to Bradford, and the other for 24 barrels for delivery at Liverpool. The plaintiff said that the goods were shipped in good order and condition and were not so delivered, and that the damage was due to negligent stowage, or to the unfitness of the ship. He claimed £2,293 damages. The defendants did not admit that the goods were shipped in good order and condition. They also relied on the exceptions clauses in the bills of lading which, they said, protected them from liability. Further, they pleaded that the damage, if any, was caused by perils of the sea, in that the *Cervantes*, after sailing from Malaga on April 11, 1927, with the barrels of olive oil on board, met a gale on April 12 and, owing to the violent motion of the vessel, the barrels broke loose and could not be secured, and some of the olive oil was lost, and they said that that loss was caused by perils of the sea, which was within the exceptions in the bills of lading. The plaintiff, however, pleaded that, after loading the plaintiff's cargo, the *Cervantes*, without justification, deviated from the contract voyage, and the perils of the sea were met with after the unauthorised deviation, and, therefore, the defendants could not rely on the provisions of the bills of lading. The Court of Appeal held, reversing the decision of Rowlatt, J., that the bill of lading could be read as meaning that the goods were destined for Liverpool by one or other of the usual routes, and even if the plaintiff had not known which way the ship was going on this occasion, still, as the ship was taking one of the known and usual routes to Liverpool, it was not deviating at the time of the loss. The shipowners were, therefore, protected by the exceptions clause in the bill of lading. The plaintiff appealed.

Dunlop, K.C., and *Harold Stranger* for the appellant.
Clement Davies, K.C., and *Cyril Miller* for the respondents.

Cur. adv. vult.

March 11. The following opinions were read.

LORD BUCKMASTER.—The appellant, who is a merchant at Malaga, on April 11, 1927, shipped 24 barrels of olive oil in the steamship *Cervantes*, one of a fleet of steamers owned by the respondents trading between Malaga and this country. The terms of the bill of lading are as follows:

> "Shipped by Leon Frenkel in the steamship *Cervantes*, with destination to Liverpool, with liberty to touch at any ports whatsoever, although they may be outside the route, without it being considered a deviation; to enter and leave ports without pilot; to assist and tow vessels in any circumstances; to discharge, re-load, tranship, send to destination by any means of transport, all responsibility of the ship ceasing on discharge from dock."

The ship proceeded to Cartegena and thence to a series of other ports on the Mediterranean coast, reaching as far as Palamos, close to France, and she then returned, calling at various ports on her way, but not calling again at Malaga, and so to Liverpool. Between Malaga and Cartagena she encountered heavy weather,

with the result that the barrels of olive oil were sprung and the olive oil was lost, whereupon these proceedings were instituted by the shipper, claiming damages for the loss. He alleged originally that the ship was not seaworthy, but that point has been disposed of adversely to him and is no longer supported. The real question in the case is whether it was a deviation from the route, not permitted by the bill of lading, to call at Cartagena, since, if that were so, the fact that the olive oil was lost in the course of that journey would entitle the appellant to the remedy which he seeks. The respondents, however, allege that in the circumstances of the case the route authorised by the bill of lading was that in pursuance of which they proceeded up the Mediterranean coast, and that to call at Cartagena was well within the permission of the deviation clause.

The point is important. A bill of lading, like every other contract, must be construed in relation to the circumstances in which it was entered into, and the respondents say that in the present case those circumstances include the practice of the sailings of their vessels, which was well known to the appellant. The facts clearly establish that such practice was this. The respondents' steamers are in the habit of going from Liverpool up the Mediterranean coast, picking up a cargo from port to port, either as they journey up or journey down, and then returning to Liverpool. In certain cases they call at Malaga after they have called at the Mediterranean ports. In other cases, as in the present, they call at Malaga first and then pursue their way to the other ports. The distinction between the two routes is well known and is covered by advertisements issued in the local papers at Malaga, stating that the voyage of any particular vessel is either "via Levante" or "directo," according as they are proceeding up the Mediterranean before going to Liverpool or going to Liverpool direct. This information is also contained in their shipping cards, and although there is no proof that the appellant himself was actually informed upon the point, since he was not at Malaga when the cargo was shipped, there is no doubt that the information was in the possession of his agents and that when they shipped the olive oil they did so in a steamer which they knew was going to Liverpool "via Levante," and not direct. It is impossible to say, in these circumstances, that there is any definite customary route. The customary route is one of two routes, and the figures showed, as to the different voyages, that the one was nearly as customary as the other. The bill of lading does not in terms say that the ship was lying at Malaga or was bound for Liverpool, but says that Liverpool was her destination, and so far as that is concerned, that destination is consistent with either of the two courses being pursued.

If, notwithstanding these facts, the fair construction of the bill of lading is that the route was direct to Liverpool, the appellant would be entitled to succeed, for an agreed term in a bill of lading must prevail over an agreement contrary to its terms. The true remedy in such a case is rectification of the document, and no such claim is made here. The appellant contends that the authorities conclude the matter of construction in his favour, and of these the most important are *Leduc* v. *Ward* (1) and *Margetson* v. *Glynn* (2). In the former case goods were shipped, for delivery at Dunkirk, in a vessel lying at Fiume and bound for Dunkirk with liberty to call at any ports in any order. Instead of proceeding direct for Dunkirk, the vessel sailed for Glasgow and was lost off the mouth of the Clyde. Proceedings were taken by indorsees of the bill of lading against the shipowners for non-delivery of the goods. The bill of lading was in the usual form and Lord Esher, M.R., points out that such a form provides for a particular voyage, and that, unless it does so, it would be impossible for the owner of the goods to know at what time he could calculate on their receipt. He continues (20 Q.B.D. at p. 481):

> "It is obviously a most important part of the contract of carriage by sea that the route by which the goods are to be brought should be determined."

And further he adds that

A "if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from one place to the other."

Fry, L.J., speaks in the same terms. In his judgment there is contained the following important passage (20 Q.B.D. at p. 484):

B "It is said that there is an American authority which shows that notice to the shipper of the route by which the ship is going to sail will rebut what is said to be an implied term of the contract, viz., that the vessel will proceed by the direct route to the port of destination. In the first place it should be observed that this seems to have been a mere obiter dictum; but assuming that, apart from the Bills of Lading Act, such notice would have had any such effect, which C I am far from saying, I think it impossible, having regard to the provisions of that Act, to suppose that any effect could be produced by such notice to the shipper with respect to a contract by bill of lading which is by statute made assignable to a third person; for to hold that it could have such effect would be to hinder that assignability of the contract which the legislature designed to effectuate."

D The words in that case, however, differ from those in the present. There is a marked distinction between a vessel lying at one port and being bound for another and a vessel having an ultimate destination, which, as far as the goods are concerned, might be either a port or an inland town.

Margetson v. *Glynn* (2) is a decision to the same effect. In that case the terms of the bill of lading provided that the goods were shipped in the steamship *Zeta*

E "now lying in the port of Malaga, bound for Liverpool, with liberty to proceed to and stay at any port or ports, in any rotation, in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever."

F Oranges were shipped at Malaga, and the ship, instead of going to Liverpool direct, went to Burriana on the north-east coast of Spain and then back again and proceeded to Liverpool. As a consequence of the delay thus caused, the oranges were rotten. Lord Esher, M.R., says ([1892] 1 Q.B. at p. 339):

"The voyage described is from Malaga to Liverpool, and, if there were nothing else in the bill of lading, the ship would be bound to go from Malaga to Liver- G pool, according to the ordinary sea course for a steamer from the former port to the latter."

He then says that the liberty to deviate is a liberty with regard to that voyage and that it is not liberty to go another voyage, but to call at those ports which are in the course of the voyage though not exactly the sea course that the ship would take. Bowen, L.J., and Fry, L.J., agreed with this judgment, and neither there H nor in the House of Lords was any serious doubt raised as to the meaning of the voyage that was contracted for in the bill of lading, although the practice of vessels to coast along the Mediterranean was referred to both in the arguments and in the judgments. So far as the principle laid down in these cases is concerned it is, to my mind, this, that the route of a vessel declared to be lying at one port and bound for another must be construed as a direct route and the circumstance of I knowledge that it was not or might not be direct will not affect that construction. That this doctrine is confined within these strict limits is shown in *Evans, Sons & Co.* v. *Cunard Steamship Co., Ltd.* (3). In that case olive oil was shipped at Bari on the Adriatic to be delivered at Liverpool. The bill of lading provided that the ship was at liberty to proceed to her port of destination, first turning to or staying in any port or ports, in a variety of named places, including the Black Sea, the Levant, the Adriatic, and the Mediterranean, in any order of rotation and whether in or out of the customary or advertised routes, without the same being a deviation. The vessel, instead of proceeding direct to Liverpool, completed her voyage by

proceeding to Fiume and other Adriatic ports and thence to Constantinople. The heat caused the casks to leak and the olive oil was lost. WILLS, J., said that the evidence showed that the only practical way to get a cargo from Bari to London was by the Adriatic round by the Levantine or Black Sea ports, and that that was in fact the agreed voyage and Constantinople was on the customary route. He, accordingly, held that the deviation clause applied.

In the Federal courts there are two cases for the year 1925, *W. R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha* (4) and *Rosenberg Bros. & Co.* v. *United States Ship Board E.F. Corpn.* (5). In the first of these cases goods were shipped from Antofagasta to Honolulu. The ship proceeded to San Francisco and thence to Portland, and after leaving Portland she was destroyed by fire and the cargo was lost. It was stated that this was a deviation from her proper course and that the usual and customary route from the nitrate ports to Honolulu was northerly to San Francisco. The shipowner answered that the particular route was well known to the shippers when the goods were shipped. It was held that the deviation was permitted, but the foundation of the judgment appears to be that the customary route had been changed to the knowledge of the shipper, and that, therefore, the presumption that the old route was the right one could not be followed. Whether that case be accurately decided according to our law or not, it is not necessary to consider, for it is not the present case. In the second case, where it was held that the deviation clause was not a protection, the learned judge said that the rule was that a deviation clause must be considered in reference to a particular voyage between the ports of departure and the destination named in a bill of lading, and to have no application to any port or ports not naturally and usually ports of call on the proposed voyage. This does not assist the present case, where there was not a port of departure and a port of destination so named in the bill of lading, for the place of departure is not mentioned, the word Malaga only occurring in the following connection: "The master or agent signs two bills of lading of one same tenor; one being accomplished, the other to stand void and of no effect. Malaga, April 11, 1927." Nor was there a customary route, but one of two routes, either of which might be taken, and this is left open on the bill of lading, which would cover either route. So far as the original parties to the bill of lading are concerned, the actual route was well known, while as to third parties the form of the bill of lading made it necessary for them to ascertain, as they readily could, which route in fact the goods would travel, for either was included in the bill of lading. There is no need in these circumstances to examine the effect of the deviation clause, since if, as I think, the route covered by the bill of lading was via Levante, the question does not arise. For these reasons I think this appeal should fail.

VISCOUNT DUNEDIN.—Notwithstanding the personally testified ignorance of the appellant, I am completely convinced that those who were acting for the appellant and with his authority at Malaga knew perfectly well that the route to be taken by the *Cervantes* was to proceed up the coast of Spain, and then to turn back to the Straits of Gibraltar, and so on to Liverpool. The regular custom of the vessels of this line was to make a round voyage of the ports on the east side of Spain, and Malaga might be touched either on the outward or on the return journey. The *Cervantes* on the occasion of the voyage in question was to touch at Malaga on the outward voyage and not on the return, so that, if goods were to go by that ship, they must needs be taken by being carried eastwards. On this occasion the *Cervantes* was on its usual route.

The bill of lading discloses these facts: (i) That the ship is the *Cervantes*. (ii) That it is one of the ships belonging to the MacAndrews Line. (iii) That the destination of the goods is Liverpool, to which port they may be sent by any means of transport. The route of the ship is not specified, but is spoken of as "the route." There is also a deviation clause. The appellant's argument is based on authority and on authority alone. He says it is settled especially by *Leduc* v. *Ward* (1) and *Margetson* v. *Glynn* (2) that the route means the direct geographical route from

A Malaga to Liverpool and that the deviation clause is of no value to sanction going to a port which, so far from being on that route, is in a contrary direction. It may be at once conceded that these cases had settled that the respondents could not get any assistance from the deviation clause. If the vessel was not on what is termed "the route" in the bill of lading, the deviation clause will not help them. It is, therefore, necessary to see what was exactly decided by these two cases as B to the route to be followed by a vessel.

In *Leduc's Case* (1) the bill of lading was as follows:

> "Shipped . . . on the steamship *Austria* now lying in the port of Fiume and bound for Dunkirk with liberty to call at any ports in any order . . . to be delivered . . . at . . . Dunkirk. . . ."

C The ship proceeded to go to Glasgow and was lost off the Ailsa Craig just before she got there. It was not pretended that the ship was on its proper route. The whole argument turned on the expression "with liberty to call at any ports in any order." It was pointed out that the argument of the shipowner would lead to a liberty to go to any port in the world. The courts held that ports meant ports which could fairly be called ports on the route; that no one could suppose that the D route from the Mediterranean to Dunkirk lay round the West of Scotland, and that, consequently, as the ship was off the route, liberty to call at ports did not save the shipowner. The decision, it is obvious, except in so far as the deviation clause is concerned, does not touch the present case, because in that case there was no question as to what was the route, and no averment that the vessel was on its route, while here there is. The real strength of the case for the appellant rests, not on E the decision, but on some of the expressions used by the learned judges. LORD ESHER, after making it clear that the bill of lading contained the contract, to the terms of which contract the plaintiff as endorsee was entitled to appeal, goes on to point out that the contract must be for a particular voyage, because, unless it was so, business in general, and insurance business in particular, would be impossible. He then says:

F

> "The ordinary form of bill of lading states that the goods are shipped on such a ship lying in the port of shipment and bound for the port of destination, and if the ship is to go to other places between those ports the names of them are inserted. Those terms appear to me to describe a voyage, and, such being the description of the voyage, what is the true effect of the document with G regard to the voyage so described? A bill of lading is a common mercantile document, which has been used for hundreds of years, and I think that business men and courts of law have always interpreted it in one way, namely, that, if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other."

H There are several observations to be made on these remarks of the learned judge; not by way of criticism of the remarks themselves, but on their proposed application to the facts of the present case. There is no statement here that the ship is lying at Malaga and bound for Liverpool. Obviously the ship was not necessarily bound for Liverpool, because of the permission given to forward the goods to Liverpool by any other means of transport. Therefore, the rigid result which LORD ESHER draws I from the words quoted cannot be sought in the present case. Then, as to the words, "the ordinary track by sea," I think these words must be construed secundum subjectam materiem. There was no question raised as to any but one route from Fiume to Dunkirk. It is, I think, clear that the words cannot be pressed to the extent that the only route is the shortest and most direct geographical route. There may be, in my view, either alternative routes or a customary route which in either case might displace the geographical route.

In *Evans, Sons & Co.* v. *Cunard Steamship Co., Ltd.* (3) the bill of lading bore "Shipped upon . . . the *Vera* . . . lying in this port (the port of Bari on the

Adriatic) bound for the port of Liverpool." The vessel proceeded on a round voyage for Constantinople. The defendants proved that the vessels of this line invariably called at Bari on the outward and not on the homeward voyage. WILLS, J., in giving judgment for the defendants, said:

> "The description of the particular voyage agreed upon must be the keynote to which the bill of lading must conform. What, then, is meant by the 'voyage from Bari to Liverpool'? LORD HERSCHELL says the expression must be understood in a business sense. In *Glynn* v. *Margetson & Co.* (2) there was no evidence as there is in this case that the only practicable way to get a cargo from Bari to Liverpool is by a more or less uncertain route via the Adriatic round by Levantine or Black Sea ports."

That case puts an end to the idea of the geographical route being the only route. It lets in the evidence of what the route under the circumstances of the ship really was.

Many cases may be figured where there is more than one route which might be used by a ship. It might be a choice between the Suez Canal, the Panama Canal, or round Cape Horn. In such a case, even if the port of starting and of destination were stated, it would be necessary to make inquiry to find out which was the usual route. Then, as to custom, it is worth while noting how even LORD ESHER, in *Leduc's Case* (1), alludes to custom. He is speaking of an American case which had been quoted, and which was said to decide that the shipowner might be allowed to prove that the person to whom he gave the bill of lading knew that the ship was going on another voyage. Let it be remembered that the case before LORD ESHER was the case of an endorsee. He then says:

> "If that is the effect of what the court which decided the case said, it was apparently said in a case where it was not necessary to decide the point, for it seems that there was proof of a custom to deviate which justified the deviation."

In *James Morrison & Co., Ltd.* v. *Shaw, Savill and Albion Co., Ltd.* (6) PHILLIMORE, L.J., said ([1916] 2 K.B. at p. 797):

> "It may be, if it is customary for the line to which the ship belongs, to the knowledge of the shipper, to touch at some intermediate port, not mentioned in the bill of lading, that touching at this port may be regarded as part of the customary course of navigation."

The same case gives an illustration of alternative routes between the same two ports. The voyage was between a port in New Zealand and London, yet the course outward bound was by the Cape of Good Hope and homeward bound by Cape Horn. The deviation there was to a place which lay on neither route and so the decision followed *Leduc's Case* (1). I must particularise that when the knowledge of the shipper is spoken of I am so far only taking that as evidence of the customary route, not as a collateral agreement for deviation.

I come next to *Margetson* v. *Glynn* (2). The bill of lading there stated that the goods were: Shipped on board the steamship *Zeta*, "now lying in the port of Malaga bound for Liverpool," &c. The appellant very naturally appeals to this case because the place at which the goods were shipped was Malaga, as here, and the place of their ultimate destination was Liverpool, as here, but in that case there is not a vestige of averment that there is any customary route between Malaga and Liverpool, except the direct route. The expressions "lying in" and "bound for" occur, and bring it straight within LORD ESHER'S observations. The whole argument was based on the scope of the deviation clause.

I am, accordingly, of opinion that neither *Leduc's Case* (1) nor *Margetson* v. *Glynn* (2) closes the door against the respondents. I think "the route" in the bill of lading means the customary route, and that by this line the regular customary route for a ship which touched at Malaga on the outward route of a round voyage was to continue eastward as the *Cervantes* did. I think the respondents are

A entitled to show that by evidence, and they have shown it; consequently, there was no deviation and the judgment of the Court of Appeal is right.

VISCOUNT SUMNER.—The question here is whether the shipowners have so deviated from the contracted voyage as to disentitle themselves to the protection of their excepted perils. The bills of lading now in suit are in Spanish with a few English clauses in the margin, but the English translation has been agreed, B and it is agreed also that they are governed by English law. The most material clause, divided into sections, is as follows:

> "Shipped by Leon Frenkel (i) in the steamship *Cervantes* with destination to Liverpool (ii) with liberty to touch at any ports whatsoever, although they may be outside the route, without it being considered a deviation (iii) to enter and C leave ports without pilot (iv) to tow and assist vessels in any circumstances (v) to discharge re-load tranship send to destination by any means of transport (vi) all responsibility of the ship ceasing on discharge from deck (vii) 24 barrels of olive oil."

This is how one bill of lading runs; the other was of identical tenor but the quantity was 110 barrels with destination Bradford. There is no statement, such as is D common, of the port where the ship is lying, or that she is "bound for" another port, and, although the general structure is that of a transit, more or less indicated, with four liberties added, the sentence is not wholly or even mainly framed to describe a route with an optional variation of that route, which is, nevertheless, to be subordinate to it. I do not think that the rules of construction applicable to deviations would apply without modifications to the liberties to tow and to tranship, E and certainly they do not to the liberty to dispense with pilotage, yet all alike are uttered, so to speak, in one breath and to some extent at least appear to stand on the same footing. Grammatically, both the word "shipped" and the words "with destination to" refer to the barrels of olive oil as to which the statements in the sentence are made, and it is plain that in the case of the bill of lading for 110 barrels this is the substantial and not merely the formal construction. Further, F the words "tranship, send to destination" point to a destination of the goods for some place, to which the ship is not or may not be bound. Nothing expressly shows that this liberty is only to be exercisable when the ship herself is accidentally prevented from getting to the destination of the goods or to the termination of her own voyage as originally contemplated. In the rest of the bill of lading the words "at destination" occur twice, and the words "port of destination" twice. I need G only say that I think none of these phrases carry the words "with destination" Liverpool or Bradford, as the case may be, any further. Certainly they are not enough to show that the words "with destination to Liverpool" are an expression of the terminus ad quem of the ship's voyage.

Each bill of lading bears the word "Malaga" just before a date, which is clearly the date when the master's signature, immediately following, was affixed. As a H matter of construction I think "Malaga," so placed, means only the place where the bills of lading were signed and does not in itself also mean that Malaga is the place where the goods were shipped. For anything that the document says to the contrary shipment might have been at a neighbouring loading place—Torre del Mar for example. It happens not infrequently that goods are shipped in one place and signed for in another for reasons of business convenience, but if such be the I fact the voyage does not simply commence at the place where the bills of lading are signed. The matter is one for proof. Accordingly, in these bills of lading I think it is clear that the voyage is not stated in terms. It is easy to surmise from them what the voyage was to be; it is easier still to infer where the goods were probably laden and to what port it was expected that the *Cervantes* would carry them, but the bills of lading do not express the ship's contract voyage. Yet until a contract voyage is established, questions of deviation do not arise. Evidence was needed to prove what that voyage was and that evidence was tendered and was admitted without objection. Its effect was that the ship, having shipped the

olive oil at Malaga, was to proceed "via Levante," calling at various ports as far eastward and north-eastward as Palamos, and returning thence, calling at other ports, until, having passed Malaga without calling again, she proceeded "directo" for the United Kingdom. No question arises here as to the precise meaning of "via Levante" or as to the ports to be called at and the order of the calls, which that expression may connote. This was shown to be a usual commercial route for the *Cervantes* to follow under the circumstances and to be the route which had been advertised for her for this voyage some time beforehand, and it was one which I think was reasonable under the circumstances. I cannot see that it is the less a reasonable and usual commercial route, though the evidence referred only to the ships of the respondents' own line. Their prominent position in this trade, the number of ships they run, and the length of time that this kind of practice has been followed by them all go to prove this conclusion. The evidence further shows that these facts were well known to those of his employees, to whom the plaintiff confided this part of his business, and the usual and reasonable commercial character of such a voyage was thereby strongly confirmed, since no objection was taken. I do not consider that any estoppel or collateral agreement arose in consequence of this knowledge, so as to furnish a defence independently of the terms of the bills of lading, but this was not necessary.

If a voyage via Levante became in fact the contract voyage, to which the contracts of carriage apply, or if, commercially, it was a due performance of whatever was agreed, the action fails, for the ship did not depart from a voyage so described and the bill of lading exceptions accordingly covered the loss sued for. At the Bar, however, it was contended that *Margetson* v. *Glynn* (2) bound your Lordships to find that there had been an unauthorised deviation and that the exceptions did not apply. The authority of that case is unquestionable, but the limits of the decision are also clear. The termini of the bill of lading voyage were expressly stated. The shipowner's claim was boldly made that a liberty to deviate, framed in almost universal terms, entirely overrode those limits and prevented what the ship actually did, or indeed almost anything else of the sort that the captain chose to do, from being an unauthorised deviation. The House decided that he was wrong and that the liberty did not cover the deviation, the principle being that these two parts of the bill of lading, the described voyage and the liberty to deviate, must be read together and reconciled and that a liberty, however generally worded, could not frustrate but must be subordinate to the described voyage. It follows that as soon as it is established in the present case that the described voyage was not departed from, there is no need to resort to or to interpret the liberty to deviate at all. Reliance was, however, placed on various sentences in the judgments of Lord Herschell and Lord Esher, chiefly the latter, as authority for saying that, when the beginning and end of the voyage have been ascertained, the law would not permit an intermediate divagation of the ship in a direction opposite to that of the named destination, since that would contradict the description of the voyage, and even amount to an abandonment of it. I think that this is a misunderstanding of these judgments. They were, of course, directed to the case in hand, and were not intended to lay down a general rule to fetter all freedom of contract between shippers and shipowners. It is additionally evident that this was so, because no material was before the House to show how far the exigencies of navigation and the usages of trade permit or require elasticity in the route by which a ship is to reach her journey's end. It was, indeed, argued that all ships in the Mediterranean trade did as the *Zeta* had done, but, apart from suggestions to this effect made to, but not accepted by, the Spanish witnesses on commission, evidence was given of the conditions of the voyage described, and, except such as could be taken judicial notice of, the court had no information. The deviation was one which not only took the ship to Burriana, a long way to the east and north-east of Malaga, but one of which every league had to be retraced, and this, with a cargo of ripe fruit, necessarily involved deviation consisting in the delay to proceed promptly towards

A the destination, apart altogether from the line of route. Both judgments endeavour to keep the door open to a certain measure of departure from the strict "sea-track" without its being considered a deviation. These expressions were not meant to state the limits of permissible departures, but to indicate the kind of facts to be taken account of, when proved, with a view to the recognition of a liberty. LORD HERSCHELL speaks of certain ports being in the way of the voyage "in a business B sense." LORD ESHER mentions various circumstances as to season and safety that may be material. It would have been enough for the decision to have said "Malaga to Liverpool is not Malaga to Burriana and back to Liverpool."

The mention of other matters, all of them depending on facts relating to the circumstances of trade and navigation and varying somewhat as time goes on and C progress takes place, really shows how clearly these great authorities desired to guard themselves in view of the fact that on many grounds deviation from the sea-track might still not be beyond the ordinary route, though in the case in hand they had not been put in evidence. Such things must be matters of degree and may not always be equally important for all classes of ships, all kinds of cargo, or all periods of trade. In more recent years to sail in the direction opposite to that D of the destination has been held not to have been a deviation from a named voyage, where it was commercially impractical to do otherwise: *Evans, Sons & Co.* v. *Cunard Steamship Co., Ltd.* (3), and a departure from the direct line from San Francisco to Honolulu by proceeding to Portland, Oregon, merely in order to earn a subsidy for the shipowner, has been held justifiable by usage in *W. R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha* (4), and the fact that a general ship is seeking E parcels at various ports in a gulf, the Persian Gulf, where she can find them, has been treated as being available to justify a departure from a named terminus under the authority of a wide deviation clause: *Hadji Ali Akbar & Sons, Ltd.* v. *Anglo-Arabian and Persian Steamship Co., Ltd.* (7).

The conclusion of the Court of Appeal, with which I concur, that the agreed voyage was one which included the passage on which the oil was damaged, makes F it unnecessary to discuss now the terms of the liberty to deviate, and I will only say that, if, as I suppose is the case, parties may, if they can find apt words to do so, contract themselves even out of *Margetson* v. *Glynn* (2), and make the liberty to deviate control the terms of the described voyage, the words used here, viz., "at any ports whatsoever, although they may be outside the route," seem to go far, and possibly far enough to achieve this object. I think that the appeal should be G dismissed.

LORD WARRINGTON.—The appellant (the plaintiff in the action) shipped on board the defendants' ship *Cervantes* at Malaga 134 barrels of olive oil under two bills of lading with "destination" in one case to Liverpool and in the other to H Bradford. The olive oil would not be properly described as perishable goods. The goods were lost at sea, and the appellant sued the respondents for their value. The loss was covered by the exceptions in the bills of lading, but the appellant insisted that these did not protect the respondents, inasmuch as, at the time of the loss, the ship was not on the agreed voyage, or on any permitted deviation therefrom. This view was accepted by ROWLATT, J., who tried the action, and he entered I judgment for the appellant. He thought the case depended on the effect of the deviation clause, and as to this he considered himself bound to follow a decision of HILL, J. The respondents appealed, and the Court of Appeal, consisting of SCRUTTON, GREER and SANKEY, L.JJ., reversed the judgment of ROWLATT, J., and entered judgment for the respondents, being of opinion that on the true construction of the bills of lading, in view of the surrounding circumstances, the ship was on the agreed voyage, and therefore the question as to the effect of the deviation clause did not arise. The respondents are the owners of a line of steamships (of which the *Cervantes* is one) engaged in carrying general cargoes between the ports of

Spain and Portugal and the United Kingdom and North Germany. The business was established about a century ago. It has for many years been customary for the vessels of the line to make regular round voyages from the United Kingdom and back again, calling at ports in Spain and Portugal to discharge or pick up cargo as the case might require. At the time in question, April, 1927, the *Cervantes* in the ordinary course of her owner's trade was engaged in one of such round voyages and touched at Malaga outward bound. Having there shipped the appellant's goods she proceeded along the eastern coast of Spain, touching at various ports including Cartagena, and having reached Palamos retraced her steps, touching at several ports and ultimately reached the United Kingdom. She did not touch at Malaga on the homeward voyage. The loss of the olive oil occurred as the consequence of heavy weather encountered between Malaga and Cartagena on the way out.

I now turn to the bills of lading. They are both in the same terms, except that in the one case the destination is "to Liverpool" and in the other "to Bradford." They are in Spanish, but we have been furnished with an agreed English translation. In the margin, together with other matter, are the words "MacAndrews Line," with a list of the ports at which the firm have offices, including Malaga, Cartagena and other ports on the east coast of Spain. The material passage is as follows:

> "Shipped by Leon Frenkel in the steamship *Cervantes* with destination to Liverpool with liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation; to enter and leave ports without pilot; to assist and tow vessels in any circumstances; to discharge or load, tranship, send to destination by any means of transport, all responsibility of the ship ceasing on discharge from dock."

There follows a specification of the goods and a number of provisions not material to the question. The exception clause is a wide one and includes perils and risks of the seas. The bill of lading purports to be signed at Malaga on April 11, 1927. It is to be observed that the ship is not described as "now in the port of Malaga bound for Liverpool," the more usual way of describing the termini of a sea voyage, and in the case of the Bradford bill that town is obviously not such a terminus. The fact is, I think, that "destination"' in both these documents means the ultimate destination of the goods which may or may not, according to circumstances, be the termination of the voyage. The expression "send to destination by any means of transport" confirms this view. The appellant insists that in both cases Liverpool is the proper port of discharge, and that on the construction of the contract the respondents were bound to carry the goods to Liverpool by one route and one only—viz., the direct route by which in ordinary circumstances a steamship at Malaga bound for Liverpool would travel, subject, of course, to permitted deviations, and contends, further, that to proceed in a direction opposite to that of the home port cannot be treated as authorised by general words such as those in the clause now in question. The appellant strongly relied on certain decisions of high authority—one in this House. I will examine these authorities presently, but meanwhile I propose to consider the question of construction on principle.

In the first place I think the same principles of construction apply to bills of lading as to written contracts in general. It is well settled that if the surrounding circumstances raise a latent ambiguity in any of the expressions used, parol evidence may be resorted to for the purpose of ascertaining which of the meanings of an ambiguous expression was contemplated by the parties. In the present case the question arises between the original parties to the contract, but this fact is, in my opinion, immaterial; so far as construction is concerned that must be the same whether the question arises as between the original parties or their respective assignees. As to the material circumstances, in the present case there can, I think, be no dispute. The ship was one of a line pursuing a regular course of trading

A in accordance with which her usual and customary routes with goods from Malaga destined for Liverpool would be determined by ascertaining whether she was at Malaga on the outward or the homeward section of her voyage; if the former, her route from Malaga would be concisely described as "via Levante"—viz., "via the eastern coast of Spain," if the latter, as "directo." It thus appears that "route" is in this case an ambiguous word. Parol evidence would then be admissible to prove in which of these two senses it was used by the parties to the contract.

The result of the evidence on this point is, to my mind, clear. The shipowners did all they could by advertisements in local papers, by personal communication with their regular shippers or their representatives at the port, and by the circulation of what are called shipping cards to intimate to those concerned whether a particular ship was sailing via Levante or directo. In the case of the *Cervantes*, she was advertised to sail via Levante. The appellant himself was not at Malaga, but his business there was conducted by responsible persons on his behalf. None of these persons was called. In my opinion, the inference from the evidence is irresistible that the appellant through his agents at Malaga knew perfectly well that the voyage in contemplation was one via Levante and accepted that position. The judges in the Court of Appeal were, accordingly, justified in coming to the conclusion that on the true construction of the contract the agreed voyage was that actually undertaken. In this view the question as to the meaning and effect of the deviation clause does not arise.

Are the authorities referred to by the appellant such as to preclude one from coming to the above conclusion? The only cases which it is really necessary to consider are those of *Leduc* v. *Ward* (1) and *Margetson* v. *Glynn* (2) and the same case sub nom. *Glynn* v. *Margetson & Co.* (2). In *Leduc* v. *Ward* (1) no question as to the construction of the contract in reference to surrounding circumstances arose. The voyage was by a ship stated to be lying at Fiume and bound for Dunkirk. There was no evidence establishing any latent ambiguity in these words, and the parol evidence by which it was sought to give a different meaning to what the court held to be the natural and commercial meaning of the words was rightly rejected. I think the judgment of FRY, L.J., makes it quite clear that the question what was the agreed voyage was one to be determined on ordinary principles of construction. In the view taken of the construction as to the voyage the effect of the deviation clause had to be determined and was determined against the shipowner, but that question, in the view I take, does not arise in the present case. The same remarks apply to *Margetson* v. *Glynn* (2) and *Glynn* v. *Margetson & Co.* (2). There again the voyage was described as on board a ship "lying at Malaga, bound for Liverpool," and the real question was as to the effect on such a case of a wide deviation clause. This was again decided on the principle that, the main object of the contract being ascertained, general words must be used so as not to be inconsistent with the performance of that object.

If an example of the application to the construction of a bill of lading of the general principles referred to above was required, I think it is to be found in *Evans, Sons & Co.* v. *Cunard Steamship Co., Ltd.* (3). There the ship was said to be lying at Bari bound for Liverpool. The learned judge (WILLS, J.) held that "the only practicable way to get a cargo from Bari to Liverpool is by a more or less uncertain route via the Adriatic round by Levantine or Black Sea ports," and so on. What is meant by "practicable" is clearly "practicable in a commercial sense," and the same might well be said of the course pursued by the *Cervantes* in the present case.

Arguments were addressed to your Lordships urging the extreme inconvenience to endorsees and others to whom bills of lading are submitted for financial purposes in the course of business, but if such contracts are—and by authority it is settled that they are—to be construed according to ordinary principles of law: see per FRY, L.J., in *Leduc* v. *Ward* (1), then such an argument should be addressed to

those who frame such documents and not to the court which has to interpret them. Under the Bills of Lading Act, 1855, the effect of the endorsement is merely to transfer to the endorsee the rights and interests of the endorser; the contract must be interpreted without reference to such change of interest. I agree that the appeal fails and should be dismissed with costs.

LORD BLANESBURGH concurred.

Solicitors: *Middleton, Lewis & Clarke*; *Richards, Butler & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re BARCLAY. GARDNER *v.* BARCLAY. STEUART *v.* BARCLAY

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ), March 19, 20, 21, April 15, 1929]

[Reported [1929] 2 Ch. 173; 98 L.J.Ch. 410; 141 L.T. 447; 45 T.L.R. 406]

Will—Gift for maintenance and improvement of Roman Catholic church—Gift after death of tenant for life to Father Superior of Jesuit church—Gift over failing him to any other representative father of the order of the Society of Jesus—Superior of order not the same at death of tenant for life as at death of testatrix—Validity of gift—Roman Catholic Relief Act, 1829 (10 *Geo.* 4, *c.* 7), *s.* 28—*Roman Catholic Relief Act*, 1926 (16 *& 17 Geo.* 5, *c.* 55).

By her will made in September, 1903, the testatrix gave her property to G. for life, and after the death of G. the residuary estate was left to "the Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, to the Superior of that church at the moment of the legacy falling due, and failing him to any other representative father of the order of the Society of Jesus . . ." The testatrix died in 1910 and G. died in 1928. The Superior of the Jesuit Church of the Immaculate Conception was not the same person in 1910 as in 1928. On a summons regarding the validity of the gift of the residuary estate, the next-of-kin of the testatrix contended that a gift for that purpose was contrary to the Roman Catholic Relief Act, 1829, s. 28.

Held: (i) a gift for the maintenance and improvement of a church belonging to an order of the Roman Catholic Church which was open to the public was not rendered void by s. 28 of the Act of 1829.

Liston v. *Keegan* (1) (1882), 9 L.R.Ir. 531, disapproved.

Re Greene (2), [1914] 1 I.R. 305, applied.

(ii) the gift was a valid gift to the Superior of the church at the moment of G.'s death on trust for the benefit of the church as he might in his discretion think fit.

Notes. The Roman Catholic Relief Act, 1829, s. 28, was repealed by the Roman Catholic Relief Act, 1926, s. 1 and Schedule.

Considered: *Re Coats' Trusts*, *Coats* v. *Gilmour*, [1947] 2 All E.R. 422; *Re Flinn*, *Public Trustee* v. *Griffin*, [1948] 1 All E.R. 541. Referred to: *Re Stratton*, *Knapman* v. *A.-G.*, [1930] All E.R.Rep. 255.

As to gifts against public policy, see 4 HALSBURY'S LAWS (3rd Edn.) 221–226, paras. 500–505; and for cases see 8 DIGEST (Repl.) 331 et seq. For the Roman Catholic Relief Act, 1926, see 7 HALSBURY'S STATUTES (2nd Edn.) 1296.

A Cases referred to:

(1) *Liston* v. *Keegan* (1881), 9 L.R.Ir. 531; 8 Digest (Repl.) 338, **91.*

(2) *Re Greene, Fennelly* v. *Cheator*, [1914] 1 I.R. 305; 49 I.L.T. 9; 8 Digest (Repl.) 333, **59.*

(3) *Carbery* v. *Cox* (1852), 3 I.Ch.R. 231; 8 Digest (Repl.) 232, **31.*

B (4) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 331, *128.*

(5) *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 51 W.R. 27; 18 T.L.R. 741; 8 Digest (Repl.) 325, *89.*

(6) *Re Smith, Johnson* v. *Bright-Smith*, [1914] 1 Ch. 937; 83 L.J.Ch. 687; 110 L.T. 898; 30 T.L.R. 411; 58 Sol. Jo. 494; 8 Digest (Repl.) 338, *200.*

C (7) *Sims* v. *Quinlan* (1865), 17 I.Ch.R. 43; 17 Ir. Jur. 41; 8 Digest (Repl.) 338, **97.*

(8) *Kehoe* v. *Wilson* (1880), 7 L.R.Ir. 10; 8 Digest (Repl.) 438, **459.*

Appeal by the next-of-kin from an order of Tomlin, J.

A summons was taken out by Agnes Mary Gardner, the executrix of the will of Jane Frances Penelope Barclay, of Paddington, raising the question as to the validity of a gift in the will of the residuary estate (the income of which had been held payable to Miss Gardner, executrix and legatee, for life) to the person who should be Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, at the moment of the legacy falling due, and, failing him, to any other representative father of the order of the Society of Jesus.

Tomlin, J., held that, on the true construction of the will and in the events which happened, the gift was an absolute one to Father Steuart, who was the Superior of the Jesuit church at Farm Street at the death of Agnes Mary Gardner, but who had become Superior since the death of the testatrix. The next-of-kin appealed. The facts appear in the judgment of Lord Hanworth, M.R.

Sir Thomas Hughes, K.C., and *F. H. L. Errington* for the next-of-kin.

G. B. Hurst, K.C., and *W. F. Swords* for the Superior.

C. R. D. Richmount for the testatrix's executrix by representation.

Cur. adv. vult.

April 15. **LORD HANWORTH, M.R.**—The question that has to be determined in this appeal is whether a bequest under the will of Miss Jane Frances Penelope Barclay is good and valid. Tomlin, J., held that it was, and the next-of-kin appeal. The testatrix was admitted a member of the Roman Catholic Church in 1894, at the Church of the Immaculate Conception, Farm Street, Mayfair. After that date she lived a good deal abroad in France, and she made her will on Sept. 7, 1903, and died on Feb. 6, 1910. By the terms of her will she gave a life interest in her estate to Agnes Mary Gardner. This was decided to be the effect of the terms of her will by an order made by Warrington, J., on Feb. 14, 1911.

Agnes Mary Gardner died on April 9, 1928, and the question now arises whether the gift over of the residuary estate on the death of Miss Gardner is effective, or whether there is an intestacy under the will in respect of it. The relevant portion of the will is as follows:

"In the event of the death of the said Agnes Mary Gardner I give and bequeath absolutely and entirely for ever my aforesaid property money stocks shares interests and benefits arising from them (saving two donations above mentioned which shall be paid either by the said Agnes Mary Gardner or in the event of her death by the Society of Jesus), I give and bequeath all the above mentioned property money stocks shares interests and benefits without any intermediary legatees whatsoever all the above legacy (saving the aforesaid donations) to the Superior of the Jesuit Church of the Immaculate Conception Farm Street London to the Superior of that church at the moment of the legacy falling due, and failing him to any other representative father of the order of the Society of Jesus through which Society I received the grace of the

true faith of the one Holy Catholic and Apostolic Church of Rome in which faith I an unworthy but faithful child desire to live and die."

It may be significant to bear in mind that the will gave the two legacies referred to in this passage to two reverend fathers, which were paid at or near the time of the death of the testatrix; but in respect of which the will provided that in the event of the decease of the two legatees before the testatrix, then Miss Gardner was empowered to give the entire sum of the two legacies "to the priests of the Society of Jesus for the repose of my soul."

It is argued for the next-of-kin that, on the true construction of the above words, there is a gift to the order of the Society of Jesus for the purpose of the order, or at least to the community of Jesuits at Farm Street, for the purposes of the community, and that such a gift is contrary to s. 28 of the Roman Catholic Relief Act, 1829, the Act for the relief of His Majesty's Roman Catholic subjects, the effect of which it is said was maintained, or indeed interpreted, in The Charitable Donations and Bequests (Ireland) Act, 1844, s. 15. On the other hand, it is argued in support of the bequest that it is a good gift to the Superior of the Farm Street Church, who is indicated by his office, but takes personally as such. Alternatively, that it is a good gift (a) for the church, or (b) for the members of the Society, individually, who were members at the date of Miss Gardner's death, or (c) that it is good even if it be for the Society of Jesus at large, or to the branch resident in Farm Street.

The first step towards solving these problems is to determine the construction to be put on the terms of the will that I have set out above. This is not an easy task. The learned judge has set out the facts relating to the constitution and government of the Society of Jesus. It is unnecessary to repeat them, but they render it unlikely that the testatrix intended to benefit the whole Society, rather than those members of it who were, or would be at the moment of the legacy falling due, associated with the church where she had been received into the communion, of which she speaks with reverence and gratitude. Next the donee of her residuary estate is designated as "the Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, to the Superior of that church at the moment of the legacy falling due"—a person, a designate by his office, and that office, one held in connection with the Farm Street Church. The alternative to this office-bearer, should the office be vacant, is "any other representative father of the order of the Society." Representative of what? Holding as I do that the testatrix did not intend by the Society to refer to the totality of the Society, but only to the Farm Street portion of it, I take the word "other" as indicating an alternative person designated, who was representative of the same Farm Street portion. By this reasoning I come to the conclusion that "Members of the Society serving the Jesuit church at Farm Street" is the assemblage of persons in whom the testatrix was interested, and that the Superior is singled out in his representative capacity as the donee, or failing him—if the post is temporarily vacant, or he be for some other reason not available—some other father representative, like the Superior, of the community at Farm Street. Such a donee, taking thus in a representative capacity of the particular community or assemblage indicated, could be asked and directed not unreasonably—if Miss Gardner had died before the testatrix, or before the payment of the two particular legacies—to become responsible for the payment of these two legacies. In view of the intention that I have attributed to the testatrix from the words used in reference to the main disposition of the residue, in which the Farm Street church is plainly indicated as the central point of interest, I feel that it would not be right to impute to her from the use of the words in reference to the legacies "shall be paid . . . by the Society of Jesus," a meaning that these words must be held to characterise the main disposition by a sort of refracted light or interpretation arising from them.

But, on this view of the disposition, does the donee take for his individual benefit, as the judge appears to hold, or is there any and what trust indicated for which the Father Superior is trustee? By the same reasoning whereby I have reached

A the conclusion stated as to the person indicated, I find it impossible to hold that the bequest was an individual and personal gift. I have already dwelt on the words "other representative father." If representative in the one case, so also representative in the other; that is to say, representative of the church at Farm Street and its work which the testatrix found so beneficial to herself. It is clear from *Carbery* v. *Cox* (3) that a gift to a principal officer of a community for a valid B charitable purpose is good: see also *Re Greene* (2) ([1914] 1 I.R. at p. 312). There is, primâ facie, therefore no objection to the Superior, or other representative father, being a trustee.

Liston v. *Keegan* (1) was a case in which it was held that a trust for the benefit of a church belonging to the Society of St. Vincent de Paul coming into the United C Kingdom after the Act of 1829 was void. But the maintenance of religious services tending directly or indirectly towards the instruction or the edification of the public is a good charitable purpose: see per Wickens, V.-C., in *Cocks* v. *Manners* (4) (L.R. 12 Eq. at p. 585). The emphasis is on the edification or instruction of the public, as pointed out by Farwell, J., in *Re Delany, Conoley* v. *Quick* (5) ([1902] 2 Ch. at p. 649), in contradistinction to "attempting to improve one's own D mind or save one's own soul." If *Liston* v. *Keegan* (1) were still good law, it would be an authority directly against the validity of the gift by Miss Barclay to the Father Superior for the Farm Street church. But the consideration of it led Joyce, J., to say: "I must say I should think these decisions about churches very doubtful": see *Re Smith, Johnson* v. *Bright-Smith* (6) ([1914] 1 Ch. at p. 950). *Liston* v. *Keegan* (1) is submitted to a careful examination by O'Connor, M.R., in E *Re Greene* (2) ([1914] 1 I.R. at p. 315), and I follow and agree with his reasoning and conclusion that the decision in *Liston* v. *Keegan* (1) cannot now be accepted. It appears to me that the judgment of the Master of the Rolls in *Re Greene* (2) is correct, and I accept the decision, following as it does the reasoning of Joyce, J., in *Re Smith* (6). The result of this is that a trust for the maintenance and improvement of a church which is open to the public—as the church at Farm F Street is—is good, and not to be held void under s. 28 of the Act of 1829.

To my mind it is clear that the testatrix intended to benefit the church at Farm Street to which she felt a particular and lasting obligation. There can be no question that her intention could have been effected if her will had been made after the passing of the Roman Catholic Relief Act, 1926. It is satisfactory that this court is not compelled to defeat the testatrix's wishes expressed in 1903, but G taking effect in 1928, more than fifteen months after the Relief Act received the Royal Assent, by reason of a section in a statute now a hundred years old which has never been enforced in its apparent strictness or severity. The declaration made by the learned judge should be varied by striking out the last six words, "absolutely and free from any trust," and substituting therefor "upon trust to apply the same for the benefit of the Church of the Immaculate Conception, Farm H Street, London, as he may in his discretion think fit." The costs of all parties to this appeal as between solicitor and client should be paid out of the residuary estate of the testatrix.

LAWRENCE, L.J.—The question on this appeal is whether, on the true construction of the will of the testatrix, her residuary estate is bequeathed to Father Steuart for his own use and benefit or on some and what trusts, and, in the latter I case, whether such trusts are valid.

In 1894 the testatrix was received into the Roman Catholic faith at the Church of the Immaculate Conception in Farm Street, Berkeley Square, London. This church belongs to the Order of the Society of Jesus and is open to the public. It is served by a community of priests of the order, known as the Farm Street Community, whose members, to the number of twenty or thereabouts, reside together in a house near by. The testatrix made her will in 1903 and died in France in 1910. The tenant for life died in 1928. Father Steuart was the Superior of the Farm Street church at the time of the death of the tenant for life. He did not

know the testatrix. He, like all the other priests of the order, was bound by monastic vows. TOMLIN, J., held that the residue was bequeathed to Father Steuart for his own use and benefit. I am unable to agree with this view. The indications contained in the will that the gift was in respect of the office held by the legatee and that the office was not merely mentioned in order to describe the legatee, who was to take for his personal use, are, in my opinion, too strong to admit of the construction placed on it by the learned judge. Not only is the legatee described by his office without mentioning his name, which, of itself, might not be sufficient to prevent him from taking for his own benefit, but the testatrix directs the Society of Jesus to pay the pecuniary legacies given to the two French priests in the event of the death of Agnes Mary Gardner, and concludes her will by stating that it was through the Society that she received the grace of the Roman Catholic faith, thereby showing that the gift was prompted by gratitude to the Society. In view of this direction and statement, I am of opinion that the correct interpretation of the will is that the Superior of the Farm Street church or other representative father, as the case may be, was not intended to take the residue for his own use and benefit.

The question then arises what are the trusts on which Father Steuart takes the residue? Four alternative views have been presented to us by counsel. On behalf of the tenant for life it is contended that Father Steuart takes the residue as trustee for the Order of the Society of Jesus generally or, alternatively, as trustee for the Farm Street community as such. On behalf of Father Steuart it is contended that he takes it as a trustee for the Farm Street church or, alternatively, for the individual members of the Farm Street community living at the date of the death of the tenant for life. In my opinion, the nature of the office in respect of which the bequest is made determines the trusts on which it is to be held. I construe the will to mean that if, when the gift takes effect in possession, there be a Superior of the Farm Street church, the residue is to go to him in his character of Superior of that church, but that if at that time there should happen to be a vacancy in that office, then the residue is to go to any other father of the Order of the Society of Jesus who for the time being represents or acts as the Superior of the Farm Street church, and that in either case the recipient is bound to apply the residue for the benefit of that church and for no other purpose. The contention that the testatrix intended to create a trust in favour of the Order of the Society of Jesus generally, no doubt, derives some support from the direction as to the payment of the two legacies and from the concluding sentence of the will, but, in my opinion (apart from the inherent improbability that the testatrix intended to benefit the order at large, whose headquarters are in Rome and whose members, numbering nearly 20,000 persons of all nationalities, are scattered all over the world), the references in the will to the Society are not sufficient to outweigh the fact that the residue is given in clear terms to the Superior of this particular church and not to the Society of Jesus. I am unable to accept the suggestion that the Superior, or other representative father, was merely nominated as the person to give a receipt for the legacy on behalf of the Society. If the testatrix had desired to leave her residue to the Society, it is difficult to understand why she did not say so. The direction to the Society to pay the legacies and the reference to the Society at the end of her will are explicable on the ground that the church which the testatrix intended to benefit belongs to the Society, and that, therefore, the testatrix was benefiting the Society by leaving her residue to be applied for the benefit of that church and was in that manner showing her gratitude for having received the grace of the Roman Catholic faith through the Society. The contention that the gift was either to the Farm Street community as such or to the individual members of that community cannot, in my opinion, be supported. This community is not mentioned in the will, and the will contains no indication that the testatrix intended to benefit either the community as such or the individuals composing the community. There is no evidence that the testatrix was ever interested in the activities of this community other than those

A connected with the Farm Street church, and I cannot accept the theory suggested by the learned judge that, to the testatrix, the Society of Jesus meant the Farm Street community.

There remains the question whether a bequest for the benefit of a church belonging to a monastic order but open to the public is valid. There are several Irish cases in which it was apparently held that a gift to such a church is void: B see, e.g., *Sims* v. *Quinlan* (7), *Kehoe* v. *Wilson* (8), and *Liston* v. *Keegan* (1). JOYCE, J., in *Re Smith* (6), considered the decisions in these cases very doubtful, and his criticisms on them lead O'CONNOR, M.R., in *Re Greene* (2) to review all the Irish cases on this subject. In *Re Greene* (2) the testatrix directed her residue to be applied "for the decoration or improvement of the Roman Catholic Church of the Carmelite fathers at Clarendon Street in the City of Dublin." The C Master of the Rolls held that this bequest was a valid charitable bequest and was not void under the Roman Catholic Relief Act, 1829. The grounds of his decision may be summarised as follows: that the Act of 1829 did not prohibit monastics from acquiring property in the United Kingdom, and that it was not the function of the court to inflict on monastics unspecified penalties, in the shape of civil disabilities, in addition to the particular penalties imposed by the Act; that neither D the Act of 1829 nor the proviso to s. 15 of the Act of 1844 operated to render void a bequest in favour of persons bound by monastic vows unless the bequest were made for an illegal purpose; that a community illegal as such might be made the recipient of a bequest expressly devoted to a lawful purpose which the community was bound to carry out; that a bequest for the maintenance of a church whose E purpose is public worship is a lawful charitable bequest although the church belongs to a monastic order; that in such a case it is the public who are the charitable objects and the legatees are only the administrators of the charity. The Master of the Rolls in the course of his judgment points out that it is obvious that a bequest to aid the admission of young priests into a monastic order is in direct violation of s. 33 of the Act of 1829, and is quite different in character from one F for the benefit of a church the property of a monastic order. In my judgment, the reasoning of the Master of the Rolls, which accords with the view evidently taken by JOYCE, J., on this subject, is sound and applies directly to the bequest in the present will. It follows that, in my opinion, the gift of the residue to Father Steuart on trust for the benefit of the Farm Street church is a valid charitable bequest. In these circumstances, the wider question whether, if the bequest had G been to the Farm Street community as such or to the Order of the Society of Jesus at large, it would have been valid does not arise, and I prefer not to express any opinion on it. In the result I agree with the order proposed by the Master of the Rolls.

RUSSELL, L.J.—In this case, TOMLIN, J., saw his way to construe the gift in the events which happened as a gift to Father Steuart free from any trust. For H myself, I find the language used by the testatrix too strong for me to adopt the same view.

The gift is to a person to be ascertained in a particular way, who may, and in all probability will, be quite unknown to, and unconnected with, the testatrix. This fact, though it renders unlikely an unfettered beneficial gift to the donee, would be insufficient, without further context, to establish a trust. In this will I there are to be found three important features. First, the testatrix explains the reason of the gift, viz., gratitude to the Society of Jesus for her receipt of the grace of the true faith. Secondly, the gift is to a person holding an official or representative character. Thirdly, the testatrix, by her direction that, in a certain event, the Society of Jesus shall pay two donations, shows that, in her view, the Society is interested in the gift of her residuary estate. Reading the will as a whole, and giving proper effect to the language used, I feel constrained to come to the conclusion that Father Steuart takes the residue not for his own benefit but subject to a trust.

The question then arises, what trust is applicable to the residue? TOMLIN, J., took the view that if any trusts applied, they were trusts for the personal benefit of the individuals who were members of the community of Jesuits at Farm Street at the death of the tenant for life; and that, on the authority of such cases as *Cocks* v. *Manners* (4) and *Re Smith* (6). I am unable, however, to find in this will any trust for the community at Farm Street. There is no such express trust, nor do the references to the Society of Jesus justify, in my opinion, any implication of such a trust. The learned judge took the view that the Society of Jesus meant to the testatrix the particular section of it composed by the community at Farm Street, and that her references to the Society were references only to Farm Street. I can find no support of this theory in the language which the testatrix has used, and I feel unable to adopt it.

I agree, however, with the learned judge that the testatrix does not indicate any desire to leave the property to the order at large. Had she wished to do this, nothing would have been easier than to say it; her will, be it observed, suggests an author quite ignorant of any difficulties which may be in the path of such a disposition. What she does show clearly enough is a desire to leave her property to someone who represents the Farm Street church; either the Superior of the church at the given moment, or, if at the moment, there happens to be no such Superior, then to any other Jesuit priest who represents the Farm Street church. That is the way in which I construe the alternative gift. Father Steuart, accordingly, takes the property because, and only because, he was at the given moment the representative of the Farm Street church. The gift should, accordingly, be construed as a gift to him as trustee to be applied by him as such trustee, for the purposes and benefit of the Farm Street church. The church is open to the public and is managed and used for the practice and advancement of the Catholic religion. The gift is, therefore, good as a charitable gift. If this gift to Father Steuart be construed (as I construe it) as a gift for the purposes and benefit of the Farm Street church, every word of the will is satisfied and explained. Gratitude to the Society of Jesus is satisfied by the gift to one of its churches, and the direction as to the legacies is explained by the fact that the Society is, through one of its churches, interested and concerned in the disposition of the residue. There might at one time have been a doubt whether the fact that the public church to be benefited by the gift belonged to the Order of the Society of Jesus, or to some other order of men bound by vows, rendered the gift void. No case in this country had so decided. Certain decisions in the Irish courts had been considered as laying down that a gift for the benefit of a church open to the public, but belonging to such an order, would be bad. JOYCE, J., expressed the view that these decisions were open to question (*Re Smith* (6)). Any doubt was, in my opinion, removed by the judgment and decision of the Master of the Rolls in Ireland in *Re Greene* (2). In that case, the Master of the Rolls reviewed all the previous authorities, and held that a gift for the benefit of such a church was valid. I find his reasoning quite convincing. Indeed, his reasoning affords grounds for doubting whether a gift in favour of such an order is necessarily invalid.

In the view which I take of the meaning of this will that interesting question does not arise. Indeed, it is to be hoped that it may now never arise owing to the fact that, in 1926, the legislature of this country realised the propriety of repealing these penal sections of the Roman Catholic Relief Act, 1829, which, owing to the good sense of the authorities, had never been put into force. In the result, I would vary the order of TOMLIN, J., in the manner indicated by the Master of the Rolls.

Appeal allowed on decision as to existence of trust.

Solicitors: *Bridges, Sawtell & Co.*; *Donaldson & Co.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re DOMINION TAR AND CHEMICAL CO., LTD.

[Chancery Division (Eve, J.), July 1, 1929]

[Reported [1929] 2 Ch. 387; 98 L.J.Ch. 448; 142 L.T. 15; 45 T.L.R. 601; [1929] B & C.R. 71]

Company—Winding-up—Distribution among contributories—Preference shares—Payment of arrears of dividend in priority—Deduction of income tax.

A company was incorporated in 1903 with a nominal capital of £30,007 in £1 shares. In 1924 the capital was increased by resolution of an extraordinary general meeting to £750,000, 300,000 preference shares of £1 each being created, the holders of which were entitled to a fixed cumulative dividend of 7 per cent. and priority of return of capital and payment of "all arrears of dividend," earned or not, on a winding-up, but no further rights. In 1929 it was resolved by special resolutions to wind-up. On realisation, after providing for payment of creditors and costs, there was sufficient to repay the capital paid up on the preference shares and all arrears of dividend.

Held: the sum payable to the preference shareholders was the full amount of the preference dividend without any obligation on the liquidator to deduct from it the amount of income tax thereon.

Re New Chinese Antimony Co. (1), [1916] 2 Ch. 115, and *Re Springbok Agricultural Estates, Ltd.* (2), [1920] 1 Ch. 563, applied.

Notes. Considered: *Re Home Grown Sugar, Ltd.* [1938] 1 All E.R. 85. Referred to: *Re E. W. Savory, Ltd.*, [1951] 2 All E.R. 1036.

As to distribution among contributories on a winding-up, see 6 Halsbury's Laws (3rd Edn.) 678–682; and for cases see 10 Digest (Repl.) 1065 et seq.

Cases referred to:

(1) *Re New Chinese Antimony Co., Ltd.*, [1916] 2 Ch. 115; 85 L.J.Ch. 429; 114 L.T. 989; 60 Sol. Jo. 513; [1916] H.B.R. 8; 10 Digest (Repl.) 1070, *7414.*

(2) *Re Springbok Agricultural Estates, Ltd.*, [1920] 1 Ch. 563; 89 L.J.Ch. 362; 123 L.T. 322; 64 Sol. Jo. 359; [1920] B. & C.R. 107; 10 Digest (Repl.) 1070, *7415.*

(3) *I.R.Comrs.* v. *Wright*, [1927] 1 K.B. 333; 95 L.J.K.B. 982; 135 L.T. 718; 11 Tax Cas. 181, C.A.; Digest Supp.

(4) *I.R.Comrs.* v. *Burrell*, [1924] 2 K.B. 52; 93 L.J.K.B. 709; 131 L.T. 727; 40 T.L.R. 562; 68 Sol. Jo. 594; 9 Tax Cas. 27, C.A.; 28 Digest 108, *665.*

Adjourned Summons to determine the question whether, in distributing the assets of the company and in paying the arrears of preference dividends, the liquidator ought to deduct income tax on such arrears, and, if so, at what rate.

The company was incorporated in 1903 with a capital of £30,007 in £1 shares. At an extraordinary general meeting, held on April 15, 1924, it was resolved to increase the capital to £750,000 by the creation of, inter alia, 300,000 preference shares, the holders of the preference shares being entitled to a fixed cumulative preference dividend at 7 per cent. per annum, and in a winding-up to priority as to return of capital and to payment of all arrears of dividend, earned or declared or not, down to the commencement of the winding-up over all other shares for the time being, but not to any further or other rights. Any surplus assets were to go to the ordinary shareholders. On Feb. 4 and Feb. 19, 1929, special resolutions for the winding-up of the company were passed and confirmed. The liquidator realised the assets which, after providing for creditors and the costs of liquidation, were sufficient to repay the capital paid up on the preference shares and all arrears of dividend, and leave a sum for distribution among the ordinary shareholders equal to three-and-a-half times the amount paid or credited as paid up on the ordinary shares. The last dividend on the preference shares was paid on Nov. 1, 1928, and

the dividend was, therefore, in arrear until Feb. 19, 1929, when the liquidation began. All income tax on the profits had been paid. A

Wynn Parry for the liquidator.

Lionel Cohen, K.C., and *Devine* for the preference shareholders.—No income being payable, the preference shareholders are entitled to all arrears of dividends without deduction. The assets are now capital: see *I.R.Comrs.* v. *Wright* (3); DOWELL'S INCOME TAX LAWS (9th Edn.) at p. 36; *I.R.Comrs.* v. *Burrell* (4). B

J. W. F. Beaumont for the ordinary shareholders.—No income tax is now payable, but it ought to be deducted from the arrears of dividends. The preference shareholders are only entitled to such interest as they would have received if the company had not gone into liquidation: *Re New Chinese Antimony Co., Ltd.* (1); *Re Springbok Agricultural Estates, Ltd.* (2). C

EVE, J.—I think that the judgments of NEVILLE, J., in *Re New Chinese Antimony Co., Ltd.* (1), and of LAWRENCE, J., in *Re Springbok Agricultural Estates, Ltd.* (2), indicate that in their opinion the real sum payable to the preference shareholders under clauses not distinguishable from the one which I have to construe was the full amount of the preferential dividend without any reference to the question whether the distributable fund represented any reserve of profits or surplus profits earned by the company, and without any obligation on the liquidator to deduct from the dividend so paid the amount of the income tax. In other words, it seems to me that the construction which they have put upon the words "all arrears of the said preferential dividend" was not arrears of such sums as the preference shareholders would have received had the company been a going concern, had the company earned profits available for the preferential dividend, and had they in fact declared their dividend, but all arrears of the interest payable to the preference shareholders at the rate fixed by the contract between them and the company, and that in truth and in substance the expression "all arrears of the said preferential dividend" in a clause of this sort means a sum equal to the amount secured as preferential dividend to the shareholders by the contracts under which the preference shares were issued. In my opinion, an obligation, which the preference shareholders would be under in one set of circumstances, cannot be imposed on them by the court in a different state of circumstances, and I think on these grounds, fortified by the decisions to which I have referred, the preference shareholders in this case are entitled to their full 7 per cent. dividend before the surplus assets are applied in making further payments to the ordinary shareholders. D E F

Solicitors: *G. & G. Keith.* G

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

BERRY *v.* BERRY

[KING'S BENCH DIVISION (Swift and Acton, JJ.), June 5, 6, 1929]

[Reported [1929] 2 K.B. 316; 98 L.J.K.B. 748; 141 L.T. 461; 45 T.L.R. 524]

Deed—Variation—Variation by agreement in writing not under seal—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 44.

Since by s. 44 of the Supreme Court of Judicature (Consolidation) Act, 1925, in the case of a conflict between the rules of law and the rules of equity, the rules of equity are to prevail, a contract under seal may be varied by a subsequent parol agreement.

Notes. Referred to: *Perrott & Co.* v. *Cohen*, [1950] 2 All E.R. 939; *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, [1956] 1 All E.R. 256 n.

As to the avoidance and variation of deeds, see 11 HALSBURY'S LAWS (3rd Edn.) 360 et seq.; and for cases see 12 DIGEST (Repl.) 395–397. For Supreme Court of Judicature (Consolidation) Act, 1925, s. 44, see 18 HALSBURY'S STATUTES (2nd Edn.) 481.

Cases referred to:

(1) *Nash* v. *Armstrong* (1861), 10 C.B.N.S. 259; 30 L.J.C.P. 286; 7 Jur.N.S. 1060; 9 W.R. 782; 142 E.R. 451; 12 Digest (Repl.) 397, *3070*.

(2) *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; 2 Nev. & M.K.B. 28; 2 L.J.K.B. 127; 110 E.R. 713; 12 Digest (Repl.) 398, *3082*.

(3) *Morris* v. *Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34, H.L.; 12 Digest (Repl.) 398, *3086*.

(4) *West* v. *Blakeway* (1841), 2 Man. & G. 729; 9 Dowl. 846; Drinkwater, 179; 3 Scott, N.R. 199; 10 L.J.C.P. 173; 5 J.P. 435; 5 Jur. 630; 133 E.R. 940; 12 Digest (Repl.) 396, *3065*.

(5) *Steeds* v. *Steeds* (1889), 22 Q.B.D. 537; 58 L.J.Q.B. 302; 60 L.T. 318; 37 W.R. 378, D.C.; 12 Digest (Repl.) 506, *3790*.

(6) *Webb* v. *Hewitt* (1857), 3 K. & J. 438; 29 L.T.O.S. 225; 69 E.R. 1181; 12 Digest (Repl.) 397, *3072*.

Appeal from the Mayor's and City of London Court.

In 1920 the defendant, E. W. Berry, and his wife, the plaintiff, C. H. Berry, agreed to live separately in future, and on March 4, 1920, they entered into an indenture which provided that the husband should pay the wife £12 down and £18 per month during their joint lives, so long as they lived separately. In 1928 the husband found difficulty in making the monthly payments which had been secured by the deed, and an arrangement, embodied in a written agreement of June 25, 1928, not under seal, was made, by which the monthly payments were reduced to £9; but a provision was added that if the husband's annual income from all sources rose above a certain sum, the wife should have 30 per cent. of that increase. After payments under this supplementary agreement had been going on for some time, the wife claimed that she was entitled to £18 per month under the original deed, and when it was not paid, brought an action for £54 arrears in the county court. The husband's defence was that the deed had been varied by the agreement of June 25, 1928. The wife contended that, as the original agreement had been embodied in a deed, it could be varied only by a deed, and that the purported variation by a contract in writing not under seal was of no effect. The county court judge held that the deed could be varied by the subsequent agreement in writing, and gave judgment for the husband. The wife appealed.

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 44:

". . . generally in all matters not particularly mentioned in this Act, in which there was formerly or is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules

of equity shall prevail in all courts whatsoever in England so far as the matters to which those rules relate are cognisable by those courts."

R. S. Shove for the wife.

Geoffrey Howard, for the husband, referred to *Nash* v. *Armstrong* (1); *Goss* v. *Lord Nugent* (2); LEAKE ON CONTRACTS (7th Edn.), p. 598; and BULLEN AND LEAKE ON PLEADINGS (8th Edn.), p. 581.

Shove, in reply, referred to the judgment of LORD DUNEDIN in *Morris* v. *Baron & Co.* (3) ([1918] A.C. 1 at p. 25), which well illustrates the difference between rescission and variation. Equity follows the law, unless there is a conflict, and no satisfactory authority has been adduced to show that equity would sanction the variation in question. [He referred also to FRY ON SPECIFIC PERFORMANCE (3rd Edn.), p. 469.]

SWIFT, J.—In 1920 Mr. Edward William Berry and his wife, Mrs. Catherine Harriet Berry, agreed to live separately in future. On March 4, 1920, they entered into a deed of separation which provided inter alia that:

"(c) The husband shall forthwith pay to the wife the sum of £12 and shall, during the joint lives of himself and the wife, if they shall so long live separate from each other, whether the marriage is dissolved or not, pay to the wife an annual sum of £216 free of income tax for her separate use without power of anticipation, the said annual sum to be paid by equal monthly instalments in advance on the first day of each month. . . ."

In 1928 Mr. Berry found a difficulty in making the monthly payments which had been secured by the deed, and an arrangement was come to between the parties that the monthly sum of £18 should be reduced to £9 per month, the advantage being given to the wife that, if the husband's income rose above a certain amount per annum, she should have 30 per cent. of the excess. That arrangement was embodied in a written agreement dated June 25, 1928, which recited the deed of March 4, 1920, and went on to provide:

"It is hereby agreed between the parties that the said payment as set out in the said indenture hereinbefore referred to shall be varied in the following manner, that is to say, the said Edward William Berry shall pay to the said Catherine Harriet Berry the sum of £9 sterling on the 1st July next and thereafter the sum of £9 sterling on the first day of each and every month so long as the said Edward William Berry's earnings from every source whatsoever shall not exceed the sum of £350 per annum and the said Edward William Berry shall pay to the said Catherine Harriet Berry in the same manner as the principal sum of £9 per month before mentioned a sum equal to 30 per centum per annum calculated monthly on any amount in excess of £350 per annum which he may earn."

After the payments had been made under that supplementary agreement for some time, Mrs. Berry claimed that she was entitled to £18 per month under the deed, and, as she did not get it from her husband, she brought an action in the Mayor's and City of London Court in which she claimed £54, being the amount which she said was due to her under the deed in respect of three months. Mr. Berry's defence to that action was that the deed had been varied by the agreement of June 25, 1928. The reply was made that the agreement of March 4, 1920, being embodied in a deed, could not be varied except by another deed, and, as there was no deed varying the deed of March 4, 1920, but only a contract in writing, the deed was still in effect and must be enforced at the instance of Mrs. Berry. The matter was fully argued before the judge of the City of London Court, who reserved judgment. He ultimately came to the conclusion that Mr. Berry's contention was right, and that, although the agreement of March 4, 1920, was contained in a deed, it could be varied by an agreement in writing not under seal made between the parties subsequently.

From that decision this appeal is brought, and I have come to the conclusion that the judge of the City of London Court was right in the determination at which he arrived, and that this appeal should be dismissed. It is quite clear, as was said by BOSANQUET, J., in *West* v. *Blakeway* (4) (10 L.J.C.P. at p. 177), that

> "no rule of law is better established than that a covenant cannot be varied or dispensed with, but by some contract of equal value; and this covenant, therefore, cannot be varied but by some instrument under seal."

But, although that was the rule of law, the courts of equity have always held themselves at liberty to allow the recission or variation of a contract under seal by preventing the party who has agreed to rescission or variation suing under the deed. In *Nash* v. *Armstrong* (1) it was held that an agreement not to call for the performance of a deed and to substitute certain other terms for some of the matters provided for by the deed was a good consideration for a promise to perform such a substituted contract, even although the deed be not thereby released. In the course of the argument WILLES, J., said: "I should have thought that the agreement would have been a good answer to an action on the deed by way of equitable plea." As ACTON, J., has pointed out, in the report of the case at 10 C.B.N.S. at p. 262, WILLES, J., added: "The payment of the £70 under the agreement would surely be ground for an unconditional perpetual injunction against proceeding upon the deed." That being the state of the common law and of the equitable practice when the Supreme Court of Judicature Act, 1873, was passed, that Act contained a provision (see s. 25 (11)) which is now to be found in s. 44 of the Supreme Court of Judicature (Consolidation) Act, 1925, in these terms:

> "Subject to the express provisions of any other Act, in questions relating to the custody and education of infants and generally in all matters not particularly mentioned in this Act, in which there was formerly or is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail in all courts whatsoever in England so far as the matters to which these rules relate are cognizable by these courts."

It seems to me, therefore, that, when the question arises whether or not a deed can be varied by any agreement which is not itself contained in a deed, the rules of equity must be applied in the consideration of the matter and the principles which the courts of equity would have applied to it at the time when the rules of the common law would have prevented such a thing being done have to be applied now. These principles were applied by this court in *Steeds* v. *Steeds* (5). That was an action by two obligees of a common money bond to which the defendant pleaded accord and satisfaction by delivery of stock and goods to one of the plaintiffs. On an application to strike out the defence as being no answer to the action, it was held that, according to the rule in equity which was to prevail, accord and satisfaction must be taken to be an answer to an action for a speciality debt. In the course of the judgment of the court, which was read by WILLS, J., it was said:

> "It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of merit or justice, viz., that a contract under seal cannot be got rid of except by performance or by a contract also under seal; so that supposing it had really been the case that in satisfaction of an overdue bond for £1,000 the person liable had given property worth £2,000, which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his £1,000 without returning the property. One would have thought that if the courts of equity ever interfered at all to prevent a man from enforcing an unconscientious and dishonest demand to which there was no answer at law, they would perpetually restrain an action brought under the circumstances described. Mr. Wood, however, who is an equity lawyer, contended before us that this was a case in which equity would follow the law,

and would refuse to interfere, and he laid great stress upon a case of *Webb* v. *Hewitt* (6), which he said established that proposition. We are glad to say that we are unable to agree with him, and that we think he has done injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law. The case cited appears to us to lead to the opposite conclusion to that contended for, and we think it perfectly clear that the ratio decidendi of the learned Vice-Chancellor was, that when the plaintiff had accepted money's worth in place of money in discharge of the bond, the debt in equity was gone and there was an end of it."

In the present case Mrs. Berry took in exchange for the £18 a month to which she was entitled under the deed the sum of £9 per month with the possibly great advantage of receiving 30 per cent. of her husband's earnings if they exceeded £350 a year. Having acted under that agreement for some time, and having taken her chance of seeing whether her husband's earnings would rise to more than £350 a year, she wished to repudiate the agreement and to sue on the original deed. In my view, it would be inequitable to allow her to do so. I think that the county court judge came to a right conclusion in law, and that this appeal should be dismissed.

ACTON, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Vizard, Oldham, Crowder & Cash*; *Windsor & Brown.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

WATT *v.* LONGSDON

[Court of Appeal (Scrutton, Greer and Russell, L.JJ.), June 25, 26, 27, 28, July 23, 1929]

[Reported [1930] 1 K.B. 130; 98 L.J.K.B. 711; 142 L.T. 4; 45 T.L.R. 619; 73 Sol. Jo. 544]

Libel—Privilege—Qualified privilege—Privileged occasion—Need of mutual interest and duty—Communication to business associates—Communication to wife regarding husband.

The plaintiff and the defendant were directors of a company of which S. was chairman and B. a manager abroad. In May, 1928, the defendant received from B. a letter stating that the plaintiff, while abroad, had behaved dishonestly towards his creditors and had had immoral relations with a female servant. On May 5 the defendant, without making further inquiries, showed B.'s letter to S., and on the same day he wrote to B. saying he had long suspected the plaintiff of immorality and asked for further information. Without waiting for this information, on May 12 the defendant sent B.'s letter to the plaintiff's wife who had been in England during the relevant period. The plaintiff claimed from the defendant damages for the libels which he alleged the defendant had published to S., to B., and to the plaintiff's wife.

Held: to constitute a privileged occasion it was not sufficient that the person to whom a defamatory statement was made had an interest which caused him to be a proper recipient of the statement if the party making the statement had no legal, moral or social duty to make the statement to the recipient; except in the case of communications based on common interest there must

be either an interest in the person receiving the statement and a duty to communicate in the person making it or an interest to be protected in the person making the statement and a duty in the recipient to protect that interest; a "moral or social duty" in this connection meant a duty recognised by English people of ordinary intelligence and moral principle, but not enforceable by any legal proceeding; there was a duty on the defendant to communicate B.'s letter to S. and the defendant had a common interest with B. when he wrote to him on May 12 and asked for further information, which made the occasions of those communications privileged, but there was no duty on the defendant to communicate the contents of B.'s letter to the plaintiff's wife, and, therefore, the occasion of that communication was not privileged.

Per SCRUTTON, L.J.: It is impossible to say that a stranger or a friend is always under a moral or social duty to communicate to husband or wife information he has received as to the conduct of the other party to the marriage. It is equally impossible to say that he is never under such a duty. It must depend on the circumstances of each case, the nature of the information, and the relation of speaker and recipient, the judge being much influenced by the consideration that, as a general rule, it is not desirable for anyone, even a mother-in-law, to interfere in the affairs of man and wife.

Observations on proof of malice.

Libel—Privilege—Qualified privilege—Privileged occasion—Question for judge—Determination of facts by jury.

Per GREER, L.J.: It is well settled that whether an occasion be privileged or not is a question for the judge, but he may ask the jury to determine any particular facts which are in dispute.

Notes. Considered: *Braddock* v. *Bevins*, [1948] 1 All E.R. 450. Referred to: *Ley* v. *Hamilton* (1934), 151 L.T. 360; *Phelps* v. *Kemsley* (1942), 168 L.T. 18; *Winstanley* v. *Bampton*, [1943] 1 All E.R. 661.

As to qualified privilege, see 24 HALSBURY'S LAWS (3rd Edn.) 54 et seq.; and for cases see 32 DIGEST 112 et seq.

Cases referred to:

(1) *Coxhead* v. *Richards* (1846), 2 C.B. 569; 15 L.J.C.P. 278; 10 Jur. 984; 135 E.R. 1069; 32 Digest 122, *1539*.

(2) *Amann* v. *Damm* (1860), 8 C.B.N.S. 597; 29 L.J.C.P. 313; 2 L.T. 322; 7 Jur.N.S. 47; 8 W.R. 470; 141 E.R. 1300; 32 Digest 31, *229*.

(3) *Davies* v. *Snead* (1870), L.R. 5 Q.B. 608; 39 L.J.Q.B. 202; 23 L.T. 126, 609; 34 J.P. 693; 32 Digest 114, *1455*.

(4) *Whiteley* v. *Adams* (1863), 15 C.B.N.S. 392; 3 New Rep. 126; 33 L.J.C.P. 89; 9 L.T. 483; 10 Jur.N.S. 470; 12 W.R. 153; 143 E.R. 838; 32 Digest 130, *1615*.

(5) *Stuart* v. *Bell*, [1891] 2 Q.B. 341; 60 L.J.Q.B. 577; 64 L.T. 633; 39 W.R. 612; 7 T.L.R. 502, C.A.; 32 Digest 122, *1545*.

(6) *Adam* v. *Ward*, [1917] A.C. 309; 86 L.J.K.B. 849; 117 L.T. 34; 33 T.L.R. 277, H.L.; 32 Digest 129, *1608*.

(7) *Toogood* v. *Spyring* (1834), 1 Cr.M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, *1489*.

(8) *Cockayne* v. *Hodgkisson* (1833), 5 C. & P. 543; 32 Digest 118, *1500*.

(9) *Bennett* v. *Deacon* (1846), 2 C.B. 628; 15 L.J.C.P. 289; 135 E.R. 1093; 32 Digest 132, *1626*.

(10) *Harrison* v. *Bush* (1856), 5 E. & B. 344; 3 C.L.R. 1240; 25 L.J.Q.B. 25; 25 L.T.O.S. 194; 20 J.P. 147; 1 Jur.N.S. 846; 3 W.R. 474; 119 E.R. 509; 32 Digest 123, *1550*.

(11) *Pullman* v. *Hill & Co.*, [1891] 1 Q.B. 524; 60 L.J.Q.B. 299; 64 L.T. 691; 39 W.R. 263; 7 T.L.R. 173, C.A.; 32 Digest 76, *1069*.

(12) *Macintosh* v. *Dun*, [1908] A.C. 390; 77 L.J.P.C. 113; 99 L.T. 64; 24 T.L.R. 705, P.C.; 32 Digest 120, *1520*.

(13) *London Association for Protection of Trade* v. *Greenlands, Ltd.*, [1916] 2 A.C. 15; 85 L.J.K.B. 698; 114 L.T. 434; 32 T.L.R. 281; 60 Sol. Jo. 272, H.L.; 32 Digest 120, *1521*.

(14) *Kitson* v. *Playfair* (1896), Times, Mar. 28; 22 Digest (Repl.) 413, *4447*.

(15) *Blackham* v. *Pugh* (1846), 2 C.B. 611; 15 L.J.C.P. 290; 135 E.R. 1086; 32 Digest 133, *1642*.

(16) *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q.B. 156; 64 L.J.Q.B. 681; 72 L.T. 525; 59 J.P. 371; 11 T.L.R. 332; 14 R. 587, C.A.; affirmed, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 32 Digest 154, *1868*.

Appeal from an order of HORRIDGE, J., on the trial of an action with a special jury.

The plaintiff, William Wallace Watt, claimed to recover from the defendant, Robert Cyril Longsdon, damages for a libel which he alleged had been published by the defendant to the plaintiff's wife and others. HORRIDGE, J., held that the publications were privileged, and that there was no evidence of malice fit to be left to the jury. He, accordingly, gave judgment for the defendant. The plaintiff appealed.

T. J. O'Connor, K.C., and *G. P. Harvey* for the plaintiff.

Stuart Bevan, K.C., and *Kenelm Preedy* for the defendant.

Cur. adv. vult.

July 23. The following judgments were read.

SCRUTTON, L.J.—This case raises, among other questions, the extremely difficult legal problem, equally important in its social results, with regard to the circumstances, if any, in which a person will be justified in giving to one partner to a marriage information which that person honestly believes to be correct, but which is, in fact, untrue, about the matrimonial delinquencies of the other party to the marriage. The question becomes more difficult if the answer in law turns on the existence, or non-existence, of a social or moral duty, a question which the judge is to determine, without any evidence, by the light of his own knowledge of the world, and his own views on social morality, a subject-matter on which views vary from age to age, from country to country, and even from man to man.

The Scottish Petroleum Co., which carried on business, among other places, in Morocco, had in Casablanca, a port in Morocco, a manager named Browne, and a managing director named Watt. The company had in England a chairman named Singer, who held a very large proportion of shares in the company, and also another director, Longsdon, a young man under thirty years of age. The latter had been in Morocco in business and in friendly relations with Watt and Browne, and was a friend of Mrs. Watt, who had nursed him in an illness. The company went into voluntary liquidation in November, 1927, and Longsdon was appointed liquidator. In April, 1928, Mrs. Watt was in England, and her husband in Casablanca. It is not clear, and there is no evidence, what the effect of the liquidation had been on the actual employment of Watt and Browne, that is, whether they, or either of them, was still in receipt of salary. Watt's directorship was, under the Companies Acts, in a state of suspended animation. In these circumstances, Longsdon, in England, received a letter at the beginning of May from Browne in Casablanca stating that Watt had left for Lisbon to look for a job, that he had left a bill for £88 for whisky unpaid, and that he had been for two months in immoral relations with his housemaid, who was now publicly raising claims against him for money matters. The woman was described as an old woman, stone deaf, almost blind, and with dyed hair. A number of details were given which Browne said Watt's cook had corroborated. The information was mixed up with an allegation that Watt had been scheming to compromise or seduce Mrs. Browne. The letter concluded:

"From a letter shown to me by Mr. Watt I know how bitterly disappointed Mrs. Watt is, and how very much troubled she is. It would therefore perhaps be better not to show her this letter as it could only increase most terribly her own feelings in regard to her husband. These awful facts might be the cause of a breakdown to her, and I think she has enough to cope with at present. Mr. Singer, however, should perhaps know."

On May 5 Longsdon, without making inquiries, sent Browne's letter on to Singer, his chairman.

At the trial Watt's counsel put in Longsdon's answer to interrogatory 5, viz., that he believed the statements in the letter to be true. On May 5 Longsdon wrote a long letter to Browne, in which he said that he had long suspected Watt's immorality, but had no proof, that he thought it wicked and cruel that Mrs. Watt, a very old friend of the writer's, should be in the dark when Watt might return to her—did not Browne agree?, that he (Longsdon) would not speak until he had a sworn statement in his possession, "and only with such proof would I speak, for an interferer between husband and wife nearly always comes off the worst." Could Browne get a sworn statement? "It may even be necessary for you to bribe the woman to do such, and if only a matter of a few hundred francs I will pay it, and, of course, the legal expenses." Longsdon's letter describes the woman who was to make this sworn statement as "a prostitute all her life," a description not contained in Browne's letter. Watt returned to England in May, and, without waiting for the sworn statement, on May 12 Longsdon sent the letter to Mrs. Watt. Mr. and Mrs. Watt separated, and Mrs. Watt instituted proceedings for divorce, which, apparently, are still pending. Mr. Watt then instituted proceedings against Longsdon for libel, namely: (i) the publication of Browne's letter to Singer; (ii) the publication of the same letter to Mrs. Watt; (iii) Longsdon's letter of May 5 to Browne. The claim alleged: "The plaintiff, the defendant and one E. A. Browne, were at all material times in the employment in Morocco of the Scottish Petroleum Co., now in liquidation, of which one W. M. G. Singer was chairman and had a controlling interest therein." The defence admitted those facts. The plaintiff also put in at the trial the defendant's answers to interrogatories which showed that his only information on the subject was derived from Browne's letter, that he made no further inquiries, and that he honestly believed that all the statements in Browne's letter, and in the defendant's letter of May 12, were true. The defendant did not justify, but he pleaded privilege. The case was tried before HORRIDGE, J., and a jury. The learned judge held all three publications to be privileged, and that there was no evidence of malice fit to be left to the jury. He, therefore, entered judgment for the defendant. The plaintiff appeals.

The learned judge appears to have taken the view that the authorities justify him in holding that if there is an obvious interest in the person to whom a communication is made which causes him to be a proper recipient of a statement, even if the party making the communication had no moral or social duty to the party to whom the communication is made, the occasion is privileged. He derives this from the opinions of TINDAL, C.J., and ERLE, J., in *Coxhead* v. *Richards* (1), as approved by WILLES, J., in *Amann* v. *Damm* (2), and by BLACKBURN, J., in *Davies* v. *Snead* (3), and especially from the approval of these decisions, and the citation of the judgment of ERLE, C.J., in *Whiteley* v. *Adams* (4), by LINDLEY, L.J., in *Stuart* v. *Bell* (5). He has, therefore, found in the present case that the occasion of each of the three communications, to Singer, to the wife, and to Browne, was privileged, and that there is no evidence of excess of communication or of malice to be left to the jury. "No nice scales should be used," as LORD DUNEDIN said in *Adam* v. *Ward* (6).

By the law of England there are occasions on which a person may make defamatory statements about another which are untrue without incurring any legal liability for his statements. These occasions are called privileged occasions. A reason frequently given for this privilege is that the allegation that the speaker has

"unlawfully and maliciously published" is displaced by proof that the speaker had either a duty or an interest to publish, such duty or interest conferring the privilege. But communications made on these occasions may lose their privilege. (i) They may exceed the privilege of the occasion by going beyond the limits of the duty or interest, or (ii) they may be published with express malice, so that the occasion is not being legitimately used, but abused. A very careful discussion of the way in which these two grounds of loss of privilege should be considered will be found in LORD DUNEDIN'S judgment in *Adam* v. *Ward* (6). The classical definition of "privileged occasions" is that of PARKE, B., in *Toogood* v. *Spyring* (7), a case where the tenant of a farm complained to the agent of the landlord, who had sent a workman to do repairs, that the workman had broken into the tenant's cellar, got drunk on the tenant's cider, and spoilt the work he was sent to do. The workman sued the tenant. PARKE, B., gave the explanation of privileged occasions (1 Cr.M. & R. at p. 193):

> "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

It will be seen that the learned judge requires: (i) A public or private duty to communicate, whether legal or moral; (ii) "fairly warranted by any reasonable occasion or exigency"; (iii) a statement in the conduct of his own affairs where his interest is concerned. PARKE, B., had given several other definitions in slightly varying terms. For instance, in *Cockayne* v. *Hodgkisson* (8) (5 C. & P. at p. 548) he had directed the jury,

> "Where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication."

This adds to the protection of his own interest spoken of in *Toogood* v. *Spyring* (7), the protection of the interests of another where his situation requires him to do so. This, I think, involves that his "situation" imposes on him a legal or moral duty. The question whether the occasion was privileged is for the judge, and so far as "duty" is concerned, the question is: Was there a duty, legal, moral or social, to communicate? As to legal duty, the judge should have no difficulty; the judge should know the law. But as to moral or social duties of imperfect obligation, the task is far more troublesome. The judge had no evidence as to the view which the community takes of moral or social duties. All the help the Court of Appeal can give him is contained in LINDLEY, L.J.'s judgment in *Stuart* v. *Bell* (5) ([1891] 2 Q.B. at p. 351):

> "The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings whether civil or criminal. My own conviction is that all, or at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff."

Is the judge merely to give his own view of moral and social duty, though he thinks a considerable portion of the community hold a different opinion, or is he to endeavour to ascertain what view "the great mass of right-minded men" would take? It is not surprising that with such a standard both judges and text-writers treat the matter as one of great difficulty in which no definite line can be drawn. I refer to the judicial recognition of the difficulty cited in FRASER ON LIBEL (6th Edn.), pp. 183 to 186; ODGER ON LIBEL (6th Edn.), p. 220; and GATLEY ON LIBEL AND SLANDER (2nd Edn.), p. 252.

A conspicuous instance of the difficulties which arise when judges have to determine the existence of duties, not legal, but moral or social, by the inner light of their own conscience and judgment, and knowledge of the world, is to be found in *Coxhead* v. *Richards* (1). A correct appreciation of what was the difference of opinion in that case is, in my opinion, of great importance in the decision of the present case. The short facts were that Cass, the mate of a ship, wrote to Richards, an intimate friend of his, a letter stating that on a voyage from the Channel to Wales, which was going to continue to eastern ports, the captain, Coxhead, had by his drunkenness endangered the safety of the ship and the lives of the crew, and Cass asked Richards' advice what he should do in view of the risk of repetition of this danger on the voyage to the east. Richards, after consulting "an elder brother of the Trinity House, and an eminent shipowner," sent this letter to Ward, the owner. Richards did not know Ward, and had no interest in the ship. The owner dismissed the captain, who thereupon brought an action against Richards. The judge at the trial directed the jury, if they should think that the communication was strictly honest, and made solely in the execution of what he believed to be a duty, to find for the defendant. They did so, while finding that the plea of justification failed. The plaintiff then moved for a new trial, on which motion the court, after two hearings, was equally divided. It is not very clear whether the judges differed on a general principle, or on its application to the facts of the case. I understand TINDAL, C.J., to have taken the view that if a man has information materially affecting the interests of another, and honestly communicates it to that other, he is protected, though he has no personal interest in the subject-matter, and that his protection arises from (2 C.B. at p. 596) "the various social duties by which men are bound to each other," and that it was the duty of the defendant to communicate this information to the owner. ERLE, J., appears to put the matter on (2 C.B. at p. 608) "information given to prevent damage from misconduct," "the importance of the information to the interest of the receiver," and says that a person having such information is justified in communicating it to the person interested, though the speaker did not stand in any relation to the recipient, and was a volunteer. He does not expressly refer to any social duty. On the other hand, COLTMAN, J., and CRESSWELL, J., both appear to me to hold that in any such circumstances there was no moral duty; that any tendency that way was counterbalanced by the moral duty not to slander your neighbour. CRESSWELL, J., says the same thing (2 C.B. at p. 604).

In the subsequent case of *Bennett* v. *Deacon* (9) the same four judges repeated the same division of opinion, where Deacon, a man to whom the plaintiff owed £25, volunteered to a tradesman who was about to deal with the plaintiff the statement that unless the tradesman was paid ready money he would lose the goods, and his money, or price, for he (Deacon) was about to seize the goods of the plaintiff for debt. I think it is clear that TINDAL, C.J., and ERLE, J., thought that a volunteer, with no personal interest, would be protected in giving information apparently material to the interest of the recipient, and that COLTMAN, J., and CRESSWELL, J., thought he would not. How far either set of judges meant to lay down a general principle applicable to all such cases is not very clear; they certainly differed in its application to the particular facts of those cases. I myself should have thought, and I think most of the judges who have considered the case, as, for instance, WILLES, J., in *Amann* v. *Damm* (2) and LINDLEY, L.J., in *Stuart* v. *Bell* (5) did think, that on the particular facts of *Coxhead* v. *Richards* (1), Richards, if he

believed the statements in the letter to be true, had a moral duty to forward them to the shipowner, who had, obviously, a vital interest in them, if they were true. A

In 1855 in *Harrison* v. *Bush* (10) LORD CAMPBELL, giving the judgment of the Court of Queen's Bench, accepted a principle stated thus (5 E. & B. at p. 348):

> "A communication made bonâ fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable." B

This is the first of a series of statements that both parties, the writer and the recipient, must have a corresponding interest or duty. LORD ESHER, M.R., says in *Pullman* v. *Hill & Co.* (11) ([1891] 1 Q.B. at p. 528): C

> "An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged."

LORD ATKINSON, in *Adam* v. *Ward* (6), expresses it thus ([1917] A.C. at p. 334): D

> "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

With slight modifications in particular circumstances, this appears to me to be well-established law, but, except in the case of communications based on common interest, the principle is that there must be either interest in the recipient, and a duty to communicate in the speaker, or an interest to be protected in the speaker, and a duty to protect it in the recipient. Except in the case of common interest justifying intercommunication, the correspondence must be between duty and interest; there may, in the common interest cases, be also a common or reciprocal duty. It is not every interest which will create a duty in a stranger or volunteer. This appears to fit in with the two statements of PARKE, B., already referred to, and with the language of ERLE, C.J., in *Whiteley* v. *Adams* (4), that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it. This is approved by LINDLEY, L.J., in *Stuart* v. *Bell* (5), but I think should be expanded into "either (i) a duty to communicate information believed to be true to a person who has a material interest in receiving the information, or (ii) an interest in the speaker to be protected by communicating information, if true, relevant to that interest, to a person honestly believed to have a duty to protect that interest, or (iii) a common interest and reciprocal duty in the subject-matter of the communication between speaker and recipient." If *Macintosh* v. *Dun* (12) is rightly decided, the duty to communicate does not arise where the communication is made in pursuance of a contract made for the private gain of the speaker. But after the decision of the House of Lords in *London Association for Protection of Trade* v. *Greenlands, Ltd.* (13), *Macintosh* v. *Dun* (12) must not be relied on too strongly. Lastly, in *Stuart* v. *Bell* (5), the division of judges in *Coxhead* v. *Richards* (1) was repeated. Stanley, the explorer, and his valet Stuart, were staying with the mayor of Newcastle, Bell. The Edinburgh police made a very carefully worded communication to the Newcastle police that there had been a robbery in Edinburgh at an hotel where Stuart was staying, and it might be well to make very careful and cautious inquiry into the matter. The Newcastle police showed the letter to the mayor, who, after consideration, showed it to Stanley, who dismissed Stuart. Stuart sued the mayor. LINDLEY, L.J., and KAY, L.J., held that the mayor had a moral duty to communicate, and Stanley a material interest to receive; LOPES, L.J., held that, in the circumstances, there was no moral duty to communicate, though, in some E F G H I

A circumstances, there might be such a duty in a host towards a guest. I myself should have agreed with the majority, but the difference of opinion between such experienced judges shows the difficulty of the question.

In my opinion, HORRIDGE, J., went too far in holding that there could be a privileged occasion on the ground of interest in the recipient without any duty to communicate on the part of the person making the communication. But that does B not settle the question, for it is necessary to consider, in the present case, whether there was, as to each communication, a duty to communicate, and an interest in the recipient. First, as to the communication between Longsdon and Singer, I think the case must proceed on the admission that at all material times Watt, Longsdon, and Browne were in the employment of the same company, and the evidence of the answer to the interrogatory put in by the plaintiff that Longsdon C honestly believed the statements in Browne's letter. In my view, on these facts, there was a duty, moral and business, on Longsdon to communicate the letter to Singer, the chairman of his company, who, apart from questions of present employment, might be asked by Watt for a testimonial to a future employer. Equally, I think Longsdon receiving the letter from Browne, might discuss the matter with him, and ask for further information, on the ground of a common interest in the D affairs of the company, and to obtain further information for his chairman. I should, therefore, agree with the view of HORRIDGE, J., that these two occasions were privileged, though for different reasons. HORRIDGE, J., further held that there was no evidence of malice fit to be left to the jury, and while I think some of Longsdon's actions and language in this respect was unfortunate, as the plaintiff has put in the answer that Longsdon honestly believed the truth of the statements E in Browne's and his own letters, like LORD DUNEDIN in *Adam* v. *Ward* (6), I should not try excess with too nice scales, and I do not dissent from his view as to malice. As to the communications to Singer and Browne, in my opinion, the appeal should fail, but, as both my brethren take the view that there was evidence of malice which should be left to the jury, there must, of course, be a new trial as to the claim on these two publications.

F The communication to Mrs. Watt stands on a different footing. I have no intention of writing an exhaustive treatise on the circumstances when a stranger or a friend should communicate to husband or wife information he receives as to the conduct of the other party to the marriage. I am clear that it is impossible to say that he is always under a moral or social duty to do so; it is equally impossible G to say that he is never under such a duty. It must depend on the circumstances of each case, the nature of the information, and the relation of speaker and recipient. It cannot, on the one hand, be the duty even of a friend to communicate all the gossip the friend hears at men's clubs or women's bridge parties to one of the spouses affected. On the other hand, most men would hold that it was the moral duty of a doctor who attended his sister-in-law, and believed her to be H suffering from a miscarriage, for which an absent husband could not be responsible, to communicate that fact to his wife and the husband. HAWKINS, J., in *Kitson* v. *Playfair* (14) did not have to rule on this point, because of the finding of the jury as to malice, and I think postponed ruling as long as he could. If this is so, the decision must turn on the circumstances of each case, the judge being much influenced by the consideration that, as a general rule, it is not desirable for anyone, I even a mother-in-law, to interfere in the affairs of man and wife. Using the best judgment I can in the difficult matter, I have come to the conclusion that there was not a moral or social duty in Longsdon to make this communication to Mrs. Watt such as to make the occasion privileged, and that there must be a new trial so far as it relates to the claim for publication of a libel to Mrs. Watt. The communications to Singer and Browne being made on a privileged occasion, there must be a new trial of the issue as to malice defeating the privilege. There must also be a new trial of the complaint as to publication to Mrs. Watt, the occasion being held not to be privileged. The plaintiff must have the costs of this appeal; the

costs of the first trial must abide the result of the second trial, the issues being separated. A

GREER, L.J.—The question involved in this appeal is one that, in my judgment, would be easy to answer if it were not for the difficulties occasioned by some of the earlier decisions on the subject of privileged occasions in the law of libel. Notwithstanding the serious difference of judicial opinion in *Coxhead* v. *Richards* (1), *Blackham* v. *Pugh* (15), and *Bennett* v. *Deacon* (9), the rule of law we have to apply in the present case has been finally accepted in the form stated by LORD ATKINSON in *Adam* v. *Ward* (6) ([1917] A.C. at p. 334): B

> "A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential." C

The language of LORD ATKINSON is similar to that which was used by LORD CAMPBELL, C.J., in *Harrison* v. *Bush* (10) (5 E. & B. at p. 348):

> "A communication made bonâ fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty." D

This statement of the law is in accord with what was said by PARKE, B., in *Toogood* v. *Spyring* (7) (1 Cr.M & R. at p. 193):

> "In general, an action lies for malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters, where his interest is concerned." E

It is suggested, however, on the authority of WILLES, J.'s approval of the decision of TINDAL, C.J., and ERLE, J., in *Coxhead* v. *Richards* (1), in *Amann* v. *Damm* (2), and the similar approval of BLACKBURN, J., in *Davies* v. *Snead* (3), and of the judgment of LINDLEY, L.J., in *Stuart* v. *Bell* (5), that it is unnecessary that there should be any duty in the person making the communication, and it is sufficient if there is either a duty on his part or an interest in the person receiving the communication. It is clear, however, that what was said by WILLES, J., in *Amann* v. *Damm* (2) was merely obiter, and that he was not considering the question whether interest in the recipient was sufficient to establish a privileged occasion; and the observations relied on in the present case by HORRIDGE, J., in the judgment of BLACKBURN, J., in *Davies* v. *Snead* (3), do not support the proposition for which they were cited. BLACKBURN, J., is, in effect, treating the judgments of TINDAL, C.J., and ERLE, J., as based on the duty of the defendant to make the communication in question. The results of those two judgments, afterwards followed in *Blackham* v. *Pugh* (15), he points out (L.R. 5 Q.B. at p. 611): F G H

> ". . . is, that where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he bonâ fide and without malice does tell them it is a privileged communication." I

These words clearly indicate that the privileged occasion is based on a duty in the person making the communication to do what is right in the interests of society. It may be, of course, that the interest of the person receiving the communication is of such a character as by its very nature to create a social duty in another in the circumstances to make the communication that he does in fact make. In such a case the cause of the privileged occasion is not merely the interest of the recipient, it is that interest plus the corresponding social duty which arises, in the circumstances of the case, by reason of the nature of the interest. It is, however,

unfortunate that LINDLEY, L.J., in *Stuart* v. *Bell* (5) uses the words quoted by HORRIDGE, J., which appear to indicate that the occasion of privilege may arise either out of the moral or social duty of the person making the communication, or out of the interest of the person receiving it. It is quite clear, however, that the lord justice and the other members of the Court of Appeal did not decide the case on the ground that the existence of the recipient's interest was sufficient in itself to give rise to privilege. In his judgment LINDLEY, L.J., cites with approval the following words from PARKE, B.'s judgment in *Toogood* v. *Spyring* (7) (1 Cr.M. & R. at p. 193):

> "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society."

These words seem to me to indicate that there must be the warrant of some social duty created by the "reasonable occasion or exigency."

Assuming that the defendant has no common interest with the person to whom the libel is published, and it is necessary that there should be some moral or social duty to make the communication, what is the test by which duty is to be determined? This may be a question which is very difficult to answer. Opinions may easily differ as to whether the circumstances are such as to make the communication a moral or social duty. Similar questions of degree arise in many cases, and are left to the determination of a jury. In negligence cases, what the average reasonably careful man would do is left to be determined by a jury whenever it is a question in which opinions may differ. But it is well settled that whether an occasion be privileged or not is a question for the judge, though he may ask the jury to determine any particular facts that are in dispute. The only guide one can get from previous decisions is to be obtained from the judgments of the Court of Appeal in *Stuart* v. *Bell* (5). There, LINDLEY, L.J., says ([1891] 2 Q.B. at p. 350):

> "I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal."

Would the great mass of right-minded men in the position of the defendant have considered it their duty, in the circumstances, to make the communication? KAY, L.J., says (ibid. at p. 359): "The true mode of judging upon the question is to put oneself as far as possible in the position of the defendant." I think these tests are as near as one can reasonably get to the tests to be applied in forming an opinion on the question whether a privileged occasion arising out of a moral or social duty has, or has not, arisen.

In my judgment, no right-minded man in the position of the defendant, a friend of the plaintiff and of his wife, would have thought it right to communicate the horrible accusations contained in Mr. Browne's letter to the plaintiff's wife. The information came to Mr. Browne from a very doubtful source, and, in my judgment, no reasonably right-minded person could think it his duty, without obtaining some corroboration of the story, and without first communicating with the plaintiff, to pass on these outrageous charges of marital infidelity of a gross kind, and drunkenness and dishonesty, to the plaintiff's wife. As regards the publication to the plaintiff's wife, the occasion was not privileged, and it is unnecessary to consider whether there was evidence of express malice. As regards the publication to the chairman of the company, who owned nearly all the shares, and to Mr. Browne, I think on the facts as pleaded there was, between the defendant and the recipients of the letters, a common interest which would make the occasion privileged, but I also think there is intrinsic evidence in the letter to Browne, and evidence in the hasty and unjustifiable communication to the plaintiff's wife, that would be sufficient to entitle the plaintiff to ask for a verdict on these publications on the ground of express malice. The plaintiff's counsel put in as part of his case the defendant's answers to interrogatories Nos. 5 and 8, which were to the effect that the defendant believed all the matters alleged in Browne's letter, which he published to the

plaintiff's wife and to Mr. Singer, to be true. It was suggested that this belief made it impossible to say that the publication was malicious. I do not agree with this view. Malice is a state of mind: see the judgments in *Nevill* v. *Fine Arts and General Insurance Co.* (16) in the Court of Appeal. A man may believe in the truth of a defamatory statement, and yet when he publishes it will be reckless whether his belief be well founded or not. His motive for publishing a libel on a privileged occasion may be an improper one, even though he believes the statement to be true. He may be moved by hatred or dislike, or a desire to injure the subject of the libel, and may be using the occasion for that purpose, and if he is doing so the publication will be maliciously made, even though he may believe the defamatory statements to be true. I agree with the statement of the law contained in BLAKE ODGERS' monumental book on LIBEL AND SLANDER (5th Edn.) at p. 354. It is as follows:

> "And even though it is clear that the defendant believed in the truth of the communication he made, and was acting under a sense of duty on a privileged occasion, the plaintiff may still rely upon the words employed, and the manner and mode of publication, as evidence of malice. An angry man may often be led away into exaggerated or unwarrantable expressions; or he may forget where and in whose presence he is speaking, or how and to whom his writing may be published. Clearly this is often but faint evidence of malice; the jury will generally pardon a slight excess of righteous zeal. In some cases, however (which we will proceed to examine), such excess has secured the plaintiff a verdict. But if the jury find there was no malice in the defendant such excess becomes immaterial."

I think the defendant's conduct in disseminating the gross charges that he did to the plaintiff's wife, and to Mr. Singer, and repeating, and to some extent adding to them, in his letter to Mr. Browne, and his offer to provide funds for procuring the evidence of the two women in Casablanca, affords some evidence of malice which ought to have been left to the jury. It is not for us to weigh the evidence. It will be for the jury to decide whether they are satisfied that in publishing the libels the defendant was, in fact, giving effect to his malicious, or otherwise improper, feelings towards the plaintiff, and was not merely using the occasion for the protection of the interests of himself and his two correspondents. For these reasons I think the appeal should be allowed with costs, a new trial ordered, and the costs of the former trial should abide the event of the new trial.

RUSSELL, L.J.—The plaintiff complains of publication by the defendant of defamatory matter on three occasions, namely, (i) publication to the plaintiff's wife of the letter of April 30, 1928, from Browne to the defendant; (ii) publication to Singer of the same letter; and (iii) publication to Browne of the defendant's own letter of May 5, 1928. There is no plea of justification. The substantial defence as to each publication is that the letter was published without malice, and in the belief that the matters contained therein were true, and on a privileged occasion, and in such circumstances as to make it a privileged publication.

The plaintiff put in evidence the defendant's answers to the fifth and eighth interrogatories; the appeal, accordingly, falls to be decided upon the footing: (i) That the defamatory matter contained in the letters is all false, and (ii) that the defendant believed it all to be true. HORRIDGE, J., decided that each publication was made on a privileged occasion, and that there was no evidence of malice to go to the jury. He, accordingly, withdrew the case from the jury, and entered judgment for the defendant. The grounds of the decision as to privilege were as follows. As regards the publication to Singer, he held that Singer, as director and largest shareholder of the Scottish Petroleum Co., and the defendant, as director and liquidator of the company, had common interests in the communications regarding the conduct of the plaintiff while in the employ of the company. As regards the publication to Browne, he held that the defendant was entitled to apply to Browne for further particulars, and that he and Browne had a common interest

A in communications relating to the conduct of the plaintiff while in the employ of the company. He held, therefore, that the publication to Singer, and the publication to Browne, were made on privileged occasions. As regards the publication to the plaintiff's wife, he felt more difficulty. As I understand the language used by the learned judge, the question which he considered and decided was this: Is it sufficient to constitute privilege that the recipient of the communication has an B interest in receiving it, even if the person making the communication has no interest in making it, or duty to make it, or is it necessary to constitute privilege that reciprocity should exist, so that there should be both an interest or duty in the person making the communication to make it and a duty or interest in the receiver to receive it? The former he regards as the view of TINDAL, C.J., and ERLE, J., in *Coxhead* v. *Richards* (1); the latter as the view of COLTMAN, J., and C CRESSWELL, J., in the same case. After referring to authorities, which he regards as supporting the former view, he concludes his judgment as to privilege thus:

> "I think the right view is that, if there is an obvious interest in the person to whom a communication is made which causes him to be a proper recipient of the statement, if that statement is honestly made, then the statement is D privileged. Therefore, I hold that on this occasion the statement to the wife, which consisted in producing the letter, was a statement made on a privileged occasion. Therefore, I think all the communications—the communications to Mr. Singer, the communication to the wife, and the communication to Browne —were all made on privileged occasions."

For myself, I am not prepared to assent to this view. In my opinion, the true E result of the authorities is as stated by LORD ATKINSON in *Adam* v. *Ward* (6) ([1917] A.C. at p. 334):

> "A privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a F corresponding interest or duty to receive it. This reciprocity is essential."

In view of the detailed examination of the authorities contained in the judgments of SCRUTTON and GREER, L.JJ., I am content to express my view without further reasoning. That being my opinion, I now consider how the result of the authorities affects the decision in the present case. As regards the publication to Singer, we must act upon the view, common to both sides of the pleadings, that at all material G times the plaintiff, the defendant, and Browne were in the employ of the Scottish Petroleum Co. In these circumstances, and the defendant believing the truth of the libels, there was a duty on the defendant to make the communication to Singer, and an interest in Singer to receive it; hence was the occasion a privileged occasion. As regards the defendant's letter to Browne, this must also, I think, be held to have been written on a privileged occasion; the defendant having a duty to com- H municate to Singer, had an interest in asking Browne for further information, and so an interest in making the communication which Browne had a duty to receive. Accordingly, I agree with the learned judge that, as regards these two publications, the occasions of them were privileged occasions. In regard to the question of evidence of malice, I have felt more difficulty in agreeing with the learned judge. I would have thought that the conduct of the defendant in making his hasty I communication to the wife, and his subsequent conduct, and the language used by him in his letter to Browne, was some evidence to go to the jury. No doubt the necessity of accepting the view that the defendant did, in fact, believe the truth of all the defamatory matters alleged diminishes the weight of the other matters which might be relied upon by the jury as indicating express malice. The question should, however, in my opinion, have been left to them to consider and determine. As regards the communication to the plaintiff's wife, I am unable to say that, in the circumstances of the present case, there existed any duty on the defendant to communicate to the plaintiff's wife Browne's letter of April 30, 1928. The question

whether any duty lies on a third party to communicate to one spouse the delinquencies of the other can never be answered by reference to a fixed test or rule. The answer in each case must always depend upon the actual facts of that case. After carefully considering the proved facts of the present case I agree with the other members of the court that the publication made by the defendant to the plaintiff's wife of Browne's letter was not made upon a privileged occasion. The appeal should be allowed, and a new trial ordered.

Appeal allowed.

Solicitors: *Smith, Rundell, Dods & Bockett*; *Church, Rendell, Bird & Co.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

VANDERPANT *v.* MAYFAIR HOTEL CO., LTD.

[Chancery Division (Luxmoore, J.), July 10, 11, 12, 15, 16, 17, 18, 19, 29, 1929]

[Reported [1930] 1 Ch. 138; 99 L.J.Ch. 84; 142 L.T. 198; 94 J.P. 23; 27 L.G.R. 752]

Nuisance—Highway—Obstruction—Action by private individual—Obstruction of access to premises—Need to prove particular, direct, and substantial damage —Question of degree.

Speaking generally, the public have the right of free and unobstructed passage over the whole of a public highway. The owner of premises abutting on a public highway is entitled to make a reasonable use of that highway for the purpose of obtaining access to his own premises and of loading and unloading goods at his premises. But the right of the public is a higher right than that of the occupier, and if the user by the occupier, though reasonable so far as the particular business carried on by him is concerned, in fact causes a serious obstruction to the public, then the private rights of the occupier must yield to the public rights, and the court will interfere by restraining the continuance of the obstruction. In every case the answer to the question whether the public right has been interfered with must necessarily depend on the extent of the user. In other words, the question is always one of degree. In general the law as so stated applies to a suit by a private individual as it does to a suit brought by the Attorney-General on behalf of the public, but the private individual who seeks to restrain the obstruction of a public highway must, in order to maintain his suit, prove that he has sustained particular damage other than and beyond the general inconvenience and injury suffered by the public, and, moreover, he must prove that the particular damage which he has sustained is direct and substantial.

Nuisance—Noise—Interference with comfort—Relevance of locality—Defence to action—Best known means taken to prevent noise—Exercise of trade in reasonable and proper manner.

Apart from any right which may have been acquired against him by contract, grant, or prescription, every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions

obtaining among English people. It is also necessary to take into account the circumstances and character of the locality in which the complainant is living. The making or causing of such a noise as materially interferes with the comfort of a neighbour, when judged by the standard just mentioned, constitutes an actionable nuisance, and it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. The question of the existence of a nuisance is one of degree and depends on the circumstances of the case.

Notes. Under the London County Council (General Powers) Act, 1937, a nuisance by noise in the metropolis, which can be dealt with summarily under the Public Health (London) Act, 1936, is deemed to exist where a person makes or continues or causes to be made or continued any excessive or unreasonable or unnecessary noise which is injurious or dangerous to health.

Referred to: *Medcalf* v. *Strawbridge, Ltd.*, [1937] 2 All E.R. 393; *Newman* v. *Real Estate Debenture Corpn., Ltd., and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131.

As to nuisance by obstruction of a highway or by noise, see 19 HALSBURY'S LAWS (3rd Edn.) 270 et seq., and 24 HALSBURY'S LAWS (2nd Edn.) 41, 51; and for cases see 26 DIGEST 413 et seq., and 36 DIGEST (Repl.) 258–262.

Cases referred to:

(1) *Barber* v. *Penley*, [1893] 2 Ch. 447; 62 L.J.Ch. 623; 68 L.T. 662; 9 T.L.R. 359; 37 Sol. Jo. 355; 3 R. 489; 26 Digest 428, *1473*.

(2) *Lyons, Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631; 83 L.J.Ch. 281; 110 L.T. 284; 78 J.P. 98; 30 T.L.R. 75; 58 Sol. Jo. 97; 12 L.G.R. 194, C.A.; 26 Digest 428, *1475*.

(3) *A.-G.* v. *Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276; 69 L.J.Ch. 204; 81 L.T. 762; 48 W.R. 314; 16 T.L.R. 144; 64 J.P.Jo. 68, C.A.; 26 Digest 425, *1442*.

(4) *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 23 T.L.R. 751, P.C.; 31 Digest (Repl.) 145, *2846*.

(5) *Pwllbach Colliery Co., Ltd.* v. *Woodman*, [1915] A.C. 634; 84 L.J.K.B. 874; 113 L.T. 10; 31 T.L.R. 271, H.L.; 36 Digest (Repl.) 299, *431*.

(6) *Soltau* v. *de Held* (1851), 2 Sim.N.S. 133; 21 L.J.Ch. 153; 16 Jur. 326; 61 E.R. 291; 36 Digest (Repl.) 256, *68*.

(7) *Benjamin* v. *Storr* (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T. 362; 22 W.R. 631; 26 Digest 425, *1441*.

(8) *A.-G.* v. *W. H. Smith & Sons* (1910), 103 L.T. 96; 74 J.P. 313; 26 T.L.R. 482; 8 L.G.R. 679; 26 Digest 425, *1443*.

(9) *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch.D. 713; 46 L.J.Ch. 311; 36 L.T. 433; 41 J.P. 660; 3 Asp.M.L.C. 411; 26 Digest 426, *1447*.

(10) *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8; 42 L.J.Ch. 122; 27 L.T. 569; 37 J.P. 100; 21 W.R. 129, L.C.; 36 Digest (Repl.) 301, *462*.

(11) *Colonial Bank* v. *Cady and Williams*, *London Chartered Bank of Australia* v. *Cady and Williams* (1890), 15 App. Cas. 267; 60 L.J.Ch. 131; 63 L.T. 27; 39 W.R. 17; 6 T.L.R. 329, H.L.; 9 Digest (Repl.) 379, *2448*.

(12) *Carr* v. *London and North Western Rail. Co.* (1875), L.R. 10 C.P. 307; 44 L.J.C.P. 109; 31 L.T. 785; 39 J.P. 279; 23 W.R. 747; 21 Digest 288, *1020*.

(13) *Fritz* v. *Hobson* (1880), 14 Ch.D. 542; 49 L.J.Ch. 321, 735; 42 L.T. 225, 677; 28 W.R. 459, 722; 24 Sol. Jo. 366; 26 Digest 336, *664*.

(14) *Spencer* v. *London and Birmingham Rail. Co.* (1836), 8 Sim. 193; 1 Ry. & Cam. Cas. 159; 7 L.J.Ch. 281; 59 E.R. 77; 26 Digest 453, *1687*.

(15) *Jones* v. *Pritchard*, [1908] 1 Ch. 630; 77 L.J.Ch. 405; 98 L.T. 386; 24 T.L.R. 309; 36 Digest (Repl.) 294, *406*.

(16) *Richards* v. *Rose* (1853), 9 Exch. 218; 2 C.L.R. 311; 23 L.J.Ex. 3; 22 L.T.O.S. 104; 18 J.P. 56; 17 Jur. 1036; 156 E.R. 93; 19 Digest 42, *223*.

(17) *Hall* v. *Lund* (1863), 1 H. & C. 676; 1 New Rep. 287; 32 L.J.Ex. 113; 7 L.T. 692; 9 Jur.N.S. 205; 11 W.R. 271; 158 E.R. 1055; 19 Digest 48, *267*.

(18) *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; affirmed (1852), 19 L.T.O.S. 308, L.C.; 36 Digest (Repl.) 247, *1*.

Action by the plaintiff for an injunction to restrain the defendant company from obstructing the public highway opposite the plaintiff's house, No. 62A, Curzon Street, Mayfair, so as to cause a nuisance to him and those occupying the house, and as ancillary to that a further injunction to restrain them from so conducting their business at or in connection with the Mayfair Hotel as to induce or permit any person or persons transacting business with them at the hotel to obstruct the public highway so as to cause a nuisance to him or those occupying the house. He also sought an injunction to restrain the defendant company from causing a nuisance to him and those occupying the house by noise arising at the hotel from shouting, loud talking, or the handling of kitchen or domestic utensils, milk churns, and other articles.

The plaintiff was the owner and occupier of the premises No. 62A, Curzon Street, which he had occupied since 1919. The house was a private dwelling-house and was the last house on the north-east side of Curzon Street adjoining the site of the Mayfair Hotel, which belonged to the defendant company. Curzon Street at that end was a cul-de-sac so far as vehicular traffic was concerned, but there was an exit from it for foot passengers through Lansdowne Passage into Berkeley Street. When the plaintiff first acquired his house, the site of the Mayfair Hotel was comprised in and formed part of the gardens of Devonshire House, and there was no exit from those gardens into Curzon Street. Until building operations were started on the Devonshire House site, the end of Curzon Street in which the plaintiff's house was situate was an exceptionally quiet and peaceful spot with but little traffic passing over it, though, like the rest of Curzon Street, it was a public highway.

In or about June, 1926, the defendant company acquired the site, and erected thereon a large hotel. The hotel had been so planned and erected that there was an entrance to it from a small yard of an area of approximately 220 sq. ft., which in its turn opened into Curzon Street. The entrance from Curzon Street into this yard was by a gate about 10 ft. wide. This entrance was made with the approval and consent of the Westminster City Council as the highway authority within the said city under and by virtue of an agreement dated Sept. 29, 1926, and made between the corporation of the city of Westminster of the one part and the defendant company of the other part. The agreement provided by cl. 1:

> "Conditionally upon the exact observance and performance by the licensee of the stipulations on the part of the licensee hereinafter contained the council hereby agree to construct across the pavement of Curzon Street aforesaid a carriageway crossing having the dimensions and occupying the position shown on the plan hereto annexed being a crossing to give access for vehicles to the service yard of the property intended to be called 'The Mayfair Hotel.' "

Clause 3:

> "The licensee covenants with the council to use every endeavour to secure that the delivery or removal of goods by way of the crossing shall be confined to the early hours of the morning and further that the licensee will exercise the utmost care to prevent any undue noise arising from the use of the crossing to the detriment or inconvenience of adjoining residents."

Clause 7 provided:

> "The council may at any time on giving one calendar month's notice in writing to that effect to the licensee at the last known address of the licensee aforesaid and without any notice upon the licensee ceasing to be in occupation of the Mayfair Hotel remove the said crossing and the cost of such removal and of

A restoring and making good the said pavement and the adjoining carriageway and of all incidental works shall on demand be repaid by the licensee to the council and the council shall not be responsible for any injury or damage to the premises or goods of the licensee arising from any of the matters aforesaid."

Before and after this agreement was entered into the plaintiff from time to time complained of the obstruction caused to his house by the bringing of building and other materials to the hotel. The first complaint made by the plaintiff to the defendant company was contained in a letter dated Jan. 11, 1927, addressed to the secretary of the defendant company. It dealt exclusively with obstruction, and was in the following terms:

"I have to complain of a nuisance to which I am subjected arising from the obstruction of the front of this house by vehicles delivering goods to or removing same from the service entrance of the Mayfair Hotel in Curzon Street. I shall be obliged if you will see that the front of my house is not thus obstructed and also that the crossing to the service yard is used only in accordance with the terms of the agreement between the Westminster City Council and the Mayfair Hotel Co."

On Jan. 13 this was answered by the managing director of the defendant company:

"In answer to your letter addressed to the secretary, Mayfair Hotel Co., you will, of course, be aware that the hotel is not yet open for business, and you can rely that every effort will be made to meet your convenience, and to cause you as little nuisance as possible during the remainder of the deliveries of the furniture for this hotel, but, of course, it is quite unavoidable that some inconvenience will be caused to you during this period. We hope to open the hotel by the end of March, and you may be quite sure that the agreement which I entered into on behalf of this company with the Westminster City Council, which is operative when the hotel commences to run, will be observed so far as possible both in the letter and in the spirit."

The next letter on this subject was from the plaintiff to the managing director, dated March 24, 1927, and was in these terms:

"Referring to the correspondence which passed between us in January, and particularly your letter of Jan. 13, 1927, I had hoped from the assurance you then gave me that the hotel company would arrange for vehicles to be loaded or unloaded in the service yard of the hotel, which I understood was the intention of the agreement between the hotel company and the Westminster City Council. This has been very far from what has happened for some weeks past, and the roadway in front of my house has been continually obstructed for long periods by vehicles serving the hotel. It is right, therefore, that I should give you notice specifically that if I find when the hotel is opened in a few days' time that the front of my house is still obstructed to anything like the extent I have suffered during this year, I shall be compelled to take whatever steps are necessary to protect my rights."

That letter was answered on the same day by the managing director of the defendant company by a letter in which he said:

"I have your letter of even date. It is a source of great regret to me that you feel you have cause for complaint, but I do not think you can realise the magnitude of our enterprise and the difficulties we have had to cope with in equipping and furnishing an hotel of this size. I assure you, speaking from many years of experience, that everything possible has been done to minimise the nuisance you complain of in opening this hotel, and when we are finally opened, as we shall be at the end of this week, I feel sure you will have no reasonable cause for complaint. I would only like to add that I am extremely sorry for the inconvenience which must have been caused to you, but with the best will in the world during the period of building this hotel, it has been

unavoidable. It will be my constant endeavour to see that the staff of this hotel conduct the business with the least possible annoyance, and if you will bear with us for two days longer, I think everything will be all right."

The hotel was opened for business on March 28, 1927, and on April 28, 1927, one month after the hotel was opened, the plaintiff again wrote to the managing director. The letter dealt with the complaint as to noise as well as obstruction, but the part relating to the issue of obstruction only was as follows:

"I duly received your letter of March 24, 1927, and I have to thank you for the intention therein expressed of doing everything possible to minimise the nuisance I complained of. The hotel has now been open for four weeks, and I confess I have been able to detect very little evidence of this intention having been carried out, and I must say emphatically that the hotel as at present conducted very seriously interferes with the reasonable quiet enjoyment I am entitled to at my house. The disturbances commence before six o'clock in the morning with the delivery of the milk and continues with the removal of the kitchen refuse, empty bottles, house refuse, &c., the delivery of the ice, mineral waters, beer, and general food supplies. The east end of Curzon Street has every appearance of being used as the goods yard of the hotel. Vans stand side by side to deliver or receive goods which, while waiting to be disposed of, are dumped on the highway, and there is practically a continuous procession of men in front of my house carrying the goods to the hotel yard or in the reverse direction. When, as not infrequently happens, three vans are stationed in the roadway, access to my house by vehicles is impossible. The roadway is usually obstructed by the motor carrier. . . . It appears to me that the hotel is taking an entirely unfair advantage of the fact that Curzon Street is for vehicular purposes a cul-de-sac and not a thoroughfare. The hotel has the misfortune of enjoying a frontage to Curzon Street of less than 10 ft., and this at a point where the average width of the street is only about 14 ft., and this being so, I am convinced that the hotel is not entitled to make a convenience of the thoroughfare to the annoyance of adjoining owners. For the present I wish to avoid any discussion of our respective legal rights, and in that spirit I have written you as fully as I have done that you may understand something of what I am having to put up with, but you must kindly understand that I am not prepared to be permanently embarrassed or annoyed at the instance of the hotel, however much I shall dislike having to resort to legal proceedings. I cannot help thinking much could be done to minimise the nuisance I complain of if the bulk of the goods was delivered in Berkeley Street and Stratton Street where the hotel has ample frontages, and, by regulating the movements of the staff and restricting the removal and arrival in Curzon Street between the hours of 10 p.m. and 8 a.m."

This was answered on May 7, and the letter dealt with both complaints, and was as follows:

"I have arranged for the laundry and the first clearance from Berkeley Street and also put large 'Silence' notices up in the kitchen and am experimenting with microphones in the kitchen too, but when all is said and done this is a large first-class hotel and there must be a certain amount of noise from the work of the hotel. This is frankly the position. I again emphasise that Mr. Devegney [the manager of the hotel] has made alterations to meet your wishes in every way that is practical, but the staff and goods entrance is in Curzon Street, and I am afraid that is a fact that has to be accepted, but no doubt when the plans were prepared, you had knowledge of the building and, of course, an hotel cannot be as quiet as Devonshire House garden. I would again emphasise our desire to meet you in every way practicable, and most stringent instructions have been given to minimise your inconvenience. With regard to the traffic question, I think that has now been stopped."

Instructions were given by the defendant company with regard to the delivery of goods, so that a number of tradespeople dealing with the defendant company after that date made their deliveries to other entrances of the hotel and not at the Curzon Street entrance, and a man was employed by the defendant company to control the traffic coming to the hotel entrance in Curzon Street. The plaintiff again wrote on May 16, and he said this:

> "I thank you for your letter of May 7, 1927, informing me of the steps which are being taken to meet some of the matters complained of in my letter to you of April 28, 1927. All I ask is that the reasonable quiet enjoyment I am entitled to at my house shall not be interfered with. I am, unfortunately, only too well aware that the staff and goods entrance of the Mayfair Hotel is in Curzon Street, but seeing that the hotel possesses a frontage to that street of only about 10 ft., the idea of using such a narrow frontage for so important a purpose as staff and goods entrance has always seemed to me a mistake. At any rate, if this arrangement stands, the hotel must accept the consequences, one of which is, I am convinced, that the hotel will be held not entitled to make a convenience of the public thoroughfare to the annoyance of adjoining owners."

That was answered on May 18, 1927, by the managing director:

> "Many thanks for your letter of the 16th inst., and I want to reiterate our intention and desire to do everything we can to minimise any discomfort that may be caused you. If at any time we can be of service to you, you have only to command us. It would be a great pleasure to me to be able to find some way in which my company could compensate any disadvantages that may have arisen."

There was a further complaint on May 29, in which the plaintiff said:

> "When you called upon me on the 10th inst. I understood you to say that as from the following day (Wednesday the 11th) the kitchen refuse would not be cleared from the Curzon Street entrance, also that goods would be delivered or removed only by vans which could enter the hotel yard. The van collecting the kitchen refuse was standing in front of this house for some time this morning between eight and nine o'clock."

That was answered by the manager on May 30:

> "I am in receipt of your letter of yesterday's date and regret to hear that the fact that a van stopped in front of your door was an annoyance to you. I am certain that you know of our good will to prevent any trouble of this nature, and you know it was an exception. I have again given strict instructions that no vehicle should stop in front of your doors. I am sorry to say that we had some unfortunate accident in our goods lift, which prevented us from taking the refuse away yesterday, as we would have wished, but I quite understand this must be our own trouble."

After this no complaints in writing were made by the plaintiff to the defendant company, but he appears to have continued his complaints to the town clerk of the city of Westminster, for on April 26, 1928, the town clerk wrote to the defendant company stating that the council continued to receive complaints as to the user of the public way in Curzon Street for the receipt and dispatch of goods at the Mayfair Hotel. It appeared from the evidence given before me that the Westminster City Council, as the result of the plaintiff's complaint, stationed one of their inspectors in Curzon Street to report on the traffic coming to and from the hotel, but no steps were taken by the Westminster City Council as the result of the complaints. The plaintiff issued the writ in this action on July 6, 1928.

Gavin Simonds, K.C., and *Bischoff*, for the plaintiff, referred to *Barber* v. *Penley* (1) and *Lyons, Sons & Co.* v. *Gulliver* (2).

Farwell, K.C., and *Mulligan*, for the defendants, referred to *A.-G.* v. *Brighton*

and Hove Co-operative Supply Association (3), *Lyttleton Times Co., Ltd.* v. *Warners, Ltd.* (4), *Pwllbach Colliery Co., Ltd.* v. *Woodman* (5), *Soltau* v. *de Held* (6), *Benjamin* v. *Storr* (7), *A.-G.* v. *W. H. Smith & Sons* (8), *Original Hartlepool Collieries Co.* v. *Gibb* (9), *Gaunt* v. *Fynney* (10), *Colonial Bank* v. *Cady and Williams* (11), *Carr* v. *London and North Western Rail. Co.* (12). A

Simonds, in reply, cited *Fritz* v. *Hobson* (13) and *Spencer* v. *London and Birmingham Rail. Co.* (14). B

Cur. adv. vult.

July 29. **LUXMOORE, J.,** read a judgment in which he stated the facts and continued: Evidence was given by the plaintiff and on his behalf to support the claim in respect of obstruction, and I will deal with this evidence in due course. But before doing so, I think it will be convenient to state my view as to the law C relating to the obstruction of a public highway, having regard to the rights of the public and those members of the public who occupy premises abutting thereon. Speaking generally, the public have the right of free and unobstructed passage over the whole of a public highway. The owner of premises abutting on a public highway is entitled to make a reasonable use of that highway for the purpose of obtaining access to his own premises, and of loading and unloading goods at his D premises. But the right of the public is a higher right than that of the occupier, and if the user by the occupier, though reasonable so far as the particular business carried on by him is concerned, in fact causes a serious obstruction to the public, then the private rights of the occupier must yield to the public rights, and the court will interfere by restraining the continuance of the obstruction. In every case the answer to the question whether the public right has been interfered with E must necessarily depend on the extent of the user; in other words, the question is always a question of degree. This kind of question can only be determined after a careful consideration of all the facts of the case. This, I think, is a convenient summary of the law as laid down in such cases as *Original Hartlepool Collieries Co.* v. *Gibb* (9), *A.-G.* v. *Brighton and Hove Co-operative Supply Association* (3), and *A.-G.* v. *W. H. Smith & Sons* (8). F

The law as I have just stated it is that which is applicable to a suit brought by the Attorney-General on behalf of the public to restrain the obstruction of a public highway by a person occupying premises abutting thereon. Does the same law apply to the case of a suit by an individual? Again, speaking generally, I think it does, but the private individual who seeks to restrain the obstruction of a public highway must, in order to maintain his suit, prove G that he has sustained particular damage other than and beyond the general inconvenience and injury suffered by the public; and, moreover, he must prove that the particular damage which he has sustained is direct and substantial. This is, I think, the result of the authorities which were cited to me on this point, namely, *Benjamin* v. *Storr* (7), *Barber* v. *Penley* (1), *Lyons, Sons & Co.* v. *Gulliver* (2), which is usually referred to as the *Palladium Case*, and *Soltau* H v. *de Held* (6), which was cited for the passage in the judgment of KINDERSLEY, V.-C. The present action is brought by a private individual, and not by the Attorney-General on behalf of the public. The plaintiff must, therefore, prove that he has been unreasonably obstructed by the defendant company, and that he has suffered particular damage; and that that damage is direct and substantial. Has he succeeded in satisfying all those conditions? As I have pointed out, in each I case the question to be determined is one of fact. The plaintiff claims that he has been obstructed in the access to his own house, and if the evidence is sufficient to establish that the defendant company has interfered substantially with the reasonable access to the plaintiff's house, then, in my opinion, the plaintiff will have satisfied the necessary conditions to enable him to maintain this action, because he would then have established the fact that he has sustained an injury affecting him particularly, in a manner beyond that in which other members of the public are in fact affected, and the damage resulting from that injury would be direct and

substantial. It would not then be a case in which, to use the words of COZENS-HARDY, M.R., in the *Palladium Case*, it would be necessary for the plaintiff to prove that he has lost £1, £2 or £3 by reason of the nuisance and obstruction of which he has complained.

Having stated my view of the law as it applies to a suit by a private individual in respect of the obstruction of a public highway, let me consider the facts as disclosed by the evidence adduced before me. The plaintiff's own evidence in chief, so far as obstruction is concerned, was given in general terms, and it was a little difficult to ascertain from it what was the extent of the obstruction of which he was complaining. I will give a few typical passages by way of example. On the first day, he is asked this question: "(Q.) One month after the hotel had been opened, had you any complaint to make of the obstruction of the highway? (A.) I had a lot of complaints to make. (Q.) Would you explain, first of all in general terms in your own words, what it was of which you complained? (A.) The first cause of complaint was a van, collecting offal, which stopped outside my house. Another cause of complaint was the delivery of the milk in the early morning." Then, later on, he is asked questions about the supplies to the Mayfair Hotel, and he says that the cycle carrier was something of which he complained, and in answer to a question about what the cycle carrier did, he said: "The cycle carrier was used to fetch all sorts of supplies, and one of my causes of complaint is that supplies, which are frequently brought in a taxicab which stops outside my house, are taken out outside my house and then into the hotel." Then counsel for the plaintiff says: "Does that go on to-day? (A.) It went on in the last month. At that period they used to have large quantities of baize-covered tables brought there, and they used to be spread about the surface of the roadway in Curzon Street as though it was laid out for a party, and chairs also used to be dumped on to the roadway." Then, on the second day, he is asked again certain questions about obstruction. "(Q.) Were there occasions before July of last year when access to your front door was obstructed by vans or lorries, whatever they may have been, delivering goods to the defendant hotel? (A.) On many occasions access to my house was obstructed, and furthermore, on many occasions, I called the attention of somebody described as a traffic superintendent or porter to the fact. (Q.) Apart from your own house, has the access of other people coming to your house been similarly obstructed? (A.) It has." Then, later on, he is asked with regard to certain notes he had taken, and he is asked this question: "I suppose you did not make a note every time you saw anything? (A.) No, because there ceased to be any object, because it was their continual practice to use the road in front of my house as their goods yard." Then, further on, the plaintiff speaks with regard to something which had happened, I think on Nov. 23, 1928, when some chairs were being delivered, and he also further said, referring to the previous night, the night before he was giving evidence: "Last night at 6.45, a large motor van delivered gilt chairs—about two dozen of them—and I 'phoned through to call the manager's attention to the fact so that he could verify it then and there. (Q.) Where were the chairs stacked? (A.) They were stacked on the roadway." Then he is asked about the time, and then he is asked: "Were they stacked near your house? (A.) Last night they were just in front, but that is all. A motor van was stopped outside the adjoining premises in the middle of the road, and the chairs were between the van and the entrance to the hotel yard." Then I asked him: "Could you have got to your front door in a motor? (A.) Yes, I could have got there, but I could only have got out again by the man backing out."

It will be noticed from these passages that the plaintiff's evidence consists to a considerable extent of statements to the effect that the access to his house is obstructed. In other words, the plaintiff, instead of stating the facts which he claims constituted the obstruction, states his own conclusion without, in some cases at any rate, any statement of the facts on which such conclusion is based. The plaintiff in fact explained, in his cross-examination by counsel for the defendants, to some extent what he meant by obstruction. On the second day he is again

asked a question about goods being delivered by a taxicab which drove up to his door, and the man getting out and walking into the hotel, and he is asked: "Would you feel you had a cause of complaint if a taxicab drove up to your door, and a man got out and paid it and went away, and then walked into the hotel? Would you then feel that you had a cause for complaint? (A.) I think so, and that occurs nightly. (Q.) Nightly? (A.) I called Mr. Devegney—the manager's—attention to it." Then he is asked about an incident when three vehicles were standing in a line west of his house, and counsel for the defendants asked him: "I thought we had agreed about this, that three vehicles standing well west, that is to say, so that they are quite clear of your front door, in a line, one behind the other in the middle of the road, would not cause you any obstruction; that is so, is it not? (A.) That is so. (Q.) When you say that you frequently see three or four, are you intending to suggest that those vehicles were not standing one behind the other, but that they were standing across the road? (A.) I think I am intending to say that they are three or four vehicles standing in the centre of the road, except that I say they are side by side." Then he is asked this: "If a vehicle comes down Curzon Street, and stops west of your house—when I say 'west,' I mean so that the vehicle's bonnet or head is clear of your house—in the middle of the road, and a boy or man proceeds to take out goods and carry them to the yard of the hotel, that does not cause you any damage, does it? (A.) It causes me annoyance; it is using the public highway as a goods yard." He was then asked to be a little more specific as to the occasions on which he had in fact been prevented from getting to his own front door, and his evidence was that over a definite period, from May, 1927, to the present time, he was only able to point with certainty to four definite occasions when he was unable to get to the front door of his house in a taxi or another car, though he said he thought there were other occasions when he was in fact so prevented. He was asked if he ever made any request to the driver of the vehicle obstructing his access to his front door to move away and so enable him to obtain the access he required, and he stated quite frankly that he could only remember one such occasion, and he added that the request was complied with immediately. On the plaintiff's evidence alone it would be impossible to hold that there has been any unreasonable obstruction which would give rise to any legal rights enforceable by him against the defendant company. But it is necessary to consider the rest of the evidence.

The next witness was an observer employed by a private detective agency, engaged by the plaintiff for the express purpose of observing and of reporting as to the vehicles coming to the plaintiff's end of Curzon Street. He watched the premises daily for a period between June 19, 1928, and June 25, 1928, and also on May 18, 1929; he spent eight hours each day on observation, except on Saturdays. He made a note of all vehicles coming to the plaintiff's end of Curzon Street to deliver or collect goods to or from the defendant company's hotel. There was a considerable number of such vehicles in the course of each day. He gave his evidence quite fairly, and admitted that while he was carrying out his observations, the traffic manager employed by the hotel took every possible precaution to see that vehicles did not stop in front of the plaintiff's house, and the note that he took itself shows that the traffic manager was successful in this, for it is only on some three or four occasions during the whole period of observation that any vehicles stopped in front of the plaintiff's door. I asked him if he could tell me how long, if at all during his observations, it would have been impossible for a vehicle to get to the plaintiff's door, and he answered: "I should think on four or five occasions on each day; for about five to ten minutes on each occasion." I asked him if he could point out to me any particular occasion from his note, and after examining his notes, he selected one occasion. It is taken from his evidence on the third day, and he says: "I should think on June 19, 1928, from 10.55 until 11.10 a.m. or 11.15 a.m. (Q.) What is that? (A.) There is a van just leaving at 10.45, and at 10.55 a horse van pulled up on the far side of the house—that would probably be on the north side. (Q.) It was not in front of the house? (A.) No, it

A was to the west. (Q.) It did not stop there? (A.) No, it was leaving." He was unable to point to any other occasion.

The next witness was a Mr. Milner, a photographer, was was engaged by the plaintiff to take photographs of all such incidents as might occur during certain periods of time as might be said to cause obstruction of the access to the plaintiff's house. He spent five different periods at the plaintiff's end of Curzon Street, B namely on June 18, 19, 20 and 21, 1928, and one day in May, 1929. On each day, the period of observation occupied several hours. During the five different periods, the witness took some ninety-three photographs. A consideration of those photographs throws a considerable light on the plaintiff's claim, for out of the whole ninety-three there are certainly not more than four cases where it would be C impossible for a vehicle to obtain access to the plaintiff's front door. A large number of photographs show goods in sacks and parcels being carried past the plaintiff's house, but by no stretch of the imagination could such incidents be said to cause anything in the nature of an obstruction. Mr. Lydall, the plaintiff's solicitor, was called. He stated that he had frequently stayed with the plaintiff at 62A, Curzon Street. His evidence was mainly directed to the other issue, but D he did say that he personally had never experienced any difficulty in coming to or leaving the house in a vehicle, though it is only fair to say he generally came and went on foot.

Three witnesses who live in this part of Curzon Street were called on the plaintiff's behalf. Mr. and Mrs. Brocklebank, who live at 62, Curzon Street, on the opposite side of Curzon Street to No. 62A, Curzon Street. Neither of them gave E any evidence with regard to obstruction of the access to the plaintiff's house; they only spoke to the access to their own house. Their evidence was of little positive value to the plaintiff's case, but it has some bearing on the defence, because it establishes that even so far as they are concerned, the actual access to their house had not been substantially obstructed, for it has only been necessary on a few occasions to ask vehicles to move so as to enable them to draw up to their own F front door, a request which was apparently on each occasion answered satisfactorily. The other witness, a lady, who lives in a flat in the block next to the plaintiff's house and on the same side of the street, said nothing about obstruction. The only other witness who was called by the plaintiff on this part of the case was a Mr. Williams, the inspector employed by the Westminster City Council to make the observations to which I have already referred. His evidence left no doubt to G my mind that, although there was a substantial number of vehicles delivering goods to the hotel during each day, the traffic was so regulated as to leave the access to the plaintiff's front door unobstructed, and that if vehicles were unable to get into the defendant company's yard, they were kept standing for the time necessary for the delivery of the goods in a position in the centre of Curzon Street to the west of the plaintiff's house, or in such a manner as to cause as little inconvenience as H possible.

It is to be observed that, apart from the plaintiff, no one has been called to say that he or she was unable to get access to the plaintiff's house by reason of the state of the traffic in Curzon Street. Further, the evidence is that no one but the plaintiff has ever made any complaint of obstruction to the defendant company. It is true that complaints were made to the Westminster City Council, with a view I to getting the council to terminate the agreement under which the hotel's entrance in Curzon Street was maintained; but the result of such complaints was, at the best, of negative value so far as the plaintiff was concerned, for the council, after causing observations to be made, have not terminated the agreement referred to. The evidence given by the plaintiff and on his behalf has satisfied me beyond any doubt that there is no substantial obstruction of the access to his house of which he has any legal ground for complaint, and I hold that there has not in fact been any unreasonable obstruction of his access, with the result that, so far as this part of the action is concerned, the plaintiff's claim fails.

I will now deal with the second branch of the action. Has the defendant company, in carrying on the hotel business, caused such a noise as to entitle the plaintiff to relief? The defendant company has put forward two defences. The first is a denial that any nuisance, sufficient to entitle the plaintiff to relief at law, has been caused by them, and the second is a legal defence. I will deal with this latter defence first. As I have already pointed out, the plaintiff bought his house in 1919, and at the time he bought it the site now occupied by the hotel was part of the gardens of Devonshire House, and, undoubtedly, the place was exceptionally quiet and peaceful. At the end of 1925, when the erection of buildings on the site of the Mayfair Hotel was in contemplation, questions arose with regard to the effect of such buildings on the plaintiff's windows facing the hotel site. As the result of negotiations between the solicitors for the plaintiff and the solicitors for the hotel company, an agreement was entered into on March 30, 1926, between Arthur Octavius Edwards, of the one part, and the plaintiff, of the other part. At the time this agreement was entered into the defendant company had agreed to acquire the interest of Mr. A. O. Edwards in the site, and Mr. Edwards was in consequence merely a trustee of the site for the defendant company. This was well known to the plaintiff. The agreement, so far as it is material, provides:

"(1) The said Arthur Octavius Edwards for himself and his successors in title owner or owners for the time being of the premises comprised in and intended to be demised to him by the before mentioned lease agrees that notwithstanding any rights he may have under [a certain building agreement] or the lease to be granted thereunder he will not during the continuance of the said lease block up any of the windows in the eastern wall of No. 62A, Curzon Street, and will only make use of so much of the said eastern wall as is necessary for the purpose of the building which is now in course of erection on the land to be comprised in the said lease and that he will leave an area of the extent and width shown upon the diagram plan attached hereto in front of the window to the dining room of No. 62A, Curzon Street, shown on the said plan and that the walls of the said area and the sloping roof over the hotel scullery shall be faced with white glazed bricks or white glazed tiles and that the said area shall be paved with cement paving and drained to the open yard to the north of same and that the said Harry Sheil Elster Vanderpant shall have the use of the said area during the continuance of the said lease (but so that such user shall be deemed to be enjoyed with the express permission of the said Arthur Octavius Edwards) and that he the said Arthur Octavius Edwards will not during the continuance of the said lease seek to acquire any rights of light over the site of the said No. 62A, Curzon Street, and that he will not object to the height of the said No. 62A, Curzon Street, being raised to a similar height to that of the buildings now in course of erection by the said A. O. Edwards as shown on the annexed diagram plan."

Then there was a provision that a certain alteration might be made in the wall of the area. Clause 2 provides:

"In consideration of the agreements on the part of the said Arthur Octavius Edwards contained in para. 1 hereof the said Harry Sheil Elster Vanderpant agrees that he will not do or cause or permit to be done any thing or act so as in any way to interfere with or obstruct or prevent the erection of any building which is now in course of erection or may hereafter be erected by the said A. O. Edwards on the land to be comprised in the said lease so long as the provisions of cl. 1 hereof are duly observed and so that any building hereafter to be erected by the said A. O. Edwards shall not diminish the access of such light and air to the windows in the eastern wall of No. 62A, Curzon Street, as will be enjoyed immediately on the completion of the buildings now in course of erection and will not at any time object to the erection of any such building or claim any damages in respect thereof provided that in erecting any such

A building the said Arthur Octavius Edwards observes the provisions of para. 1 hereof,"

and the agreement was entered into without prejudice to the rights of the owners of the freehold of the land. The plan on the agreement shows, and the plaintiff admitted, that he knew that it was proposed to erect the kitchen of the hotel on that part of the site nearest to the plaintiff's house. Both the ground plan and the section plan show quite clearly the site of the kitchen, but there is nothing on the plan to show that there was to be any opening in the wall or roof of the kitchen on the side nearest the plaintiff's house. The plan also shows the yard which was to be made, with an entrance from it into Curzon Street and from the yard into the hotel.

The legal point raised by counsel for the defendants is this. He says that the plaintiff cannot complain of any noise from the hotel kitchen unless he can establish by evidence that the noise complained of arises owing to the carrying on of the defendant company's hotel kitchen in an improper manner, because it is a principle of law that if a person takes a grant over the property of another, and it is in the contemplation of both parties that the grantor's property is going to be used for a particular purpose, the grantee cannot complain of anything arising in the course of that contemplated user. This principle does not depend on the doctrine of estoppel or anything of that kind, but is, in fact, the result of an implied contract. The grantee asks the grantor to give him a right over his (the grantor's) land, and the grantor agrees to do so, but at the same time says: "I am going to use my land for a particular purpose," and on that the grant is made. The legal implication is that the grantor is entitled to use his land for the purpose contemplated when the grant was made, and there is an implied contract binding on the grantee unless there is evidence that the user is improper; and it is only in the case where the user is improper that the obligation is released, because it was never contemplated by either party that there should be an improper user. This principle is expounded in *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (4), and is accepted by LORD PARKER in *Pwllbach Colliery Co., Ltd.* v. *Woodman* (5). The passage where LORD PARKER deals with the first-named case in his judgment is as follows ([1915] A.C. at p. 646):

"The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: see *Jones* v. *Pritchard* (15) ([1908] 1 Ch. 630) and *Lyttleton Times Co., Ltd.* v. *Warners, Ltd.* (4). But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use. Thus, in *Jones* v. *Pritchard* (15), it was obviously the intention of the parties that the chimney flues connected with the grantor's house should continue to be used by the grantor to get rid of his smoke, notwithstanding that a moiety thereof was conveyed to the grantee, and similarly that the flues connected with the grantees' premises should be used to get rid of the grantee's smoke, notwithstanding that a moiety thereof was retained by the grantor. There was no difficulty, therefore, in implying the appropriate easements. Similarly, in *Lyttleton Times Co., Ltd.* v. *Warners, Ltd.* (4), the lessor was doing on property retained by him precisely what both parties at the time of the grant contemplated that he should do, neither more nor less, and in these circumstances the court implied a reservation of the right to do it, notwithstanding that it occasioned a nuisance to the grantee. *Richards* v.

Rose (16) is a similar case. In *Hall* v. *Lund* (17) the decision may be explained on the doctrine of continuous and apparent easements, but it is equally explicable on the principle I am now considering. The common intention of the parties in that case may well have been that the bleaching works, the subject of the demise, should be carried on by the lessee in precisely the same manner as had theretofore been the case, the refuse therefrom being turned as theretofore into the natural watercourse which flowed through the lessor's property. I think, however, that WILDE, B., states the principle somewhat too broadly. 'A demise,' he says, 'of a brewery would carry with it the right to use the premises for brewing; although that might be a nuisance to the lessor or his assigns. So, if a mill were demised the lessee would have a right to grind there, although the noise might annoy the lessor or his assigns.' It is true that a demise of an existing brewery or an existing mill would probably connote a common intention that the brewery or mill should be worked in the manner in which it had been worked prior to the demise, and therefore that if so worked it caused a nuisance to the lessor, he could not be heard to complain. But I doubt whether this would hold if the method of working were subsequently altered and a nuisance thereupon ensued, even though it might be proved that this method of working was the usual method, and that the lessee had been guilty of no negligence."

Does this principle apply to the present case? No doubt, it was within the knowledge of both parties that it was intended to use the part of the hotel site next the plaintiff's house as the hotel kitchen, but there was nothing to suggest that such kitchen should have any opening on the side next to the plaintiff's house. The evidence, I think, shows that so far as the noise from the kitchen itself is concerned, the real reason why it is heard in the plaintiff's house is because there are, in fact, openings on the side facing the plaintiff's house, for the evidence has established to my satisfaction that no noise can be heard coming from the kitchen in the rooms of the hotel on the other side of the kitchen, and that there is no opening from the kitchen facing the hotel side of it. Further, so far as the noise caused by delivery of goods into that yard is concerned, there is nothing on the evidence to show that the actual method of user of the yard for any of these purposes was in the contemplation of the parties. For these reasons, I think the principle on which counsel for the defendants sought to rely, fails to be applicable to the present case.

It is, therefore, necessary to consider the question whether the defendant company, in the carrying on of the hotel business, has caused a sufficient noise to entitle the plaintiff to relief at law. Before I deal with what the evidence has established, I will state what constitutes an actionable nuisance by noise. Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people: see *Walter* v. *Selfe* (18) and the remarks of KNIGHT BRUCE, V.-C. It is also necessary to take into account the circumstances and character of the locality in which the complainant is living. The making or causing of such a noise as materially interferes with the comfort of a neighbour, when judged by the standard to which I have just referred, constitutes an actionable nuisance, and it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Again, the question of the existence of a nuisance is one of degree and depends on the circumstances of the case.

A The evidence in the present case establishes the fact that the defendant company is carrying on the hotel business in a kitchen which, for all practical purposes, adjoins the plaintiff's house. It is ventilated by a series of windows which face the plaintiff's house, and such windows are almost invariably open. The staff employed in the kitchen when meals are in full swing numbers somewhere about seventy persons. The orders for the meals required are given and the meals are B cooked in the kitchen; and in addition, the plates required for the guests' use are heated and kept warm on a series of hot plates which have been erected in the kitchen. There is no doubt that the defendant company has done what it can to minimise the noise in the kitchen, but, as counsel who argued the defendants' case with much moderation and ability very frankly admitted, it is impossible to say that the carrying on of a large kitchen, with the employment of a staff of about C seventy persons, no matter what precautions are taken, does not make a considerable noise. The chief times at which this noise arises are naturally the time when lunch and dinner are being served, and there is also some considerable noise at supper time. The evidence of the plaintiff, his maid, and of Mr. Lydall, his solicitor, has satisfied me beyond all reasonable doubt, that the noise from the kitchen is plainly heard in the dining room and bedrooms which have windows D facing the hotel, and that such notice constitutes a nuisance of which the plaintiff is entitled to complain. So far as lunch and dinner times are concerned, the evidence has established quite clearly that it is frequently necessary to shut the windows of the dining room at No. 62A, Curzon Street, to prevent the noise interfering with the conversation, and, so far as supper time is concerned, that it is often impossible to get to sleep by reason of the noise coming from the kitchen, E or that the witness has been awakened from his or her sleep by such noise. Further than this, the evidence has satisfied me that there is a nuisance caused in the early hours of the morning by the staff of the hotel leaving by the entrance in Curzon Street, and later by the arrival of the staff and of the milk and ice. The noises thus caused have frequently awakened the several witnesses, and have made it difficult for them to enjoy a proper period of rest and sleep. So far as the F noise caused by the departure and the arrival of the staff and the delivery of goods is concerned, this would not, in my view, cause any substantial nuisance during the ordinary hours of the day, and I think it will be sufficient to restrain these particular matters by reference to the period between the hour of 10 p.m. in the evening and the hour of 8 a.m. in the morning. With regard to the kitchen I think the injunction must be in general terms.

G The result of the whole action, therefore, is that the plaintiff succeeds on one issue and loses on the other. In these circumstances, and having regard to the extent of the evidence and the time occupied with regard to each issue, and to the fact that such issues are wholly independent of each other, I think the proper course is to say that neither party shall have any costs of the action.

Solicitors: *Lydall & Sons*; *Markby, Stewart & Wadesons.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

PAPADOPOULOS *v.* PAPADOPOULOS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Hill, J.), October 18, 22, 30, November 5, 1929]

[Reported [1930] P. 55; 99 L.J.P. 1; 142 L.T. 237; 94 J.P. 39; 28 L.G.R. 73]

B

Conflict of Laws—Foreign judgment—Recognition by English courts—Decree of nullity—Want of jurisdiction in foreign court—Consent of parties to jurisdiction.

In 1912 the husband, a domiciled Cypriot, went through a form of marriage with the wife, a domiciled Frenchwoman, at a register office in London. In 1913 he went to Cyprus and practised medicine there. In 1914 the wife instituted proceedings against him in the District Court of Nicosia, and it was declared that, the parties agreeing that the marriage celebrated in London was void ab initio as being contrary to the law of the domicil of both parties, the marriage was null and void. The husband returned to England in 1914 and the wife in 1929. She then took out a summons under the Summary Jurisdiction (Married Women) Acts, 1895–1925, on the ground that the husband had wilfully neglected to maintain her.

C

D

Held: the decree made by the court of Nicosia in 1914 was open to examination, and on examination it appeared that it was not made by a court competent to determine on the validity of a marriage, and the parties could not give it jurisdiction by consent; regarding the decree as evidence of the agreement between the parties, that agreement was void as authorising the parties to disregard their marital obligations; and, therefore, the marriage still subsisted and the wife was entitled to a maintenance order.

E

Husband and Wife—Summary proceedings—Maintenance of wife—Neglect to provide—Failure of duty—Excuse by husband—Burden of proof.

Per HILL, J.: Neglect to provide maintenance means failure in a duty to provide maintenance. Where a husband seeks to excuse himself from his liability to maintain his wife, the onus is on him to prove the excuse.

F

Notes. Applied: *Marcovitch* v. *Marcovitch* (1934), 151 L.T. 139; *Simons* v. *Simons*, [1938] 4 All E.R. 436. Considered: *Stringer* v. *Stringer*, [1952] 1 All E.R. 373. Referred to: *Winnan* v. *Winnan*, [1948] 2 All E.R. 862; *Tulip* v. *Tulip*, [1951] P. 378.

As to foreign judgments, see 7 HALSBURY'S LAWS (3rd Edn.) 140 et seq.; and as to summary jurisdiction in matrimonial cases, see ibid., vol. 12, 479 et seq. For cases see 11 DIGEST (Repl.) 481 et seq., 501 et seq., and 27 DIGEST (Repl.) 693 et seq.

G

Cases referred to:

(1) *Price* v. *Price* (1927), 43 T.L.R. 609; 71 Sol. Jo. 432, D.C.; 27 Digest (Repl.) 711, *6783*.

H

(2) *Chetti* v. *Chetti*, [1909] P. 67; sub nom. *Venugopal Chetti* v. *Venugopal Chetti*, 78 L.J.P. 23; 99 L.T. 885; 25 T.L.R. 146; 53 Sol. Jo. 163; 11 Digest (Repl.) 460, *941*.

(3) *Ricardo* v. *Garcias* (1845), 12 Cl. & Fin. 368; 9 Jur. 1019; 8 E.R. 1450, H.L.; 11 Digest (Repl.) 530, *1422*.

(4) *Sinclair* v. *Sinclair* (1798), 1 Hag. Con. 294; 161 E.R. 557; 11 Digest (Repl.) 485, *1098*.

I

(5) *Ogden* v. *Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 24 T.L.R. 94, C.A.

(6) *Hopkins* v. *Prescott* (1847), 4 C.B. 578; 16 L.J.C.P. 259; 9 L.T.O.S. 223; 11 Jur. 562; 136 E.R. 634; 12 Digest (Repl.) 329, *2549*.

(7) *Walrond* v. *Walrond* (1858), John. 18; 28 L.J.Ch. 97; 32 L.T.O.S. 122; 22 J.P. 754; 4 Jur.N.S. 1099; 7 W.R. 33; 70 E.R. 322; 27 Digest (Repl.) 219, *1746*.

(8) *Chapman* v. *Bradley* (1863), 33 Beav. 61; 2 New Rep. 477; 33 L.J.Ch. 139; 9 Jur. N.S. 1046; 55 E.R. 289; affirmed (1863), 4 De G. J. & Sm. 71; 3 New Rep. 182; 33 L.J.Ch. 139; 9 L.T. 495; 10 Jur.N.S. 5; 12 W.R. 140; 46 E.R. 842, L.JJ.; 12 Digest (Repl.) 327, *2525.*

(9) *Brodie* v. *Brodie*, [1917] P. 271; 86 L.J.P. 140; 117 L.T. 542; 33 T.L.R. 525; 62 Sol. Jo. 71; 27 Digest (Repl.) 217, *1726.*

(10) *Printing and Numerical Registering Co.* v. *Sampson* (1875), L.R. 19 Eq. 462; 44 L.J.Ch. 705; 32 L.T. 354; 23 W.R. 463; 12 Digest (Repl.) 272, *2093.*

Appeal from a maintenance order made by Mr. Graham Campbell, the metropolitan police magistrate, sitting at Bow Street.

The wife, Mrs. Annie Eugenie Louie Papadopoulos, summoned the husband, Dr. Stylianos George Papadopoulos, on the ground of wilful neglect to provide her with reasonable maintenance. The husband was born in Cyprus in 1886. In October, 1905, he came to London to study medicine, and in May, 1906, became a student at St. Bartholomew's Hospital. From January, 1907, to November, 1912, he and the applicant lived together as man and wife, and on Nov. 27, 1912, he went through a form of marriage with her at the Holborn Register Office. He had taken certain medical degrees, and for a time he was medical officer at the Shadwell Hospital. In 1913 he returned to Cyprus and began to practise there. The wife followed him to Cyprus in February, 1914, and there instituted proceedings against him. Both parties were represented by counsel, and as the result of an agreement between the parties a judgment was given by the District Court of Nicosia on May 14, 1914, by which that court ordered, inter alia:

"(2) that plaintiff and defendant declaring that the marriage celebrated on the 27th Nov., 1912, at the Holborn Registration District, in the county of London, between the parties being void ab initio, as contrary to the law of the domicil of both parties as regards the essential conditions of marriage, it is hereby declared null and void; (3) that the plaintiff shall not make any further claim against the defendant whensoever or wheresoever in respect of the matters which form the subject of this action or otherwise; (4) that the plaintiff shall not use the name of Styliano G. Papadopoulos, or any part thereof; (5) that the sum of £380 be paid by the defendant to the King's Advocate at his office within a week from to-day for the account of the plaintiff in full satisfaction of all claims of the plaintiff against the defendant."

At the time of the decree Cyprus was under British control, though nominally a possession of the Ottoman Empire. The money was paid to the wife, and she went to France. After the outbreak of war in August, 1914, the husband came to England. From June, 1915, until January, 1920, he held an appointment at the army general hospital at Greenwich, and after December, 1914, he was in England, engaged in medical practice, apart from short visits to Cyprus. The wife, having lived in France between 1914 and 1929, came to England on March 15, 1929, and took out a summons against the husband under the Summary Jurisdiction (Married Women) Acts, 1895 to 1925, on the ground of wilful neglect to maintain her.

Both parties gave evidence at the hearings on May 23 and 30, 1929, at Bow Street Police Court. A member of the Cyprian Bar gave evidence that any form of marriage by a Cypriot which was not according to the rites of the Greek Church would not be recognised by the court of Nicosia. In Cyprus there was no law as to collusion in matrimonial proceedings, and he would not say that the court never acted on the consent of the parties only. The court would base its jurisdiction on domicil. A decree of this court could be reversed by the Cyprian Court of Appeal. The husband in his evidence said that he had refused to marry the wife in church, and he went through the register office ceremony, when the time came for them to part in 1912, after she had said: "What excuse should I give to my mother?" and after considerable quarrelling. He also said that she had learned from the French Consul that it was no marriage unless in the Greek Church. The wife in her evidence denied the truth of these statements. She also said that she had been

married before in France, but had divorced her previous husband before the 1912 ceremony in London. A

The magistrate held (i) that the domicil of the parties in May, 1914, when the judgment was delivered, was Cyprus; (ii) that both parties agreed that what caused the London marriage to be contrary to the law of the Cyprian domicil was the fact that it was not celebrated before a Greek priest; (iii) that a foreign judgment which purported to annul a marriage duly celebrated in England according to B English law, merely because formalities required by the law of the domicil had not been complied with, offended against British notions of substantial justice, and, therefore, the Nicosian decree was invalid to English law; (iv) that the payment of £380 to the wife in full satisfaction of claims made by her for breach of promise to marry did not estop her from denying the validity of the nullity decree; (v) that the police court had jurisdiction to make an order because the husband was resi- C dent in London, and that the wife was not out of time in making her complaint: *Price* v. *Price* (1). The magistrate ordered the husband to pay the complainant £2 a week.

The husband appealed on the following grounds: (i) The magistrate was wrong in law; (ii) in view of the judgment of a competent court of jurisdiction the wife was estopped from alleging (a) that she was the wife of the husband and (b) main- D taining any further matrimonial proceedings against him; (iii) the Nicosia decree was binding upon the parties and conclusive of their rights and status and the matter was res judicata, and that the decree was final as a decision in rem; (iv) the magistrate was wrong in holding that a form of marriage which did not comply with the forms requisite in the county of the domicil was a valid marriage; (v) the magistrate was wrong in holding that he could make an order notwithstanding that E the parties had separated in 1914 upon the decree being pronounced and had never since resumed cohabitation.

Schiller, *K.C.*, and *Martin O'Connor* for the husband.
Bayford, *K.C.*, and *Julian Fuller* for the wife.

Cur. adv. vult. F

Nov. 5. The following judgments were read.

LORD MERRIVALE, P.—The main questions on this appeal are whether the husband is entitled to repudiate, and has effectually repudiated, a contract of marriage into which he entered in London in 1912, and whether the wife is bound by an agreement with the husband to which she entered in 1914, whereby it was agreed in consideration of a sum of money paid by the husband to the wife that G the marriage so contracted was or should be treated as a nullity. Incidental questions have arisen with regard to the law of Cyprus before and since 1914, when the island became incorporated in the British Empire—the nature and extent of the jurisdiction of the British courts which existed in Cyprus during the protectorate and before the annexation, the marriage laws and customs of Cyprus as they affect native members of the Greek Church there and here, and the juristic and evidential H effects of a consent judgment recorded in courts in Cyprus.

The husband, a Cypriot born on the island in 1886, of Greek parents domiciled there, became a medical student in London in 1905 and resided here continuously until 1913, and since December 1914 has again been resident here. In London, about 1906, he made the acquaintance of the wife, who is of French origin and apparently of French domicil, and, after living together some years, they were in I 1912 married before the registrar of marriages of the Holborn district. The marriage at the Holborn registry is that which the husband repudiates. The ground of repudiation is an assertion that he was at the time a member of the Greek Church, and that the marriage of members of the Greek Church in Cyprus could only be effectually solemnised in a church in the presence of a priest. It is unnecessary to consider what proofs would establish such a contention in an English court. In Cyprus it appears to have been believed. The matter did not arise before the learned magistrate, and it was not raised here. The husband, after obtaining his

A diplomas, went back to Cyprus, leaving the wife here with authority—it was said—to provide for her maintenance by selling their household furniture. She later followed him to Cyprus and, not being received by him as his wife, she instituted a suit in the District Court of Nicosia, one of the British courts in Cyprus established and regulated under Orders in Council pursuant to the powers of the Crown under the Anglo-Turkish Convention of 1878, whereby she asserted her marriage B and claimed maintenance, and alternatively damages for breach of promise and other pecuniary relief. When this suit came on for hearing, terms were agreed upon and made the basis of a consent judgment.

[His Lordship recited the operative part of the Nicosia judgment and continued:] The wife received the sum named in the decree made in Nicosia, and left Cyprus. She and the husband saw no more of each other for the ensuing fifteen C years. He, it is said, married again in Cyprus. In the present year, however, the wife took up her residence again in London, and after some communication between the solicitors of the parties, she obtained the issue of a summons at Bow Street Police Court claiming an order for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, on the ground of the husband's "wilful neglect to provide reasonable maintenance" for her. In a carefully con- D sidered judgment the learned magistrate, Mr. Graham Campbell, found the wife's allegation proved, and ordered maintenance at the rate of £2 per week. This is the decision against which the present appeal is brought. The notice of appeal puts forward the judgment in the District Court of Nicosia as a bar to all further proceedings of the wife and the payment and acceptance of the sum of £380 as a final satisfaction of all possible claims of hers antecedent or subsequent thereto. E The judgment is set up as a res judicata to establish the nullity of the marriage contract made in London, that is, as a judgment in rem granted in a competent court of the domicil of the husband invoked by the binding primâ facie against all the world, but at any rate not open to any attack by the party who obtained it. On the hearing of the appeal the broad questions which I have specified were argued on behalf of the husband. It was not part of his case that the marriage F in London was not valid. It could not well be. The suggested disability of a member of the Greek Church in Cyprus to marry otherwise than in accordance with the rules of that church was what Lord Gorell designated in *Chetti* v. *Chetti* (2) a disability which can be got rid of at will, and is, therefore, no bar to this marriage.

Counsel relied upon the provision of the Evidence Act, 1851 (Lord Brougham's G Act), s. 7, which permits proof of foreign and colonial judgments by production of a copy authenticated in compliance with the statute. Producing the document so authenticated he claimed that this court—whatever its views as to the apparent sufficiency of the transactions in Cyprus—should accept the decree as conclusive of the rights of the parties in the matters to which it referred. Moreover, he submitted the decree itself afforded evidence of the jurisdiction of the court. The H court at Nicosia, he said, must be assumed to have acted within the jurisdiction it in fact had. Inasmuch as there was not before the learned magistrate or here when the hearing began, any express evidence that the court of Nicosia had not such jurisdiction, any lawful assumption, he contended, might be made in support of the validity of the decree; it might be, he suggested, that the court had regard to Ottoman laws or customs of the Greek Church, known and recognised in Cyprus, I and familiar to the judges.

As to these general contentions concerning the validity of foreign judgments the argument goes a good deal beyond the law. The judgment of the House of Lords in *Ricardo* v. *Garcias* (3) was relied upon, and no doubt set forth clearly the rule which is to be observed. The questions on which the House of Lords there pronounced judgment arose on pleadings in the Court of Chancery. Upon the allegations made in the answer of the defendants in the suit the House held that certain judgments of French tribunals were, upon the pleadings, so alleged as to constitute in law a good plea of res judicata and in equity an effectual answer and defence.

The allegations so set up were allegations showing as matter of fact and matter of law a resort of the plaintiff in the suit to a competent court in France, a hearing of his case there, a judgment pronounced which the court was competent to pronounce, afterwards appealed against and affirmed on such appeal. The narrow principles of law in which their Lordships proceeded was stated by LORD LYNDHURST, L.C., and very concisely by LORD CAMPBELL. The concise statement of LORD CAMPBELL suffices for the purposes of this case. It was that

> "a foreign judgment might be pleaded as res judicata because the foreign tribunal has jurisdiction over the matter and both parties having been regularly brought before the foreign tribunal and that tribunal having adjudged between them such a judgment would be a bar to a subsequent suit in this country for the same cause."

Whether the court at Nicosia had jurisdiction to hear and determine a suit for nullity of marriage is a question of fact as to the law of Cyprus. In *Ricardo* v. *Garcias* (3) the relevant French statute which conferred jurisdiction was cited in the defendant's plea. It is true that in this case no distinct evidence as to this matter of jurisdiction was given before the magistrate and the appellant tendered none here. This court, however, does not, and no English court dealing with questions of nullity of marriage ought to proceed upon mere assumptions or even on mere admissions. LORD STOWELL had to consider in *Sinclair* v. *Sinclair* (4) the effect to be given to a foreign judgment of nullity, and he laid it down that such a judgment is open to examination here. This relevant passage was cited in full in the judgment of the Court of Appeal in *Ogden* v. *Ogden* (5), and includes this statement:

> "Something has been said on the doctrine of law, regarding the respect due to foreign judgments; and undoubtedly a sentence of separation in a proper court, for adultery, would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said that a sentence of nullity of marriage is necessarily and universally binding in other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend in a great degree on the local regulations of the country where it was celebrated. A sentence of nullity of marriage, therefore, in a country where it was solemnised, would carry with it a great authority in this country, but I am not prepared to say that a judgment of a third country on the validity of a marriage not within its territories nor had between subjects of that country, would be universally binding."

Upon reference to the Orders in Council relevant to this case (Order in Council I of 1879, s. 71; Courts of Justice Order, 1882, ss. 4, 5, 22; the like of Feb. 14, 1883) to which after prolonged general argument the court called the attention of the parties, it is clear that the entire jurisdiction in matrimonial causes which in 1914 was exercisable in Cyprus by any of his Majesty's courts, there was—as it apparently still is—a jurisdiction from which the power to dissolve a marriage and the power to decree nullity of marriage are expressly excepted. The suggestion of a possible foundation for the decree in prescriptive or customary law, not found in evidence, is of no effect. The court in question is a court of His Majesty the King which has its being under Orders in Council and has thereunder a jurisdiction in matrimonial causes which is perfectly defined. These Orders in Council are, at any rate since the annexation of Cyprus, receivable in evidence here under the Colonial Statutes Act, 1907. They show the status of the District Council, its relation to the superior tribunals, and the conditions under which certain powers of the higher courts of the island might be exercised there by consent of the parties. No such consent could change the last-mentioned jurisdiction. The decree of 1914 now in question cannot be regarded as anything more than a judicial recognition of a compact made between the parties to the effect that their marriage in England should be treated by them both as a nullity, and that in consideration of the plaintiff's assent to this she should receive £380. It is not a judgment in rem,

nor is it a judgment of a court whose jurisdiction rendered it competent to determine upon the validity of the marriage.

Regarding the decree as the evidence of an agreement, counsel for the husband submitted that, if it might be held void in part, it is yet on this face of it severable. It is true that if a memorandum contains two or more distinct and independent contracts they must be judged individually. The principle is illustrated in *Hopkins* v. *Prescott* (6), where SIR THOMAS WILDE, C.J., drew the decisive distinction between "An agreement which is single and entire made on one consideration," and "one that is severable in its nature and deals with matters that are unconnected and independent of each other." The agreement here in question is "single and made on one consideration." The broad effect of the agreement here is to authorise each of the parties to disregard their marital obligations—to treat the same as non-existent. An agreement to take a child out of the control of its father was held invalid by LORD HATHERLEY, then PAGE-WOOD, V.C., in *Walrond* v. *Walrond* (7). An agreement as to property made in contemplation of marriage to be contracted abroad with a deceased wife's sister was dealt with in the same way by LORD ROMILLY, M.R., in *Chapman* v. *Bradley* (8). In *Brodie* v. *Brodie* (9) a deed executed before marriage in which the parties agreed not to cohabit was pronounced void. As was said by SIR GEORGE JESSEL, M.R., in *Printing and Numerical Registering Co.* v. *Sampson* (10) contracts "to induce another to do something against the general rules of morality . . . have always held to have been void." The agreement here in question was illegal as well as immoral and cannot be set up by either of the parties in an English court. These conclusions deal with all the grounds of the appeal. There is no notice of appeal as to the weekly amount ordered by the learned magistrate to be paid. The magistrate was right in holding that the parties were husband and wife, and upon the facts before him he had no alternative but to hold also that the husband had "wilfully failed" to maintain the wife. Under the statute which regulates his jurisdiction he could not go further and inquire into the general conduct of the parties. This appeal, therefore, fails.

HILL, J.—I agree. The first question for the magistrate was whether the applicant was a married woman and the wife of the defendant. She was, unless the marriage of Nov. 27, 1912, at the Holborn Register Office, had been dissolved or declared null and void by the court of competent jurisdiction. No court has purported to dissolve it. The District Court of Nicosia purported to declare it null and void. Now that the matter has been investigated it is clear, and was on the further argument before us conceded, that that court had no jurisdiction to make such a declaration. The parties could not by consent give it jurisdiction. The marriage is, therefore, a subsisting marriage and the magistrate rightly found that the applicant was a married woman and the wife of the husband, the present appellant.

The next question for the magistrate was whether the husband had wilfully neglected to provide reasonable maintenance for the wife. No question arises whether the husband's neglect (if any) was wilful. It was not wilful during the years 1914 to 1929 while the wife was living apart and making no claim upon the husband. But after the letter of the wife's solicitor in March, 1929, and the husband's reply, it was wilful. The question is whether the husband neglected to provide maintenance. He did not in fact provide maintenance. Neglect means failure in a duty to provide maintenance. And the question is whether he was under a duty to maintain the wife. Primâ facie he was. That is the common law of England, and it was for the husband to show that he was excused from that duty. A husband may show it in various ways. For instance, he may show that his wife has been guilty of adultery neither condoned nor connived at nor conduced to by the husband, or that she has deserted him and was continuing to desert him, or that there is a subsisting binding contract performed and not repudiated by him that she should not claim maintenance otherwise than as provided by the contract, or that a court of competent jurisdiction had in a proceeding between husband and wife already determined the rights of the wife in respect of maintenance,

and that he had fulfilled the obligations so imposed on him. But the onus is on the husband to prove the excuse. In the present case the husband contends that he was excused (i) by the decree of the District Court of Nicosia; (ii) by the agreement between husband and wife embodied in that decree.

As to (i) in the proceedings before it the court was not a court of competent jurisdiction to make a decree as to maintenance. Its powers were the same as the High Court of Justice. Having no power to declare the marriage null and void, it had no power to make an order for maintenance consequential upon a decree of nullity. It had no power to make a decree of dissolution and did not purport to do so, neither did it purport to make a decree of restitution of conjugal rights or of judicial separation, and, therefore, it did not have the power to make an order for maintenance consequential thereon. Without a precedent decree, it had no power to make an order for maintenance. Apart from the power to order alimony pendente lite, the High Court of Justice has no such power (though a magistrate has) and therefore the court in Cyprus had no such power. If it had such power to make an order for maintenance, it had no power to give a lump sum in lieu of maintenance. It does not purport to make any award in respect of maintenance of a wife; it awards a lump sum on the footing that the woman is not a wife. Consent makes no difference; the husband and wife could not by consent give the court jurisdiction to declare that the woman was not a wife, or to make any order upon that footing. One cannot separate one part of the decree from any other part. It is all one decree.

As to (ii), the agreement was as follows: If you, the husband, will pay me £380, I, the wife, will agree that the marriage was null and void and consent to the court so declaring, and I will make no other claim upon you either for maintenance or damages for breach of promise or services rendered or money lent. If you, the wife, will agree that the marriage is null and void and consent to the court so declaring and undertake to make no claim upon me either for maintenance or damages or breach of promise or services rendered or money lent I will pay you £380. It is all one agreement. The agreement that the marriage is null and void is not severable; it is part of the consideration for the promise of each. If the agreement as to nullity is unlawful, the whole agreement is unlawful. The agreement as to nullity is manifestly unlawful. It involves a licence of each to the other to marry again and therefore to commit adultery. Therefore, the husband could not set up the agreement as an excuse. There being no excuse on which the husband could rely, the magistrate rightly found that the husband continued under a duty to maintain the wife and had failed to discharge that duty, and, therefore, had in the terms of the section neglected to maintain her.

Having found a neglect to maintain, the magistrate had to fix an amount. He must consider the means of the parties at the time he makes the order. It is not disputed that, having regard to the means of the husband and wife, £2 was a reasonable amount. The appeal fails.

Appeal dismissed.

Solicitors: *Wm. Gorringe & Co.*; *Martin & Barry O'Brien.*

[*Reported by* William Latey, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* SUNDERLAND CORPORATION

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), October 18, 1929]

[Reported [1930] 1 Ch. 168; 99 L.J.Ch. 44; 142 L.T. 61; 94 J.P. 57; 46 T.L.R. 10]

Local Government—Purchase of land for two purposes—Use of land for both purposes—Subsequent alteration in proportions of land used for the respective purposes—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 154, *s.* 164, *s.* 175—*Public Health Act*, 1925 (15 & 16 *Geo.* 5, *c.* 71), *s.* 68 (1) (*c*).

Section 154 of the Public Health Act, 1875, empowered an urban authority to "purchase any premises for the purpose of widening opening enlarging or otherwise improving any street, or (with the sanction of the Local Government Board) for the purpose of making any new street": s. 164 empowered such an authority "to purchase . . . lay out plant improve and maintain lands for the purpose of being used as public . . . pleasure grounds." By the Public Health Act, 1925, s. 68 (1) (c), a local authority might "by order authorise the use as a parking-place of any part of a street within their district." By s. 175 of the 1875 Act "any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall . . . be sold."

In 1895 an urban corporation obtained a loan from the Local Government Board, and also the necessary sanction under s. 154 to purchase certain land "to be appropriated for the following purposes: making new streets—making forming or maintaining public walks or pleasure grounds." In 1896 the corporation purchased the land, and later laid out part of it as a garden, which was not dedicated to the public. In 1927 the corporation resolved to use part of this garden to make a parking-place.

Held: the corporation were not bound to allocate to pleasure grounds all the land which they had originally contemplated at the time of the purchase, but might as time passed alter the proportion of the land used for streets and for pleasure grounds; accordingly, the corporation had power to use this part of the garden for widening the street, and so had power under s. 68 (1) (c) to authorise its use as a parking-place, and s. 175 did not apply.

A.-G. v. *Hanwell Urban Council* (1), [1900] 2 Ch. 377, and *A.-G.* v. *Pontypridd Urban Council* (2), [1906] 2 Ch. 257, distinguished.

Notes. The Local Government Board is now the Ministry of Housing and Local Government (see S.I. 1951, Nos. 142, 1900). By the Local Government Act, 1933, s. 163 [14 Halsbury's Statutes (2nd Edn.) 441], a local authority may now appropriate land for purposes other than those for which it was bought subject to the approval of the Minister of Health, but that Act does not alter the position of a local authority in regard to land acquired under s. 164 of the 1875 Act: see *Hall* v. *Beckenham Corpn.*, [1949] 1 All E.R. 423. Section 175 of the 1875 Act was repealed by the Public Health Act, 1936, the corresponding (though different) provisions of which are contained in s. 116 [19 Halsbury's Statutes (2nd Edn.) 393, 394].

As to the exercise of statutory powers, see 31 Halsbury's Laws (2nd Edn.) 533, para. 697; and for cases on the subject, see 42 Digest 720–723, *1406–1423*. As to the appropriation by a local authority for other purposes of land no longer required for the purpose for which it was acquired, see 24 Halsbury's Laws (3rd Edn.) 598, para. 1105. For the Public Health Act, 1875, s. 154, s. 164, and the Public Health Act, 1925, s. 68 (1), see 19 Halsbury's Statutes (2nd Edn.), pp. 73, 77, and 259, 260, respectively.

Cases referred to: A

(1) *A.-G.* v. *Hanwell Urban Council*, [1900] 2 Ch. 377; 69 L.J.Ch. 626; 82 L.T. 778; 48 W.R. 690; 16 T.L.R. 452; 44 Sol. Jo. 572, C.A.; 11 Digest (Repl.) 122, *141*.

(2) *A.-G.* v. *Pontypridd Urban Council*, [1906] 2 Ch. 257; 75 L.J.Ch. 578; 95 L.T. 224; 70 J.P. 394; 22 T.L.R. 576; 50 Sol. Jo. 525; 4 L.G.R. 791, C.A.; 11 Digest (Repl.) 122, *142*. B

Appeal by the plaintiff relators from a decision of EVE, J., dismissing their action for a declaration that the defendant corporation were not entitled to make or provide or cause or permit to be made or provided a parking place for motor cars on any part of a piece of land purchased by the corporation in 1896, and an injunction to restrain the corporation from so acting.

The facts, which are summarised in the headnote, appear in the judgment of C LORD HANWORTH, M.R.

EVE, J., held that the land had not been acquired solely for the purposes for which it had been used hitherto, but for alternative purposes, including street widening, that therefore there was nothing to prevent the corporation from discontinuing the maintenance of part of the pleasure ground and utilising the vacant space for street widening, and that accordingly the corporation had power D under s. 68 (1) (c) of the Public Health Act, 1925, to use it as a car park. The relators appealed.

C. A. Bennett, K.C., and *D. A. S. Cairns* for the relators.

R. M. Montgomery, K.C., and *Wilfrid M. Hunt* for the corporation.

LORD HANWORTH, M.R.—This appeal fails. I should have been prepared E to say nothing and merely to adopt the judgment of EVE, J., as expressing the view on which I think this appeal must be dismissed, but out of deference to the argument presented by counsel for the relators I desire to add a few words supplementing the observations which have been made by EVE, J.

In this case we start with the fact that there was an open space on more or less derelict land in the front of a certain number of houses used by the professional F men of Sunderland, and away back at the end of the 'eighties the corporation were minded to take over that land and to make certain uses of it. Before 1896, when the surrender was actually made by the copyholders to the corporation, the corporation had desired to have this land or determined to acquire it for purposes which were not very explicitly expressed, but which were summarised in the terms on which they applied to the local government authority for a loan to enable them G to purchase the land and to make use of it when purchased. I call attention to two or three of the letters and memoranda which passed at that time. The minute of June 15, 1892, by the highways committee is this:

> "The Shrubbery [as this open space was then called] to be appropriated for the following purposes: Making new streets—making, forming and maintaining public walks or pleasure grounds, and the erection thereon of a post office, H or any or either of such purposes."

When, with greater precision, an apportionment had been made of the cost of the shrubbery land between the post office and the pleasure grounds, we find that there is a certain number of square yards attributable to the post office site and the rest to what are called the pleasure grounds, and when the loan is specifically dealt I with then it is made clear that of the total sum of £8,200 which was asked for on March 22, 1895, the sum of £3,960, part of the £8,200, was required as the purchase price of the land, and that was attributed as to £1,250 and no more for the purchase of the post office site, and £2,710 for the purchase of land for the purpose of public walks and pleasure grounds. Incidentally, I mention that the same letter took power to acquire a loan for the purposes of street improvements. Therefore, anyone reading that would find it impossible to say that the only purposes were public walks and pleasure grounds in that intrinsic sense. It was rather public walks

A and pleasure grounds than a matter of street improvement. The surrender of 1896 was made, and counsel for the relators admits that there is no restriction in terms contained in that deed. What is said is that under cl. 26 the land is conveyed to the corporation to be used and disposed of by the corporation for the purposes authorised by the Public Health Act, 1875, and s. 7 of the Post Office Act, 1891, or some or one of such purposes. Pausing there, in 1896, when the corporation B became possessed of this land called The Shrubbery, I think it is impossible to say that there had been any definite dedication or allocation to any particular purposes of the land so acquired otherwise than that portion of it which was for the post office, or that the purpose of the corporation had been made plain as to whether it was to be a garden or a street or a widened street, or something akin or ancillary to those purposes. What we do find is this, that in 1895 the corporation had C secured power to make a new street, that special power being necessary in order that they might exercise the powers of s. 154 with reference to a new street. Therefore, in 1896, the matter stood in this way, that they had purchased, and, having regard to the fact of the sanction of the Local Government Board, they had acquired the right of obtaining, these premises for the purposes of widening, opening, enlarging or otherwise improving any street, and for the purpose of making a D new street. In other words, s. 154 was put into force by them after due leave being obtained from the Local Government Board. They had at that time a power under s. 164 unfettered by need to obtain any leave. Section 164 is as follows:

> "Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure E grounds, and may support or contribute to the support of public walks or pleasure grounds."

Reading those powers as they stand, I find it quite impossible to designate what quota of the purchased property apart from the post office site is to be used for the purpose of widening a street, or making a new street, or for a public walk, or for enlarging a street or for laying out public walks or pleasure grounds. It seems F to me impossible to say that the corporation were bound to allocate to the public walks or pleasure grounds so much as and not less than they had originally contemplated in 1896, and that they could not as time passed alter the proportion of the land used for widening streets and for new streets and for public walks and for gardens. Having regard to their powers under those sections and to the lack of definition, I cannot hold the corporation bound to any particular scheme as G between the making of new streets, the widening of old streets, and the laying out of gardens or walks.

Once one has reached that position, it appears that when the powers of s. 68 are superimposed or introduced into the Act of 1875, the position of the corporation, the defendants in this action, is secure. Section 68 is to be read with the Act of 1875, and under that section there is the power to utilise any land which may be H lawfully appropriated for the purpose, or by order to authorise the use as a parking place of any part of the street. Under those two powers they might make the parking-place a part of the existing street and add to that bit as a parking-place a portion of the walk or garden; that is to say, subject always to their proceeding under the method of procedure laid down in sub-s. (2). The quality, the nature, the purpose of the proceedings by the corporation are the same. They have I acquired this land, and they can, subject to a proper discretion, determine how much is to be used for making a street, for widening a street or walk, and alter that proportion from time to time. If so, then in comes the power of s. 68, which is to be read side by side as a section of the 1875 Act with s. 154 and s. 164 of that Act as they were originally passed.

It is said against that that the court ought to be careful to see that the very heavy and great powers of the corporation are not misused so that they acquire land for one purpose and then devote it to a wholly different one. Our attention has been called to *A.-G.* v. *Hanwell Urban Council* (1) and *A.-G.* v. *Pontypridd*

Urban Council (2). The *Hanwell Case* (1) being a case in which land had been acquired for a sewage farm and then it was attempted to use it for the purpose of an isolation hospital. In the *Pontypridd Case* (2) the land had been acquired for electrical purposes, and it was desired to use a portion of it for a destructor. In argument I pointed out that in the *Hanwell Case* (1) those two purposes, the sewage farm and the isolation hospital, enured to the corporation under two wholly different Acts; and in the *Pontypridd Case* (2) it was pointed out by the learned judge that the destructor was not wanted for an electrical undertaking at all. He said:

> "Really a destructor such as this is was not wanted for the purpose of the supply of electricity at all. . . . Taking all the circumstances into consideration, I cannot say that this proposed user of the land for the erection and use of this destructor can be properly regarded, taken as a whole, as being so incidental to or connected with the main purpose of the generating and supply of electricity as to form a justifiable user of the land acquired in the manner I have mentioned."

Nothing that I say to-day, nothing in this judgment, is intended to circumscribe or cut down the authority of those two cases or the principle on which they are founded, but it appears to me that it is quite a different matter to say that when the land has been acquired for what may be called a composite purpose, both purposes being of a like nature, it is possible to intervene and use the authority of those cases to say that the discretion of the corporation as to the quantum of the user of the land can be interfered with by the court.

On the whole, I am inclined to agree with counsel for the corporation that what one has to ascertain is, under what power did they acquire the land? Counsel has called our attention to an observation of ROMER, L.J., and to other passages in *A.-G.* v. *Pontypridd Urban Council* (2) ([1906] 2 Ch. at pp. 265, 266), and it appears to me that that is the test, and not a bad test—under what power did they acquire the land? If they acquired it for the purposes of streets and purposes akin thereto, then the principle of the two cases that I have referred to cannot be used to interfere with the corporation's powers. In the present case the relators have undoubtedly struck too early. The corporation have not done more than indicate a determination, which is clearly allowed, of turning this land, or a portion of this shrubbery land, into a parking-place, but they realise, as they make plain, that before they do so they will have to proceed in accordance with sub-s. (2) of s. 68. When that procedure is commenced, it will be open to the objectors to take objection and if necessary to appeal. All that is in no way prevented by this judgment. But what the relators have undertaken to say is that the powers of the corporation are so limited, having regard to the purposes for which they acquired the land, that they have not any authority whatever under s. 68 even to commence proceedings which will ultimately be heard and determined under sub-s. (2).

It appears to me, for the reasons which I have added to those of EVE, J., that the relators cannot substantiate that position, and that EVE, J.'s order was right and the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree. It has been laid down in this court in *A.-G.* v. *Hanwell Urban Council* (1) and *A.-G.* v. *Pontypridd Urban Council* (2) that a local authority has no power permanently to apply land which it has acquired for one purpose to another purpose inconsistent with the original purpose. The first question to be determined, therefore, and in my judgment the only question, is, for what purpose was the land in question originally acquired by the defendant corporation? I think that counsel for the corporation was right in his submission that the only right method of determining that purpose is to ascertain what power or powers has the corporation exercised when it purchased the land. This is borne out by the passages cited by counsel from the judgments of COLLINS, M.R., and ROMER, L.J., in the *Pontypridd Case* (2) ([1906] 2 Ch. at pp. 265 and 266).

In the present case it is plain that in purchasing the land in question the corporation acted in exercise of two powers, viz.: (i) the power conferred by s. 154 of the Public Health Act, 1875, and (ii) the power conferred by s. 164 of the same Act. Both powers were exercised in respect of the whole of the land other than that purchased for the purpose of the post office. That being so, the corporation purchased the particular piece of land now in dispute for (amongst other purposes) the purposes mentioned in s. 154 of the Act of 1875. That being so, I am of opinion that it has power at any time after the purchase to exercise any powers it may have under or by virtue of that section in respect of the land so purchased, notwithstanding that in the meantime it may have been laid out under the powers conferred by s. 164. If that be the right view, the corporation is not threatening to act ultra vires by resolving to take steps to appropriate the piece of land for use as a parking-place. It is not for this court to say how that intention ought to be carried out. It is enough for present purposes that there are ways in which this may be done lawfully. At present the corporation has done no more than intimate its intention to appropriate the piece of land as a parking-place, intending to accomplish that object under s. 68 of the Act of 1925, which no doubt it will. Provided that the requirements of that Act are complied with I think that the powers thereby conferred are vested in the corporation as the result of its having purchased the land under the powers conferred by s. 154 of the Act of 1875. For these reasons, which are substantially those given by the learned judge and by the Master of the Rolls, I agree that this appeal fails and ought to be dismissed with costs.

RUSSELL, L.J.—I am of the same opinion. The argument of the relators is shortly this, that the land in question (by which I mean the land hatched green on the plan) was purchased for the purposes mentioned in s. 164 of the Act of 1875, and that what the corporation are proposing to do is to apply it for the purposes mentioned in s. 154, that that is an ultra vires act, and that they cannot do it. In my opinion that argument is wrong, and for this reason: that on the facts and documents in this case the land in question was not bought in exercise only of the powers contained in s. 164: it was bought in exercise of the powers contained in that section and the powers contained in s. 154. It is impossible to assign the particular powers to the particular strip of land. I think that that is what the learned judge in the court below means when he uses in his judgment the expression that it was acquired for "alternative purposes." That being so, I see nothing to prevent the corporation from using the land hatched green for the purpose of improving Norfolk Street and West Sunniside by turning the land into this street if they are so minded. In those circumstances they have, in my opinion, power, by proceeding under s. 68 of the Act of 1925, to provide a parking-place on the site of the land hatched green. For those reasons I find myself in agreement with the judgment of EVE, J., and I agree that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co.*, for *Charles Thomas Stockdale*, Sunderland; *Sharpe, Pritchard & Co.*, for *H. Craven*, Town Clerk, Sunderland.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

SMART BROS., LTD., *v.* HOLT

[KING'S BENCH DIVISION (Talbot and Wright, JJ.), May 8, 16, 1929]

[Reported [1929] 2 K.B. 303; 98 L.J.K.B. 532; 141 L.T. 268; 45 T.L.R. 504; 35 Com. Cas. 53]

B

Hire-Purchase—Distress—Exemption—"Goods comprised in any hire-purchase agreement"—Agreement and hiring "determined and ended"—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 4.

Goods were hired under a hire-purchase agreement, cl. 8 of which was as follows: "In case of any breach of any terms hereof the owners may . . . (b) . . . by written notice . . . forthwith and for all purposes absolutely determine and end this agreement and the hiring thereby constituted, and thereupon the hirer shall no longer be in possession of the goods with the owners' consent nor shall either party thereafter have any rights hereunder, but such determination shall not discharge any pre-existing liability of the hirer to the owners." The owners served on the hirer a notice stating that they had that day terminated the agreement and that their van would call to collect the goods. Before the van called the goods were seized under a distress by the landlord of the premises in which they were.

C

D

Held: once the notice had been sent, neither party to the hire-purchase agreement had any rights under the agreement, and the owners could recover their goods by the right given to them by common law without showing their title to do so under the agreement; the goods were, therefore, at the time of the distress, not "goods comprised . . . in any hire-purchase agreement," so as to be excepted from immunity from distress under s. 4 of the Law of Distress Amendment Act, 1908; and the landlord was not entitled to distrain.

E

Notes. Considered: *Drages, Ltd.* v. *Owen*, [1935] All E.R.Rep. 342. Referred to: *Druce & Co., Ltd.* v. *Beaumont Property Trust, Ltd.*, [1935] All E.R.Rep. 404; *Times Furnishing Co., Ltd.* v. *Hutchings*, [1938] 1 All E.R. 422.

F

As to distress on goods comprised in a hire-purchase agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 559 et seq.; and for cases see 18 DIGEST (Repl.) 294–296. For Law of Distress Amendment Act, 1908, see 6 HALSBURY'S STATUTES (2nd Edn.) 170.

Cases referred to:

G

(1) *Jay's Furnishing Co.* v. *Brand & Co.*, [1915] 1 K.B. 458; 84 L.J.K.B. 867; 112 L.T. 719; 31 T.L.R. 124; 59 Sol. Jo. 160, C.A.; 18 Digest (Repl.) 295, *425*.

(2) *Hackney Furnishing Co.* v. *Watts*, [1912] 3 K.B. 225; 81 L.J.K.B. 993; 106 L.T. 676; 28 T.L.R. 417, D.C.; 18 Digest (Repl.) 295, *424*.

(3) *Gledstane* v. *Hewitt* (1831), 1 Cr. & J. 565; 1 Tyr. 445; 9 L.J.O.S.Ex. 145; 148 E.R. 1548; 43 Digest 510, *488*.

H

Appeal from Nottingham County Court.

The first defendant, Mrs. Holt, was the landlady of a house at Nottingham, which was let at the rent of £100 a year to one Davison, and at Michaelmas, 1928, Davison owed her £62 10s. rent. Davison had hired goods from the plaintiffs, Smart Bros., Ltd., under a hire-purchase agreement dated May 5, 1928. By that agreement Davison undertook, inter alia, to pay punctually the monthly instalments, and also the rent of the premises on which the goods might be. Clause 8 of the agreement was as follows:

I

"In case of any breach of any term hereof the owners may (a) without prejudice to their claim for arrears of instalments or damages for breach of this agreement forthwith without notice terminate the hiring and re-possess themselves of and remove the goods; (b) alternatively, by written notice sent (by post or otherwise) to or left at the hirer's last known address, forthwith

and for all purposes, absolutely determine and end this agreement, and the hiring thereby constituted, and thereupon the hirer shall no longer be in possession of the goods with the owners' consent, nor shall either party thereafter have any rights hereunder, but such determination shall not discharge any pre-existing liability of the hirer to the owners."

On Sept. 28, 1928, the instalments were in arrear to the extent of £8 2s. 6d. On that day the plaintiffs served upon Davison notice under para. (b) terminating the agreement, and stating that the plaintiffs' van would attend and collect the goods. On Oct. 6 a distress was levied by Mrs. Holt's agent, Middleton, and goods subject to the hire-purchase agreement were seized. On Oct. 18 the plaintiffs served on all necessary parties a declaration under s. 1 of the Law of Distress Amendment Act, 1908, stating that the goods in question were their property. On Oct. 19 the goods were sold. The plaintiffs subsequently brought an action for illegal distress, under s. 2 of the Act of 1908 against Mrs. Holt, her agent Middleton, the bailiff, and the auctioneer, by whom the goods were sold. The defendants contended that the goods were distrainable by virtue of s. 4 of the Act, which excepts certain goods from immunity from distress, including "goods comprised in any . . . hire-purchase agreement." The county court judge gave judgment for the plaintiffs. The defendants appealed.

T. J. O'Connor, K.C. (*A. M. Lyons* with him), for the defendants.
Stuart Bevan, K.C. (*A. A. Pereira* with him), for the plaintiffs.

Cur. adv. vult.

May 16. The following judgments were read.

TALBOT, J.—This appeal arises out of an action for illegal distress or conversion of goods. Mrs. Holt, the first defendant, was landlady of a house, 6, Cranmer Street, Nottingham, which was let at a rent of £100 a year to a gentleman named Davison, and at Michaelmas of last year Davison owed her £62 10s. rent. He was also hirer of goods from the plaintiffs under a hire-purchase agreement dated May 5, 1928. By the agreement he undertook, among other things, to pay punctually the monthly instalments, and also the rent of the premises on which the goods might be. The eighth clause of the agreement was as follows: [His Lordship read it.] On Sept. 28, 1928, the instalments were in arrear to the extent of £8 2s. 6d. On that day the plaintiffs served on Davison the following notice:

"We beg to inform you that we have this day terminated our agreement with you. Our van will be calling upon you within the next few days to collect the whole of our goods. Will you please have them in readiness for our van to collect. Yours faithfully, Smart Bros., Ltd."

It is conceded that this notice must be taken to have been sent under cl. 8 (b) of the agreement. On Oct. 6 a distress was levied by the defendant Middleton on behalf of Mrs. Holt, and the goods in question, which were those subject to the hire-purchase agreement, were seized. The other defendants are the bailiff and the auctioneer by whom the goods were sold. On Oct. 16 the plaintiffs duly served on all necessary parties a declaration under s. 1 of the Law of Distress Amendment Act, 1908, setting forth that the goods in question were their property. The goods were sold on Oct. 19. The plaintiffs having sued the defendants in pursuance of s. 2 of the Act of 1908, recovered judgment for £85, and the question is whether the landlady was entitled to seize the goods which were the subject of the agreement of May 5.

Broadly speaking, the Act deprives landlords of the right to distrain upon goods of persons other than the tenant of the premises. But by s. 4 certain classes of goods are excepted, and as to those the right to distrain remains as if the Act had not passed. One of those classes is goods "comprised in any . . . hire-purchase agreement." Such goods are still distrainable, and, accordingly, the plaintiffs, who complain that their goods were illegally sold, maintain that they were not, when seized, comprised in a hire-purchase agreement. The defendants, the landlady

and her agents, maintain that they were. The question, therefore, is whether it is proved that the goods, which it is admitted were at the material time the plaintiffs', were at that time comprised in a hire-purchase agreement. It appears to me that, according to the natural meaning of the words, goods could only be so described if there was at any time a hire-purchase agreement relating to them which was in force and by which the rights of property and possession in them were regulated.

I think it is clear that as soon as the notice was sent under cl. 8 (b) of the agreement, all right of Davison to the possession of the goods under the agreement was at an end, and neither party to the agreement had any rights under it. It follows that there was, when the distress was levied, more than a week after the notice was sent, no hire-purchase agreement in force relating to the goods, and that, therefore, they were not at the time comprised in any hire-purchase agreement. There is, however, binding authority as to the construction of the words. In *Jay's Furnishing Co.* v. *Brand & Co.* (1) a hire-purchase agreement contained the following words:

> "If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined, and the hirer shall forthwith at his own expense return the said goods to the owners, and the owners shall be entitled to re-take possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter upon any premises where the said goods may be. Notwithstanding such return or re-taking of the said goods, the hirer shall remain liable for arrears of hire up to the date of such determination of this agreement."

The owner of the goods, acting under this clause, endeavoured without success to re-take possession of them and the next day the landlord seized them under a distress. The question was whether, when seized, the goods were comprised in a hire-purchase agreement. The judgments of BUCKLEY and PHILLIMORE, L.JJ., explain the meaning of the words. BUCKLEY, L.J., after discussing the construction of the rest of the agreement and the effect of the words "shall ipso facto be determined," said ([1915] 1 K.B. at p. 465):

> "The only question which remains is, were the goods still comprised in a hire-purchase agreement on May 15, when the landlord distrained? I apprehend that chattels remain comprised in an agreement when there is still subsisting some contractual obligation under the agreement relating to the chattels. Under this agreement there remained at the date of the distress the right of the plaintiffs to enter upon the premises and re-take possession of the chattels. Even if so much of the agreement as consisted of a demise had been brought to an end by the exercise of the plaintiffs' right to determine it, the agreement was still subsisting and bound the chattels in the sense that it gave the plaintiffs certain rights as against the chattels, the right to enter the premises and to seize the chattels and to deal with them. In these circumstances it seems to me that the chattels were still comprised in a hire-purchase agreement."

If, in the case before us, it is asked what contractual obligation under the agreement relating to the chattels was still subsisting when the distress was levied, the answer must be "none," and, therefore, they were no longer comprised in the hire-purchase agreement. PHILLIMORE, L.J., likewise founds his decision that the goods were still comprised in a hire-purchase agreement, in his words ([1915] 1 K.B. at p. 466) "entirely upon the licence to enter upon premises to re-take possession of the goods," and he goes on:

> "I do not say that the fact that certain contractual rights remain, as, for instance, the right to payment of rent or of damages for a breach of the agreement, would necessarily cause the goods still to be comprised in a hire-purchase agreement, but I do say that when any right remains in respect of the goods

A themselves, such as the right to obtain possession of them, for which right recourse must be had to the agreement, the goods are comprised in a hire-purchase agreement within the meaning of s. 4. It seems to me that this is the meaning and intention of the statute. It would be necessary for the plaintiffs to have recourse to the licence to re-take possession contained in the agreement in order to get the benefit which they seek."

B It is evident that in the present case no right under the agreement in respect of these goods themselves was still in existence when they were seized. The learned lord justice obviously thought it would not be difficult for a furnishing company so to word its hire-purchase agreements as to avoid the consequences of the form used by Jay's Furnishing Co. in *Jay's Furnishing Co.* v. *Brand & Co.* (1). In my opinion, the plaintiffs here have succeeded in doing this.

C In *Hackney Furnishing Co.* v. *Watts* (2) it was held that the goods then in question were, when seized by the landlord, comprised in a hire-purchase agreement. BRAY, J., delivering the judgment of this court, said: "The owners cannot recover their goods without showing their title to do so under the agreement." It is plain that in the case before us the plaintiffs would be under no such necessity. Their right is merely that which the common law gives them, and they have no

D need to resort to the agreement at all: see *Gledstane* v. *Hewitt* (3). In my opinion, the judgment of the learned county court judge was perfectly correct. The appeal must be dismissed.

WRIGHT, J.—I agree. The case depends on the issue whether the goods were comprised in a hire-purchase agreement within the meaning of s. 4 of the Law of

E Distress Amendment Act, 1908. They were at one time so comprised in the hire-purchase agreement dated May 5, 1928, but the question is whether they were so comprised after the letter of Sept. 28, 1928, terminating that agreement and stating that the plaintiffs' van would attend and collect the goods. The rent being in arrear, the plaintiffs had a right, under cl. 8 (b) of the agreement, to give a notice terminating the agreement in the terms of that clause which has been read

F by my Lord. Having regard to the points taken by the learned county court judge the notice must be held to have been given under cl. 8 (b).

Notwithstanding the strenuous argument of counsel for the defendants, I agree with my Lord that the notice put an end to the agreement, leaving the plaintiffs with no right to re-possess themselves of the goods under any special power granted by the agreement such as would be granted under cl. 8 (a) if they had availed

G themselves of that clause. Clause 8 (b), on the contrary, though providing that rights of a personal character, such as claims for arrears of rent, shall remain, has the effect of removing the goods from the ambit of the agreement; the goods remain the property of the plaintiffs, but the licence to the defendants had been revoked by the notice given under the agreement; the defendants had, after the notice, only such rights as flowed from their position at common law—that is, such rights as

H an owner of goods has against a person who no longer has a right to the possession of the goods and who is holding without the owner's consent. The owner has, in such a case, no right of entry to re-take possession; he can merely ask for delivery of the goods, and if refused delivery may fall back upon the aid of the court to give him possession in an action of detinue. I think, in such a case, it cannot be said that the goods are comprised in the hire-purchase agreement at the material

I time—that is, the levy of distress, when, as here, the owner of the goods has previously terminated the agreement by a notice duly given, as required by its terms. In an action of detinue following upon such a refusal by the hirer to re-deliver, the agreement of hiring under which the bailment was made would be irrelevant except as matter of history or inducement: "the detainer is the gist of the action," as LORD LYNDHURST, C.B., said in *Gledstane* v. *Hewitt* (3).

The terms of the agreement in question distinguish this case from that of *Jay's Furnishing Co.* v. *Brand & Co.* (1), because in that case the provision was that, on default, not only should the agreement be determined but the owner of the

goods should be entitled to re-take possession, and for that purpose enter upon any premises where the goods might be. BUCKLEY, L.J., says ([1915] 1 K.B. at p. 465): A

"I apprehend that chattels remain comprised in an agreement when there is still subsisting some contractual obligation under the agreement relating to the chattels. Under this agreement there remained at the date of the distress the right of the plaintiffs to enter upon the premises and re-take possession of the chattels. Even if so much of the agreement as consisted of a demise had been brought to an end by the exercise of the plaintiffs' right to determine it, the agreement was still subsisting and bound the chattels in the sense that it gave the plaintiffs certain rights as against the chattels, the right to enter the premises and to seize the chattels and to deal with them. In these circumstances it seems to me that the chattels were still comprised in a hire-purchase agreement." B C

PHILLIMORE, L.J., in the same case, says ([1915] 1 K.B. at p. 466):

"I think that these goods were still comprised in a hire-purchase agreement at the date of the distress. I rest my judgment entirely upon the licence to enter upon premises to re-take possession of the goods. I do not say that the fact that certain contractual rights remain, as for instance, the right to payment of rent or of damages for a breach of the agreement, would necessarily cause the goods still to be comprised in a hire-purchase agreement, but I do say that when any right remains in respect of the goods themselves, such as the right to obtain possession of them, for which right recourse must be had to the agreement, the goods are comprised in a hire-purchase agreement within the meaning of s. 4. It seems to me that this is the meaning and intention of the statute. It would be necessary for the plaintiffs to have recourse to the licence to re-take possession contained in the agreement in order to get the benefit which they seek." D E

In the earlier case of *Hackney Furnishing Co.* v. *Watts* (2) the relevant clause was in similar terms, and the Divisional Court gave it the same effect, and held the goods were still comprised in the agreement. I think the plaintiffs in this case have, by "apt words" such as PHILLIMORE, L.J., contemplated in *Jay's Furnishing Co.* v. *Brand & Co.* (1), taken themselves out of the cases referred to and escaped the operation of s. 4 of the Law of Distress Amendment Act, 1908, and hence the distress was unlawful and the plaintiffs were entitled to succeed in their claim. F

Appeal dismissed. G

Solicitors: *Peacock & Goddard*, for *Clifton, Woodward & Smith*, Nottingham; *Tudor & Rowe*.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law*.]

A

EXPRESS DAIRY CO., LTD. *v.* JACKSON

[KING'S BENCH DIVISION (McCardie, J.), December 5, 19, 1929]

[Reported 99 L.J.K.B. 181; 142 L.T. 231; 46 T.L.R. 147]

B *Trade—Covenant in restraint of trade—Master and servant—Infant servant—Milk roundsman—"Not in any way interfere with the" employer's trade or "customers . . . nor do any act matter or thing which shall be prejudicial to the" employer—Not to solicit, etc., "customers"—Construction—Validity—Severability.*

By contract of service made between a milk roundsman aged 20 years and
C a dairyman the milk roundsman undertook that he would "not at any time within a period of two years from the termination of this contract and service *in any way interfere with the trade* or the customers *belonging to the* [dairyman's] *business* or served by the said employer his successors or assigns nor serve solicit or canvass or endeavour in any way whatever to serve solicit or canvass or cause to be served solicited or canvassed directly or indirectly
D any of the said customers with milk or dairy produce either for his own benefit or that of any other person persons or company whomsoever nor *do any act matter or thing which shall be prejudicial to the said employer his successors or assigns.*"

Held: no part of this undertaking was binding on the roundsman be-
E cause the words above printed in italics were far too vague, indefinite and wide to be enforceable (dicta in *Davies* v. *Davies* (1) (1887), 36 Ch.D. 359, applied), and were particularly to be condemned in a service agreement made with an infant; also because the word "customers" would include those who first became customers of the employer's business after the roundsman had left his service, and so the restrictions connected with "customers" were so wide as to be unenforceable (*Konski* v. *Peet* (2), [1915] 1 Ch. 530, followed); and
F because the undertaking was not severable and so each of these defects vitiated the whole (dicta of LORD SHAW and LORD MOULTON in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (3), [1913] A.C. at pp. 742, 745, applied; *Dubowski & Sons* v. *Goldstein* (4), [1896] 1 Q.B. 478, not followed).

Notes. As to contracts of service between a dairyman and a milk roundsman
G void for unreasonable restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 441, para. 729, text and note (d); and for cases on the subject, see 43 DIGEST 66–67, *691–701.*

Cases referred to:

(1) *Davies* v. *Davies* (1887), 36 Ch.D. 359; 56 L.J.Ch. 962; 58 L.T. 209; 36 W.R. 86; 3 T.L.R. 839, C.A.; 43 Digest 41, *406.*

(2) *Konski* v. *Peet*, [1915] 1 Ch. 530; 84 L.J.Ch. 513; 112 L.T. 1107; sub nom.
H *Kaski* v. *Peet*, 59 Sol. Jo. 383; 43 Digest 49, *497.*

(3) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, *143.*

(4) *Dubowski & Sons* v. *Goldstein* (1895), unreported, D.C.; affirmed, [1896] 1 Q.B. 478; 65 L.J.Q.B. 397; 74 L.T. 180; 44 W.R. 436; 12 T.L.R. 259;
I 40 Sol. Jo. 334, C.A.; 43 Digest 43, *438.*

(5) *Jacoby* v. *Whitmore* (1883), 49 L.T. 335; 48 J.P. 325; 32 W.R. 18, C.A.; 43 Digest 40, *398.*

(6) *Showell* v. *Winkup* (1889), 60 L.T. 389; 43 Digest 41, *399.*

(7) *Henry Leetham & Sons, Ltd.* v. *Johnstone-White*, [1907] 1 Ch. 322; 76 L.J.Ch. 304; 96 L.T. 348; 14 Mans. 162; sub nom. *Leetham & Sons, Ltd.* v. *White*, 23 T.L.R. 254, C.A.; 43 Digest 61, *634.*

(8) *Bromley* v. *Smith*, [1909] 2 K.B. 235; 78 L.J.K.B. 745; 100 L.T. 731; 43 Digest 47, *477.*

(9) *Gadd* v. *Thompson*, [1911] 1 K.B. 304; 80 L.J.K.B. 272; 103 L.T. 836; 27 T.L.R. 113; 55 Sol. Jo. 156, D.C.; 43 Digest 71, *752*.

(10) *Corn* v. *Matthews*, [1893] 1 Q.B. 310; 62 L.J.M.C. 61; 68 L.T. 480; 57 J.P. 407; 41 W.R. 262; 9 T.L.R. 183; 37 Sol. Jo. 190; 4 R. 240, C.A.; 34 Digest 506, *4197*.

(11) *Sir W. C. Leng & Co., Ltd.* v. *Andrews*, [1909] 1 Ch. 763; 78 L.J.Ch. 80; 100 L.T. 7; 25 T.L.R. 93, C.A.; 43 Digest 25, *164*.

(12) *Reeve* v. *Marsh* (1906), 23 T.L.R. 24; 43 Digest 46, *470*.

(13) *Baines* v. *Geary* (1887), 35 Ch.D. 154; 56 L.J.Ch. 935; 56 L.T. 567; 51 J.P. 628; 36 W.R. 98; 3 T.L.R. 523; 43 Digest 40, *394*.

(14) *Continental Tyre and Rubber (Great Britain) Co., Ltd.* v. *Heath* (1913), 29 T.L.R. 308; 43 Digest 48, *488*.

(15) *Goldsoll* v. *Goldman*, [1915] 1 Ch. 292; 84 L.J.Ch. 228; 112 L.T. 494; 59 Sol. Jo. 188, C.A.; 43 Digest 48, *489*.

(16) *Attwood* v. *Lamont*, [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 36 T.L.R. 895; 65 Sol. Jo. 25, C.A.; 43 Digest 20, *131*.

(17) *Herbert Morris, Ltd.* v. *Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 Sol. Jo. 305, H.L.; 43 Digest 24, *154*.

(18) *East Essex Farmers, Ltd.* v. *Holder* (1926), 70 Sol. Jo. 1001; 43 Digest 43, *435*.

(19) *Clarke, Sharp & Co., Ltd.* v. *Solomon* (1920), 37 T.L.R. 176, C.A.; 43 Digest 48, *491*.

Action tried before McCardie, J., without a jury.

The facts are taken substantially from the judgment.

In May, 1927, one Cumming carried on a dairyman's business at 104, Portland Road, South Norwood, London. The defendant, who was then just over twenty years of age, entered into his service as a milk-carrier under a written agreement dated May 24, 1927, signed by both parties. The service was determinable on one week's notice. The wages payable were £3 a week together with commission, which averaged a few shillings a week. The agreement contained the following restrictive words:

> "In consideration whereof and of the said wages the said employee doth hereby agree and undertake that he shall and will well and faithfully serve the said employer his successors or assigns in the same business and will not at any time within a period of two years from the termination of this contract and service in any way interfere with the trade or the customers belonging to the said business or served by the said employer his successors or assigns nor serve solicit or canvass or endeavour in any way whatsoever to serve solicit or canvass or cause to be served solicited or canvassed directly or indirectly any of the said customers with milk or dairy produce either for his own benefit or that of any other person persons or company whomsoever nor do any act matter or thing which shall be prejudicial to the said employer his successors or assigns."

There were no separate paragraphs or sentences and no punctuation in the above clause. The defendant became twenty-one on May 10, 1928, and continued to work for Cumming under the agreement. By a written agreement dated Dec. 20, 1928, Cumming sold his business to the plaintiffs. The formal assignment was executed in January, 1929, and under that document Cumming transferred to the plaintiffs (inter alia) the goodwill of the business, together with the benefit of "all contracts and engagements (including all agreements for service by employees)." On Jan. 21, 1929, the defendant gave a week's notice to leave his employment and left on Jan. 26. During his employment he had acted as a milk-carrier on one of the rounds of the business and he carried a book containing the customers' names and addresses together with other particulars. Immediately on leaving the service of the plaintiffs the defendant began to work as a milk-carrier for another dairyman whose place of business was close to that of the plaintiffs'. He continued to call

on those who had been customers of Cumming and served them with milk on behalf of his new employer, and later on did the same on behalf of another dairyman. As a result the plaintiffs' customers fell in number from over 150 to about forty-five, and the amount of milk sold by the plaintiffs fell considerably also. The plaintiffs claimed damages and an injunction. The defendant pleaded that the restrictive words were too wide and were in restraint of trade and therefore void.

Moresby for the plaintiffs, the employers.
de Ferrars for the defendant, the milk roundsman.

Cur. adv. vult.

Dec. 19. **McCARDIE, J.,** read the following judgment.

The plaintiffs claim an injunction and damages against the defendant for breach of agreement. The facts are not in dispute: the points in issue are those of law. [His Lordship stated the facts and continued:] The plaintiffs sue on the document of May 24, 1927, and that alone. It is plain, and it is fully admitted, that if the restrictive words are binding on the defendant he has committed a breach of contract and is liable to an injunction. The defendant, however, submits that he is not bound by the contract and that the restrictive words therein are too wide and are in restraint of trade and therefore void. The points of law at issue were well argued by counsel for the defendant and by counsel for the plaintiffs. The question is of interest to the milk trade for it is usual to impose some form of restrictive obligation on those who enter the service of dairymen. In each case the decision must depend on the nature and extent of the words used in the actual contract at issue. It is not disputed that if the contract was enforceable at the suit of Cumming it is enforceable also at the suit of the present plaintiffs inasmuch as they are assignees of the business and of the benefit of the restrictive obligation entered into by employees: see, e.g., *Jacoby* v. *Whitmore* (5), *Showell* v. *Winkup* (6), *H. Leetham & Sons, Ltd.* v. *Johnstone-White* (7), per Farwell, L.J. ([1907] 1 Ch. at p. 327).

The question, then, is the validity or otherwise of the restrictive words in the contract. It is proper to observe that the contract fixes no geographical radius. No question therefore arises as to undue breach of physical area. It is also proper to observe that the period of restriction is limited to two years only from the termination of the contract. No one would contend that that period is, of itself, unreasonable under the circumstances should the bargain be otherwise valid. But, as against these considerations, it is important to remember that the defendant was an infant when he signed the contract of May 24, 1927. It is true that an infant may be bound by reasonable restrictions in his contract of employment. The decisions are clear on that point: see *Bromley* v. *Smith* (8), *Gadd* v. *Thompson* (9)—and so, too, apparently, if the contract contains stipulations which are unreasonable and therefore void provided they are clearly severable from those which are reasonable and, primâ facie, enforceable: *Corn* v. *Matthews* (10). But the fact that the covenantee is an infant seems ever to be an important factor in such cases as the present. The views of the Court of Appeal in *Sir W. C. Leng & Co., Ltd.* v. *Andrews* (11) must be borne in mind. Cozens-Hardy, M.R., there said ([1909] 1 Ch. at p. 769):

> "But we cannot forget that he (the defendant) was not an adult. He was an infant and different considerations, it seems to me, may well apply. The defendant, being an infant, entered into a contract which was only good if it was for his benefit, and, in considering whether it was for his benefit the onus is on the plaintiffs to establish that the contract was for the benefit of the infant before they can sue upon it."

There is a further point I should mention. It is that the courts will not enforce a restrictive covenant (whether the defendant be an infant or not) when the covenant is vague and indefinite: see, e.g., the dicta in *Davies* v. *Davies* (1), where a retiring partner covenanted

"to retire from the partnership; and, so far as the law allows, from the business, and not to trade, act or deal in any way so as to directly or indirectly to affect the continuing partners." A

See also on the point of vagueness *Reeve* v. *Marsh* (12) and *Mason* v. *Provident Clothing Co., Ltd.* (3).

Turning to the restrictive matter in the present contract, I venture to repeat that there are no separate paragraphs or sentences and no punctuation. The whole of the restrictive words appear to constitute one clause of inter-connected and inter-woven words. The defendant agreed that for two years after the determination of the contract he would not do certain things. So far as those things can be formulated they are: (a) He would not "in any way interfere with the trade of the said employer, his successors or assigns," (b) He would not "in any way interfere with the customers belonging to the said business or served by the said employer, his successors or assigns." (c) He would not "serve, solicit or canvas or endeavour in any way whatsoever to serve, solicit or canvas or cause to be served, solicited or canvassed directly or indirectly any of the said customers with milk or dairy produce either on his own benefit or that of any other person, persons or company whomsoever." (d) He would not do "any act, matter or thing which shall be prejudicial to the said employer, his successors or assigns." B C D

It is to be noted that in this action the plaintiffs sue upon all the words I have set out under the heads, (a), (b), (c), and (d). As to (a) and (d) I find it hard to imagine any words of a vaguer or more indefinite character. It is difficult to know what acts those words may cover or to determine the extent to which they preclude mere competition by the defendant for new customers as distinguished from, e.g., the serving or solicitation of customers actually being supplied by the plaintiffs at the time when the defendant's service ended. In my view the words in (a) and (d) are far too vague, indefinite, and wide to be enforceable. Such or the like words are particularly to be condemned when they occur, as here, in a service agreement made with an infant. But there remain heads (b) and (c) to be considered. E

Here I must state one other point. The plaintiff company (the successors of Cumming) carry on their business not only at 104, Portland Road, South Norwood, but also at many other shops and depots. As their representative said in evidence, their area of supply is the whole of London except the East End. I will assume that the word "business" referred to in the contract is the business which was carried on at 104, Portland Road, South Norwood, for apparently I ought to make this assumption by reason of the decision of the Court of Appeal in *Dubowski & Sons* v. *Goldstein* (4). The words which I have set out in heads (b) and (c) are in some ways similar to the words discussed in *Dubowski's Case* (4), though nothing approaching (a) and (d) are to be found in that action. F G

But there is still the question of the meaning of the word "customers." Customers may be classified as follows for the purposes of the present case: (a) Those who had once been customers of Cumming, but who had ceased to be customers before the defendant entered the service of Cumming. (b) Those who were customers when the defendant began to work for Cumming, but who ceased to be customers before he left. (c) Those who were customers when the defendant began to work for Cumming and continued as customers when he left. The classification can, of course, be carried further, but it will suffice to mention one further and important illustration, namely, those who first became customers of the business after the defendant left. These, it might be argued, are customers of the successors or assigns of Cumming within the meaning of the contract. The material words used in *Dubowski's Case* (4) were: "any of the customers who shall at any time be served by or then belonging to the employer, his successor or assigns in the said business." The difficulty of defining the word "customers" was felt not only in the Court of Appeal, but also in the courts below. The divisional court had restricted the injunction to customers who were such during the time when the defendant there was in the plaintiff's employment. It is not easy to ascertain H I

A the views of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.) on the points I am now discussing. In fact, however, they supported the decision of the divisional court who had granted the injunction in the limited form framed by the divisional court. The dicta of Lord Esher, M.R., and Rigby, L.J., however, seem to indicate that those learned judges inclined to the view that the word "customers" in the contract there in question would include those who became B customers for the first time after the defendant had left the service, and further, that even when so construed the restrictive clause would be reasonable and enforceable. There can be no doubt, I feel, that the decision both of the Court of Appeal and of the divisional court in *Dubowski's Case* (4) was based on a somewhat broad and liberal application of the doctrine of severability, although Lord Esher, M.R., seemed to think that neither such doctrine nor *Baines* v. *Geary* (13) was C very material. My own humble view is that in *Dubowski's Case* (4) the doctrine of severability and the correctness of the decision in *Baines* v. *Geary* (13) arose with the utmost directness. I do not propose to discuss *Baines* v. *Geary* (13) or the decisions cited by North, J., in that case, nor to analyse in detail the doctrine of severability. I would only venture to point out that in *Baines* v. *Geary* (13) Rigby, L.J., doubted whether *Dubowski's Case* (4) was rightly decided, and doubt D was also expressed by Scrutton, J., in *Continental Tyre and Rubber (Great Britain) Co., Ltd.* v. *Heath* (14).

On the doctrine of severability, however, much has been said since 1896. Thus in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (3) Lord Shaw said ([1913] A.C. at p. 742): "Courts of law should not be astute to disentangle such contracts and to grant injunctions and restraints which are not justified by their terms." E Lord Moulton said ([1913] A.C. at p. 745):

> "I do not doubt that the court may, and in some cases will, enforce a part of a covenant in restraint of trade even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only F in cases where the excess is of trivial importance or merely technical and not a part of the main purport and substance of the clause. It would, in my opinion, be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms the courts were to come to his assistance, and by applying their ingenuity and knowledge of law carve out of this void covenant the maximum of what he might validly have required. G It must be remembered that the real sanction at the back of the covenants is the terror and expense of litigation in which the servant is usually at a great disadvantage in view of the longer purse of the master."

Since *Mason's Case* (3) there seems to have been a fluctuation of opinion as to severability. In *Goldsoll* v. *Goldman* (15) the Court of Appeal seem to have applied the doctrine of severability with some liberality. But there the contract was one H with respect to a sale of goodwill. It was not a contract of service. The restrictive words, moreover, were unusual. In *Attwood* v. *Lamont* (16) Younger, L.J. (with the concurrence of Atkin, L.J.), said that since *Mason's Case* (3) and *Herbert Morris, Ltd.* v. *Saxelby* (17) the doctrine of severability requires careful and limited application if not entire reconsideration, especially in cases of contracts of service. He added these words: I

> "The learned judges of the Divisional Court, I think, took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word it is permissible, but in that case only."

The word "customers" in the contract now before me would appear to cover those who first became customers of the plaintiffs' business after the defendant had left their service. If the dicta of LORD ESHER, M.R., and RIGBY, L.J., in *Dubowski's Case* (4) are sound, such expanded meaning of the word "customers" would still leave the restrictive clause valid and enforceable, i.e., apart from any question of infancy or any question as to the other words under heads (a) and (d). But are those dicta sound? The point arose in *Konski* v. *Peet* (2), where NEVILLE, J., definitely declined to follow the dicta, and added:

> "In my opinion a judge of first instance is not only not bound, but not entitled to follow the dicta of other judges which are not in accord with his own judgment."

He there held that words which purported to prevent the defendant in that case from dealing with those who first became customers of the plaintiff after the defendant had left were too wide and therefore unenforceable. He declined to apply the doctrine of severability. In *East Essex Farmers, Ltd.* v. *Holder* (18) LAWRENCE, J., approved and followed the view of NEVILLE, J., in *Konski's Case* (2) in preference to the dicta in *Dubowski's Case* (4). See also the decision of the Court of Appeal in *Clarke, Sharp & Co., Ltd.* v. *Solomon* (19).

Taking the balance of judicial opinion at the present time I came to the conclusion that the word "customers" in the present case is used with so expanded a meaning as to render the restrictive clause (apart from other objections) too wide and that it is therefore unenforceable. Nor do I think that the case is one in which the doctrine of severability should be applied. On the whole, therefore, I must decide that the defendant is not bound by the restrictive words in the contract on which he is sued, and I am the more confirmed in this decision by the fact that the defendant was an infant at the time he signed his bargain of service. The claim to an injunction and damages therefore fails, and judgment must be entered for the defendant.

Judgment for the defendant.

Solicitors: *W. T. Ricketts & Son*; *Gibson & Weldon*, for *Frederick Gowan*.

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law*.]

Re FRYER AND HAMPSON'S CONTRACT

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), February 7, 1929]

[Reported 140 L.T. 680]

Sale of Land—Title—Abstract—Mortgage to building society—Union of mortgagee society with another to form new united society—Receipt for mortgage monies by new united society, with note that union had been made and registered endorsed on mortgage—Need to abstract and verify resolution, notice and instrument of union—Building Societies Act, 1877 (40 & 41 *Vict.*, *c.* 63), *s.* 5.

Neither the mere union of two building societies nor the registration, under the Building Societies Act, 1874, s. 33, of such union suffices to effect a transfer, under s. 5 of the Building Societies Act, 1877, of the property of the uniting societies to the new united society, as s. 5 transfers only such property as was intended by the instrument of union to be transferred.

On Nov. 30, 1925, a certain property was mortgaged to the H.E. building

society. On Jan. 31, 1928, the H.E. building society united with the H.P. building society under the provisions of the Building Societies Acts to form the H. building society. On June 28, 1928, the mortgagor repaid the mortgage to the H. building society, which society gave a receipt in its own name endorsed on the mortgage, and also a note, similarly endorsed, that on Jan. 31, 1928, the H.P. and H.E. societies "were united in accordance with the provisions of the Building Societies Acts and became one society under the name of the H. building society, notice of the union being on the date duly registered with and authenticated by the Registrar of Friendly Societies as required by the said Acts." On Sept. 15, 1928, a successor in title of the mortgagor contracted to sell the premises, and when making title he maintained that the purchaser should be satisfied with the endorsement mentioned as evidence of the discharge of the mortgage.

Held: to show a good title the vendor must abstract and verify the resolution of union, the notice of union given to the registrar, and the instrument of union, if any, and those documents must show that either the whole of the property of the original mortgagee society, or that part of it which would include its rights as mortgagee, had become vested in the new united society under s. 5 of the Act of 1877.

Notes. As to the making of title by a vendor whose property has been mortgaged to a building society and whose receipt for repayment has been given by a new united society after amalgamation, see 3 Halsbury's Laws (3rd Edn.) 631, para. 1289, text and note (f); and as to a vendor's obligations as to title, see 29 ibid. (2nd Edn.) 307 et seq., para. 404 et seq. For the Building Societies Act, 1874, s. 33, and 1877, s. 5, see 2 Halsbury's Statutes (2nd Edn.), pp. 640 and 650 respectively.

Appeal by a vendor from a decision of the Vice-Chancellor of the County Palatine Court of Lancaster in favour of the purchaser, who had objected that the vendor's answer to a requisition on title as to the discharge of a mortgage was insufficient.

G. B. Hurst, K.C., and *Allan Walmsley* for the vendor.
J. W. Manning, K.C., and *J. M. Easton* for the purchaser.

The arguments as to the correct interpretation of the effect of s. 5 of the Building Societies Act, 1877, read in conjunction with ss. 32 and 33 of the Building Societies Act, 1874, on the transfer of the property of a building society to a building society with which it became united are sufficiently outlined in the judgments.

LORD HANWORTH, M.R.—On Sept. 15, 1928, a contract was made by Christopher Thomas Fryer, then called the vendor, to sell to Ada Hampson, the purchaser, certain property consisting of two freehold plots of land, more particularly set out in the contract, and in due course requisitions of title were submitted by the purchaser to the vendor. It appears that a predecessor in title of the vendor mortgaged this property, which is the subject of the contract, to the Halifax Equitable Building Society on Nov. 30, 1925. On June 28, 1928, that mortgage was discharged, and vacated. The receipt was endorsed on the mortgage and the premises were then revested in the mortgagor. The history of that mortgage and of the revesting, and of the discharge, is contained upon the mortgage itself, a copy of which has been handed to us. It is a mortgage as at the date which I have mentioned. There is a receipt endorsed upon it, which is as follows:

"Halifax Building Society hereby acknowledge that they have on or before the day mentioned below received the sum of £820 8s. 7d., being the balance remaining owing in respect of the principal money, whether by way of original advance or otherwise secured by this mortgage, together with all interest, fines, costs and other money payments having been made by the within-named Henry Robert Collett."

Then the seal of the Halifax Building Society is affixed. There is a note below that dated Jan. 31, 1928:

"The Halifax Permanent Benefit Building Society and the Halifax Equitable Benefit Building Society were united in accordance with the provisions of the Building Societies Acts and became one society under the name of the Halifax Building Society, notice of such union being on this day duly registered with and authenticated by the Registrar of Friendly Societies as required by the said Acts.

One of the requisitions of title that were submitted by the purchaser was as follows:

"The mortgage of Nov. 30 was made to the Halifax Equitable Benefit Society, but the statutory receipt which purports to discharge the same is sealed by the Halifax Building Society. How did the latter society become entitled to the benefit of the mortgage? Abstract of every deed or instrument transferring the mortgage to the Halifax Building Society must be forwarded at the vendor's expense."

Obviously, a point arose which necessitated some explanation when the difference between the names of the mortgagees and the name of the society giving the discharge was observed. The reply to that was on Jan. 31, 1928:

"The Halifax Equitable Benefit Building Society and the Halifax Permanent Benefit Building Society were united in accordance with the provisions of the Building Societies Acts, and became one society under the name of the Halifax Building Society, notice of such union being on that date duly registered with and authenticated by the Registrar of Friendly Societies as required by the said Acts."

On that, further observation was made: "The union of the two societies must have been achieved by resolutions, notice thereof to the registrar and the registration of such notice; by whom passed?" The answer to that was: "By an instrument of union and consents in writing of shareholders, see the Building Societies Act," and various sections in several Acts which are referred to. Then followed the further requisition:

"It does not necessarily follow that the mortgage of Nov. 30, 1925, was transferred to the new society by the registration of the notice of union (see Building Societies Act, 1877, s. 5) which, by the use of the words 'as may be set forth in the instrument of union' permits effectual transfer."

Then they asked for further abstract of documents, "and the acts employed effecting transfer must be supplied." The answer to that is:

"We have nothing to add to the original reply given. Surely it is quite clear from that reply that there was no document to transfer the mortgage to the Halifax Building Society, nor was one necessary."

That created the difficulty. On that a Vendor and Purchaser's summons was taken out before the Vice-Chancellor for the purpose of obtaining a declaration that the answers to the requisitions were sufficient, and that it might be declared

"that the requisitions and objections of the purchaser in respect of the title have been sufficiently answered by the applicant, the vendor, and a good title has been shown in accordance with the said contract."

The learned Vice-Chancellor dismissed the summons. From that decision of his, which was given on Dec. 10, 1928, this appeal is brought to the court.

We have, therefore, to consider whether or not this answer of the vendor is sufficient. The way it is put is this: It is argued that although the names of the original mortgagee and of the society which granted the discharge are different, there has been a union formed between them, with the result that the one stands in the place of the other, and that by this unity the right person to give the discharge was now the Halifax Building Society, that inasmuch as the title of the Halifax Equitable Benefit Building Society and the Halifax Permanent Benefit

Building Society have been coalesced, that is sufficient to justify the receipt in the name of the Halifax Building Society, and no further question is to be asked. Reliance is therefore placed on two sections of the statutes to which reference has been made. The two sections in particular are s. 33 of the Building Societies Act, 1874, and s. 5 of the Building Societies Act, 1877. It appears to me that the learned Vice-Chancellor came to a right decision. An attempt is made on behalf of the vendor to attribute too much to the union which is effected by virtue of s. 33 of the Act of 1874. I will, however, deal with the point as presented to us by counsel on behalf of the vendor. He says: It is not quite right to look first at s. 33; attention ought to be drawn to s. 32 which gives various ways under which a building society under this Act may terminate or be dissolved. There is no doubt that the section does contemplate the possibility of a society being terminated or being dissolved by dissolution prescribed by its rules or by consent of an aliquot number of its members. Then the liabilities and assets of the society are to be dealt with in accordance with the subsections there provided. By sub-s. (4) you can have a winding-up either voluntarily or under supervision of the court.

Bearing in mind those methods, then you come to s. 33, which says baldly and plainly: "Two or more societies under this Act may unite and become one society." Counsel for the vendor says that that is what has happened to these two societies which are referred to here, namely, the Equitable Society and the Permanent Society: they have united and become one society. Having done so under s. 33, they are entitled to the benefit of s. 5 of the Act of 1877, which says:

> "The registration by the registrar of the notice of the union of any societies, or of the transfer of the engagements of any society to another society, in terms of and subject to the provisions of s. 33 of the principal Act, shall operate as an effectual conveyance, transfer and assignment, as at the date of the said registration, of the funds, property, and assets of the societies so uniting to the united society or of the society transferring its engagements to the society to which such engagements may be transferred."

So, says counsel for the vendor, inasmuch as that registration is indicated by the answer to the requisition, and, indeed, is noted upon the mortgage deed itself (the fact of their being united has been noted in that way), that ends the matter, and no further requisition or inquiry can be made.

It appears to me that such an argument fails to comply with some of the details of the section which must not be overlooked. Is it so plain that, when two societies unite, their identity is thereafter lost, and that the two societies which have united have ceased to become societies for any purpose at all and have lost their entities in the new united society formed by this juncture of the two? The words in s. 33 must not be overlooked. They are in addition to those which I have read "with or without any dissolution or division of the funds of such societies or either of them," that is to say, the words of s. 33 which I have now read appear to contemplate that two or more societies may unite and become one society with or without any dissolution or division of the funds of such societies or either of them; in other words, it appears that although the society may sink its identity, and from and after the date of the union carry on business under the new name, and be a part of a united society, yet it is contemplated that all that may happen without any dissolution or division of the funds.

Section 5 of the Act of 1877 contains words which appear to restrict the totality of the effect of registration, for the words which I have already read are followed by these, "as may be set forth in the instrument of union or transfer of engagements." It would seem, therefore, that registration may operate so far as it can, but in reference to the funds, assets and engagements of the society as may be set forth in the instrument of union or transfer of engagements. Further, there is a proviso to the section that "such union or transfer of engagements shall not affect the rights of any creditor of either or any society uniting or transferring its

engagements." In the course of the argument it was pointed out that these societies, which have power to borrow, might have obtained a loan. A creditor might desire to take suit in respect of the loan against the society to which the loan had been made. By reason of the proviso it appears that the creditor has still the right reserved to him not to take the substituted society in place of the original debtor, but to have the right of taking proceedings against the original debtor. If so, for certain purposes the entity of the uniting society cannot be immediately submerged after the act of uniting has been effected, or after there is a certificate of registration by the registrar of the actual union. More than that, from the words "with or without any dissolution or division of the funds," it appears that some limitation is necessary to the purpose of s. 5, and that purpose seems to be such "as may be set forth in the instrument of union or transfer of engagements"; in other words, the two societies may unite, they may, therefore, after their new name has been registered, carry on business in that name, but for certain purposes regulating their rights inter se it is contemplated that there may be a document called an instrument of union, and that there may be at the will of one or either of them no dissolution or division of the funds of the society. It is, therefore, necessary to find out how far there has been coalescing of the two together, or whether some particular items of property or items of liabilities or engagements have been excepted or dealt with on terms as between the two entities which are forming the new society.

As I pointed out, the statute of 1874 contemplated the existence of older societies which had been formed under the Act of William IV. In s. 25 of the Act of 1894, s. 40 of the Building Society Act, 1874, which requires an annual return to be made, is made applicable to societies which have been certified under the Building Societies Act, 1836, contemplating that there were societies in 1894 which had been certified under the Act of 1836, and had not yet become certified under the Act of 1874. It is therefore clear that there must have been contemplated as necessary a mechanical provision whereby societies could unite, but that the terms on which that unification should take place must be terms which would require a statement after negotiations between the two, the union could not be effected brevi manu, by a mere certificate of granting a new name, without any sort of document such as is called, in one of the sections, an instrument of union or transfer of engagements. Section 33 does not give such a complete unity to the two societies that no inquiry can be made thereafter as to the terms of the union. The words of s. 5 of the Act of 1877 cannot be thrown out of account, but both sections appear to indicate that there must be some further material, beyond a mere certificate of unification, as to which the purchaser would be entitled to receive information. For these reasons it appears to me that the learned Vice-Chancellor was right in the decision at which he arrived, and that therefore the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree. In my judgment the Vice-Chancellor came to a right conclusion in this case. The point which has emerged is really a very simple one. The vendor has taken out a summons to have it determined whether he has shown a good title to the property, which at one time was mortgaged to a building society. His predecessor had mortgaged the property on Nov. 30, 1925, to the Halifax Equitable Building Society. In June, 1928, the mortgagor was minded to pay off that mortgage. He thereupon accepted a receipt endorsed upon his mortgage executed, not by the original mortgagee, but by the successor in title of the mortgagee. The deed upon which that receipt was endorsed contained a note that on Jan. 31, 1928, the original mortgagee and another building society had united and become the Halifax Building Society. The mortgagor accepted that receipt apparently without making any investigation into the title of the last-named building society. A contract of sale was then made on Sept. 15, 1928, which is the subject-matter of the present summons. The purchaser, quite properly, made

a requisition which in effect was: Show me how this property became vested in the Halifax Building Society, whereas it was mortgaged to the Halifax Equitable Benefit Building Society. The vendor said in effect: That is plain from the receipt endorsed on the mortgage, and from the note which there appears. His case was, and before us is to-day, that that is sufficient evidence to show that the property had become vested in the Halifax Building Society at the date of the payment off of the mortgage. The purchaser, not unnaturally, said: If there has been a union as alleged, let me see the resolution, the terms of the union, any instrument of union that there may be, and the notice of union which under the Act you have to give to the registrar. The vendor met that with a curt refusal, saying it was quite enough that the mortgage deed on its face purported to show that the union had taken place on Jan. 31, 1928. Assuming that there is some evidence that such a union did take place, the vendor contended that under the Act that necessarily involved that this mortgage has been transferred from one of the uniting societies to the united society.

He points to two sections, s. 33 of the Act of 1874, and s. 5 of the Act of 1877, in support of that contention. If the result of those two sections were that the property would necessarily have become vested in the united society on the union of the two societies, it might be said that, subject to proof that there was such a union, the vendor has done all that was required of him. When the two sections are looked at, in my judgment that is far from being the case. In the first place, under s. 33 a union may take place with or without any dissolution or division of the funds of the societies or either of them, which shows on that section alone that the terms of union may be very material, and do form a necessary link in the title. Under the previous section, s. 32, dissolution may take place under an instrument of dissolution, which may provide for the appropriation and division of the property of the dissolving society. Section 33 contemplates that a union may take place where there has been such a dissolution. It follows from that that the vendor would have to satisfy the purchaser that under the terms of the union this property was intended to pass to the united society. Counsel for the vendor then pointed to s. 5 of the Act of 1877 and contended that under that, whatever the terms of the union were, the property would, ipso facto, vest in the united society on registration of the notice of union. When that section is looked at it is quite apparent that it refers to an instrument of union; it provides that the properties shall be vested in the united society as may be set forth in the instrument of union. I do not pause to consider what is meant by "the instrument of union." It may be that this expression refers to an agreement which is to be made between the two societies and approved by their respective members at meetings held by each society. It may be that it is sufficiently answered by the notice of union which is to be given to the registrar, but whatever it be, s. 5 to my mind clearly shows that only such properties as were intended by the terms of union to vest in the united society would so vest under the section. I can conceive that a dissolution of one or other of the societies formed part of the terms of the union, and that under those terms of dissolution the whole or part of the property of the society was divided or appropriated either among its members or among the united society and its members. I think that it is incumbent on a vendor to abstract and verify, at all events, the resolution of union, the notice to be given to the registrar of that union, and the instrument of union, if any, and till he has done that it seems to me that he has not abstracted or verified a proper title. It is just as if a vendor were endeavouring to make a title through the assignee of a mortgagee without abstracting or verifying the assignment of the mortgage, because here the vendor has omitted to show on the face of the abstract how the property became divested from the original mortgagee and vested in the Halifax Building Society, and this omission is not supplied by a mere note on the mortgage deed that the union has taken place. For these reasons I think that the appeal fails and ought to be dismissed with costs.

RUSSELL, L.J.—This is an appeal from an order of the Vice-Chancellor made on the hearing of a Vendor and Purchaser summons issued by the vendor of certain property. The sole point between the parties is this: On a particular day, namely, June 8, 1928, was the mortgaged property vested in the Halifax Building Society? Unless the vendor shows that it was he has not made out a good title to the property which he has purported to sell. He issued this summons asking the court to make a declaration that he had answered the requisitions of title sufficiently, more particularly in regard to requisition 14; and he also sought a declaration that he had shown a good title in accordance with the contract. The first contention before us was that the mere uniting of the two societies or the registration of notice of that uniting by the registrar under s. 33 of the Act of 1874 effected a transfer of the mortgaged property from the old society to the new united society. In my opinion that contention is quite wrong. There is no vesting or transfer of the property effected by the mere uniting of two societies under s. 33 of the Act of 1874. The property may have become vested in the united society under s. 5 of the Act of 1877; it probably did; but the vendor has not shown that it did, nor has he attempted, in my opinion, to do so. His contention has been such as I have indicated, and that contention, in my opinion, was wrong. Till he does show that the property vested in the united society by virtue of s. 5 of the Act of 1877, he has not, in my opinion, shown a good title to the property in accordance with the contract. In my view, the learned Vice-Chancellor was right in refusing to grant him any of the relief sought by him on the summons.

Solicitors: *Hedley Norris & Co.*, for *Vaudrey, Osborne & Mellor*, Manchester; *Rochester, Pusey & Co.*, for *T. A. Needham*, Manchester.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re GATES. GATES *v.* GATES

[CHANCERY DIVISION (Farwell, J.), November 15, 1929]

[Reported [1930] 1 Ch. 199; 99 L.J.Ch. 161; 142 L.T. 327]

Intestacy—Succession—Cases subject to special rules—Lunatic surviving 1925 *and dying without recovering testamentary capacity—No committee or receiver ever appointed—Beneficial interest in real estate—Availability for funeral, testamentary and administration expenses, and for other debts and liabilities—Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34 (3), *s.* 51 (2).

The exemption from the operation of the provisions as to devolution on intestacy, contained in the Administration of Estates Act, 1925, which, by s. 51 (2) of the Act, is conferred on any beneficial interest in real estate of a lunatic or defective of full age at the commencement of the Act dying subsequently without having recovered his testamentary capacity, applies to such an estate even if no committee or receiver had been appointed for the lunatic or defective. Section 51 (2) merely exempts such an interest from the provisions of Part IV of the Act as to devolution on intestacy, and, accordingly, such an interest is "real and personal estate" for the purposes of s. 34 (3) of the Act, and so must bear its rateable proportion of the funeral, testamentary and administration expenses and debts and liabilities in accordance with ss. 32–34 of and Sched. I to the Act.

Notes. Considered: *Jones* v. *Treasury Solicitor* (1932), 48 T.L.R. 615. Referred to: *Perrin* v. *Morgan*, [1943] 1 All E.R. 187.

As to the order of application since 1925 of the assets of a deceased in the discharge of his debts and liabilities, see 16 HALSBURY'S LAWS (3rd Edn.) 346, para. 671; and for cases on the subject, see 23 DIGEST (Repl.) 334 et seq., *4002* et seq. As to the devolution on intestacy of the estate of a lunatic dying after 1925 who has been of unsound mind since before 1926, see ibid. 413, para. 795, and 21 ibid. (2nd Edn.) 360, para. 617. For the Administration of Estates Act, 1925, s. 32, s. 33, s. 34, s. 51 (2), s. 55 (1) (viii), Sched. I, see 9 HALSBURY'S STATUTES (2nd Edn.) 733–737, 758, 761 and 766.

Adjourned Summons to determine the trusts on which the real estate of an intestate lunatic was held, and as to its liability for funeral and testamentary expenses and debts.

On Aug. 15, 1923, the deceased was admitted to a mental hospital under an urgency order signed by a magistrate. She remained in the hospital as a certified patient until her death on Feb. 1, 1929, and during the whole time she had no testamentary capacity. She was not a lunatic so found by inquisition, and no committee or receiver was ever appointed. She died a spinster and intestate, having been born in 1853. One of her brothers was her heir-at-law under the old law, and her next-of-kin were brothers and sisters of the whole and half blood. Another brother took out letters of administration to her estate, which consisted of a freehold house, subject to a charge of £200, and £27 personalty. Her funeral expenses and debts amounted to £102. The freehold house was sold for £875 and the charge paid out of the proceeds of sale.

The administrator issued this summons to determine: (a) Whether the real estate was held upon trust for the heir-at-law under the old law, or whether it was held upon the statutory trusts under s. 46 (1) (v) for the brothers and sisters of the whole blood. (b) If held upon trust for the heir-at-law, whether it ought to bear any and what part of the funeral and testamentary expenses and debts.

J. V. Nesbit for the administrator.

Gordon Alchin for the heir-at-law.

Clifford Middleton for the next-of-kin other than the administrator and the heir-at-law.

Administration of Estates Act, 1925, Part IV, s. 51 (2):

"The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real), to which a lunatic or defective, living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death and any such beneficial interest (not being an interest ceasing at his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case. For the purposes of this subsection, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged."

FARWELL, J., stated the facts, and continued: Before Jan. 1, 1926, there is no doubt that an intestate's real estate would have devolved upon the heir under the old law. That devolution, however, has been altered by the Administration of Estates Act, 1925, and, except in the case of a person of unsound mind, the real estate devolves on the next-of-kin.

The exception of a lunatic intestate is contained in s. 51 (2). [His Lordship read the subsection and proviso.] In this case the intestate was a lunatic or defective of full age, but by reason of her incapacity unable to make a will. The next-of-kin rely upon the proviso to the subsection, and contend that s. 51 (2), although in other respects it is applicable, is confined to cases where a committee

or receiver has been appointed. They support their argument by referring to the definition section, s. 55 (1) (viii). That subsection, however, says that "lunatic" includes a lunatic whether so found or not, and primâ facie I should have thought that "includes" was equivalent to "means (inter alia)." There is nothing in that subsection to confine the words "lunatic" or "defective" to the case where a committee or receiver has been appointed, and the effect is that a person of unsound mind is a lunatic or defective for the purposes of the Act.

Section 51 (2) therefore applies unless the proviso shows the contrary. That proviso, no doubt, provides that

> "for the purposes of the subsection a lunatic or defective . . . shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged."

But I do not think that those last words can regulate the meaning of the words "lunatic or defective" throughout the subsection as against that in the definition clause. The proviso merely means that a lunatic or defective for whom a committee or receiver has been appointed is not deemed to have recovered his testamentary capacity unless that committee or receiver has been discharged. It has no application to the present case. Section 51 (2) therefore applies, and the real estate devolves on their heir-at-law.

The second question was then argued.

J. V. Nesbit for the administrator.
Alchin for the heir.

FARWELL, J.—In my opinion s. 51 (2) [of the Administration of Estates Act, 1925] only exempts the lunatic's beneficial interest in real estate from the provisions of Part IV [of the Act]. Section 51 (2) is dealing only with the devolution of the beneficial interest. It is not dealing with administration of assets, and ss. 32, 33, 34, and Sched. I, which throw the funeral, testamentary and administration expenses, debts and liabilities on "the real and personal estate" rateably, are still applicable.

Declaration accordingly.

Solicitors: *Wrensted, Hind & Roberts.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

Re MAXWELL

[Probate, Divorce and Admiralty Division (Hill, J.), January 29, 1929]

[Reported 140 L.T. 471; 45 T.L.R. 215; 73 Sol. Jo. 159]

Probate—Grant—Omissions from will—Offensive words of no testamentary effect —Jurisdiction to expunge from will—Jurisdiction to omit from probate.

The Probate Court has no power to order that any part of a will be expunged, deleted, or destroyed, but offending words which have no testamentary effect may be ordered to be omitted from probate.

Notes. As to the omission of offensive words from probate, see 16 Halsbury's Laws (3rd Edn.) 190, para. 324; and for cases on the subject, see 23 Digest (Repl.) 138–139, *1424–1442*.

Cases referred to:

(1) *In the Estate of White*, [1914] P. 153; 111 L.T. 413; 30 T.L.R. 536; 58 Sol. Jo. 534; sub nom. *In the Goods of A.B.*, 83 L.J.P. 67; 23 Digest (Repl.) 139, *1432*.

(2) *In the Estate of Caie* (1927), 43 T.L.R. 697; sub nom. *In the Estate of Caie, In the Estate of Davis*, 71 Sol. Jo. 898; 23 Digest (Repl.) 139, *1441*.

Probate Motion on behalf of the sister of a testator who died on Dec. 23, 1928, that the court should make an order expunging from the will, dated Dec. 6, 1927, the fourth paragraph thereof on the ground that it was offensive but had no testamentary effect, or alternatively that the paragraph be omitted from probate. The sister was the residuary legatee, but not the person referred to in the paragraph.

Victor Russell for the applicant, the sister.—No executor has been appointed by the will, and it is proposed to ask for a grant of letters of administration with the will annexed. The offending words have no testamentary effect at all, and if published can only cause pain to the person named therein. Although there is no direct authority for the proposition that the court has the power to expunge objectionable matter from a will itself, there is no binding authority to the contrary. Bargrave-Deane, J., in *In the Estate of White* (1) said that his own view was that a will ought not to be made the medium of slanderous statements, and that where in a testamentary document words were inserted which in no sense had any testamentary value or effect and could serve no useful purpose if left in, they should be omitted from the document itself. But in that case, as in others, the order made was that the words should be omitted from probate. At the end of the report of *In the Estate of Caie* (2), in which Hill, J., declined to direct that certain words be omitted from probate, it was reported that in another motion he actually had made such an order. There are earlier cases which showed that the court could order such words to be omitted from probate, but if the words were left in the original document anybody might go to Somerset House, inspect it, and see the paragraph. Therefore the words might be repeated in the press and give pain to the person named. The paragraph should be expunged from the will, or, if that cannot be done, I ask that it be omitted from probate and any future copies issued in the registry.

HILL, J.—These words are wholly irrelevant to the testamentary dispositions. Though anyone might go and inspect the will he would be very foolish to publish the paragraph. Nobody could publish the words without running the risk of a libel or slander action. I should hesitate a long time before altering a man's will or document, though I might do so in relation to publication of probate. But that is a very different thing from altering a will or any other document a man may have written. In granting probate the court has control of the document and anyone can be restrained by injunction from publishing any offensive words in it. If I could see my way to expunge these words from the will I should not hesitate to do so. A man in his own notebook or diary may write whatever offensive things he likes

and no tribunal can prevent him from so doing. But if on his death he leaves in existence any document, whatever offensive things he may leave in it, I do not know that the court has any power to destroy it. Indeed, it would be unfortunate if the court could so order, because perhaps in a hundred years' time, when the libels had ceased to be libellous, a diary containing them might become a very historical document. I do not see my way to expunge these words from the will itself, but they will be omitted from probate.

Order that the offending paragraph be omitted from the probate.

Solicitors: *Routh, Stacey & Castle.*

[*Reported by* William Latey, Esq., *Barrister-at-Law.*]

COTTER *v.* NATIONAL UNION OF SEAMEN

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), March 11, 12, 13, 14, 1929]

[Reported [1929] 2 Ch. 58; 98 L.J.Ch. 323; 141 L.T. 178; 45 T.L.R. 352; 73 Sol. Jo. 206]

Trade Union—Action by minority of members in name of union—Technical irregularities in constitution of general meeting and passage of resolutions thereat—Irregularities all curable by resolution in general meeting—Action to restrain carrying out of resolutions—Trade Union Act, 1871 (34 & 35 *Vict.*, *c.* 31), *s.* 8.

Trade Union—Rules—Construction—"To promote and to provide funds to extend the adoption of Trade Union principles"—Interest-free loan to miners' non-political movement—Validity.

Among the objects of a registered trade union was "to promote and to provide funds to extend the adoption of trade union principles." At a special general meeting of the union resolutions were passed authorising the executive council to make an interest-free loan of not more than £10,000 to the miners' non-political movement. The majority of the members of the union approved of these resolutions, but five members who disapproved of them brought an action, in which they purported to sue on behalf of themselves and all the other members of the union to restrain the carrying into effect of the resolutions on the grounds that they were ultra vires and that there were various technical irregularities in the constitution of the meeting at which and the procedure by which the resolutions were passed. The irregularities were all alleged to have occurred in matters affecting the internal management of the union.

Held: the making of the loan would be a provision of "funds to extend the adoption of trade union principles," and so was intra vires; all the irregularities could be regularised by the majority of the delegates of the members assembled at a properly convened general meeting of the union; and the plaintiffs, as they did not have the support of a majority of the members, were not entitled to sue in the name of the union to restrain the carrying out of the resolutions: principle in *Foss* v. *Harbottle* (1) (1843), 2 Hare, 461, as explained in *MacDougall* v. *Gardiner* (2) (1875), 1 Ch.D. at p. 25, applied.

A Per **Curiam**: the interest of the members of a registered trade union in its funds is subject to the uncontrollable power of the union to apply the union funds for intra vires purposes: dictum of LORD LINDLEY in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (3), [1901] A.C. at p. 444, applied.

B **Notes.** Cf. *Edwards* v. *Halliwell*, [1950] 2 All E.R. 1064, where the Court of Appeal held on the facts that the rule in *Foss* v. *Harbottle* (1) had no application. ROMER, J., had previously held, in *Re National Union of Seamen*, *Wilson* v. *National Union of Seamen*, [1929] 1 Ch. 216, that r. III (1) authorised the Union "to provide funds to promote the establishment and growth of non-political trade unions among miners."

C Considered: *Edwards* v. *Halliwell*, [1950] 2 All E.R. 1064; *Livingstone* v. *National Union of Vehicle Builders* (1950), 210 L.T.Jo. 285.

As to interference by the court where a trade union has done something irregularly which might have been done regularly, see 32 HALSBURY'S LAWS (2nd Edn.) 530, para. 830, text and note (r); and for cases on the subject, see 43 DIGEST 103, 1086–1087. For the Trade Union Act, 1871, s. 8, see 25 HALSBURY'S STATUTES

D (2nd Edn.) 1248.

Cases referred to:

(1) *Foss* v. *Harbottle* (1843), 2 Hare, 461; 67 E.R. 189; 9 Digest (Repl.) 662, *4382*.

(2) *MacDougall* v. *Gardiner* (1875), 1 Ch.D. 13; 45 L.J.Ch. 27; 33 L.T. 521; 24 W.R. 118, C.A.; 9 Digest (Repl.) 619, *4130*.

E (3) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426; 70 L.J.K.B. 905; 85 L.T. 147; 65 J.P. 596; 50 W.R. 44; 17 T.L.R. 698; 45 Sol. Jo. 690, H.L.; 43 Digest 127, *1295*.

(4) *Osborne* v. *Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163; 78 L.J.Ch. 204; 99 L.T. 945; 25 T.L.R. 107; 53 Sol. Jo. 98, C.A.; affirmed sub nom. *Amalgamated Society of Railway Servants* v. *Osborne*, [1910]

F A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; 26 T.L.R. 177; 54 Sol. Jo. 215, H.L.; 43 Digest 104, *1089*.

(5) *Bloxam* v. *Amalgamated Marine Workers' Union* (unreported).

(6) *Howden* v. *Yorkshire Miners' Association*, [1903] 1 K.B. 308; 72 L.J.K.B. 176; 88 L.T. 134; 19 T.L.R. 193; 47 Sol. Jo. 237, C.A.; affirmed sub nom. *Yorkshire Miners' Association* v. *Howden*, [1905] A.C. 256; 74 L.J.K.B.

G 511; 92 L.T. 701; 53 W.R. 667; 21 T.L.R. 431, H.L.; 43 Digest 106, *1122*.

Appeal by the plaintiffs from a decision of ROMER, J., given on Dec. 21, 1928. The material facts, which are summarised in the headnote, are more fully set out in the judgment of LORD HANWORTH, M.R.

Sir Henry Slesser, *K.C.*, and *Norman Daynes* for the plaintiffs, the members of the union.

H *C. A. Bennett*, *K.C.*, and *Ronald F. Roxburgh* for the defendants, the union and its officials.

The arguments are fully dealt with in the judgments.

LORD HANWORTH, M.R.—This appeal raises an interesting and important point which has been fully argued before us by counsel for the plaintiffs.

I The action is brought by Joseph Patrick Cotter, Henry Thomas Bond, Raymond John Davies, James Hamlin, James Selden Lyddall, Charles Nelson, and Max Phillips, on behalf of themselves and all other members of the National Union of Seamen. It is brought for the purpose of obtaining a declaration that a special general meeting of the National Union of Seamen held on Aug. 1, 1927, was not really constituted or held in accordance with the rules of the union, and also an injunction restraining the defendants, who are the National Union of Seamen, Joseph Havelock Wilson (the general president), William John Davies (the secretary), John Thomas Blenkin Wilson (the treasurer), Richard McGhee and Frank

Foley (the trustees), from carrying into effect certain resolutions which are purported to have been passed at that meeting on Aug. 1. A

It is really unnecessary for me to recount the facts, which have been stated sufficiently and quite accurately by ROMER, J., but I must preface my judgment by referring to a few of them. The council of the National Union of Seamen, which is a registered trade union, held a meeting on July 7 and 8, 1927, and at that meeting they received a deputation from the South Wales Miners' Industrial B Union. That was a union which contained a number of representatives of several separate unions, but they were brought together into the union, the name of which I have given, because they were minded that this union should be what is called non-political. I have before me a little bundle of the rule books of these various unions of which the South Wales Miners' Industrial Union was a representative. This bundle was put in as an exhibit. I take one in particular—the rules of the C Northumberland and Durham Miners' Non-Political Trade Union. It is to be observed that this union has, among other objects, such as to improve the conditions of work, and protect the interests of its members, and to settle disputes between its members and employers, one further object, namely, to work consistently towards furthering the principles of co-operation in all industrial life, and to discourage all party, sectional, and political interests. I give that illustration as D typical of the purpose or object which had brought into being this industrial union, the representatives of which, or a deputation from which, attended at the meeting of the council of the National Union of Seamen in July, 1927. After that deputation had placed its views before the council, a long discussion took place between the members of the executive council there gathered together in meeting, and the president, Mr. Havelock Wilson, who is the general president of the National E Union of Seamen, adopted the policy of acceding to the request of the deputation that some help should be given by the National Union of Seamen to this newer body, the South Wales Miners' Industrial Union, and he advocated that they should give the help by way of a loan. A full discussion took place, and then some resolutions were passed at that meeting. One was in these terms: That the resolution from the meeting referred to be adopted by the executive as follows: F

> "That this conference of officials express their delight that this talk has been beneficial, and has removed all suspicion. We further desire to recommend to the executive committee that they should give their support to the establishment of non-political unions, and encourage the growth of the same, and especially among the miners." G

That resolution was carried at this meeting of the council by eighteen votes to eleven, and it was then recommended by Mr. Havelock Wilson that although that resolution had been carried by the council greater power and force should be given to it by having a resolution to the same purpose and end presented to, and if possible carried at, a special general meeting. Obviously such a special general meeting would convey far greater authority than the mere adoption of the resolution H at a council meeting by eighteen votes to eleven, and thus Mr. Havelock Wilson recommended that a special general meeting should be called for Aug. 1. That resolution was adopted unanimously. After the adoption of these two resolutions it was quite plain that the method by which there should be assistance given and encouragement afforded to this non-political union would be by the course of action which was to be taken at the special general meeting which was to be called for I Aug. 1; the practical course was taken after the decision to hold a special general meeting, and a further proposition was put before this council meeting, and it was this:

> "That this council resolves that in the best interests of the National Union of Seamen we give financial support in the way of a loan to the miners' non-political movement, and that such assistance be given forthwith, the loan to be not less than £10,000 free of all interest."

That resolution was put to the meeting, and it was carried by thirteen votes to twelve.

I pause there to make some observations on the criticism which has been directed against that resolution. One point is that it was to be a loan to the miners' non-political movement—a loose term, but I think it must have been understood by everyone there that what was intended was the union whose deputation had been received at this executive meeting—and next there is some difference in the form of the resolution then adopted and the resolution ultimately adopted on Aug. 1; in the first case it was "such assistance to be given forthwith, the loan to be not less than £10,000 free of all interest"; and afterwards it was "a sum of not less than £10,000"; but, treating the resolution in the sense in which it was intended—and, I have no doubt, understood by all present—it was that the resolution which had been passed in general terms for the purpose of encouraging the growth of non-political unions, should take the concrete form of a loan of £10,000 without interest, to be made by the National Union of Seamen to this new non-political union, and then another resolution was passed that the executive council endorse the action of the general president in this matter and authorise him to proceed with the same.

It appears to me, after recounting those facts, that it would not be right to hold that the resolution for lending £10,000 was intended to be carried into effect off-hand and without any reference to, or consideration by, the special general meeting which it had been previously decided should be called to deal with this very question, and I think, therefore, in agreement with ROMER, J., that it was intended that this £10,000 should be subject of consideration and, if possible, ratification, by the special general meeting. On Aug. 1 there was what purported to be a special general meeting, and at that special general meeting two resolutions were carried:

> "That this meeting endorsing the declared policy of the National Union of Seamen to promote, apply and extend trade union principles without political activities recommends the executive council to support the establishment and growth of movements and unions having a similar policy amongst workers in general and in particular among the miners; (2) that if it appears desirable to the executive council to provide funds out of the funds of the union for the purposes aforesaid this meeting approves of and sanctions such a course; without prejudice to the generality of the foregoing this meeting approves of and authorises the executive council to make a loan of not more than £10,000 without interest to the miners' non-political movement."

That resolution, when adopted by the special general meeting, of course, had a much more cogent force than had the resolution passed at the executive meeting. On Aug. 4 the writ in this action was issued by the plaintiffs whose names I have already given, and the purpose of the action is embodied in para. 8 of the statement of claim. It says: "The £10,000 resolutions and the suspension resolution"—that was a resolution with regard to suspending certain persons, including the general secretary—"were invalidated as to the suspension resolution by being contrary to natural justice and as to all the disputed resolutions by all or some or one of the following irregularities and improprieties"; and those irregularities and improprieties are then set out: The disputed meeting was not convened in accordance with its proper constitution as required under the rules; there were no sufficient circumstances for making it absolutely necessary to convene the meeting; then, the only purpose for which it could be called was for dealing with the proposition of the general policy of the union in the resolution which had been passed previous to the resolution calling the special general meeting; and then that there were irregular notices of the agenda of the meeting on Aug. 1, that persons voted who were not entitled to vote, and that one or two persons, the plaintiffs Cotter, Bond, Phillips and Lyddall, all attempted to attend and take part in the disputed meeting, that Cotter and Bond were unlawfully excluded, and that Phillips and Lyddall

were unlawfully expelled from the disputed meeting. On all those grounds it was said that the validity of the resolution to lend the £10,000 was undermined, and it was not right that it should be carried into effect.

Sir Henry Slesser.—My Lord, there is one other ground which was added by letter, and which was allowed by ROMER, J., that is the letter of Oct. 29 saying that the executive council, by allotting the delegates to the branches instead of to the districts, had infringed r. XVII (1).

LORD HANWORTH, M.R.—Yes; I am obliged to you, Sir Henry. That must be added: Further, an amendment was allowed on Nov. 9, and the amendment reads in these terms:

> "The £10,000 resolutions were and are ultra vires the union. The latter of the £10,000 resolutions purports to be authority to hand £10,000 to the miners' non-political movement, which movement is not defined and is neither a person nor a body corporate or unincorporate, and is not capable in law or in fact of receiving moneys or giving a receipt for moneys. The said resolution is void for uncertainty. The alleged payment is apparently to be made without any kind of security at no specified time and expressly without any liability on the part of anyone to pay any interest thereon. The former of the £10,000 resolutions was intended to go even further and by the use of the word 'support' to encourage the executive council to give unrestricted financial assistance not merely to the miners' non-political movement, but to any 'movements and unions having a similar policy amongst workers in general.' The miners' non-political movement being undefined can have nothing in common with the union which so far from having funds to spare for financing the philanthropy of its leaders, is and was at all material times, heavily overdrawn at its bank."

I have endeavoured, as far as I possibly can, to catalogue all the objections which have been brought against these resolutions, because I want to make it plain that the judgment of this court, as the judgment of ROMER, J., is intended to cover the various points which have been pressed before us.

The new paragraph, para. 6 (a), clearly shows that a contention is raised that the handing over of £10,000 to this miners' non-political movement is ultra vires the union. If it is ultra vires, then the persons who are interested in the funds of the union, who may have, or may become entitled to, a share in the moneys held by the union, either by way of benefit or otherwise, would be entitled to take proceedings to stop an action which is ultra vires the purpose of the union. I therefore turn to the rules which regulate both the constitution and the purpose of the union, in order to see whether the objection which is taken in para. 6 (a), which I have already read, can be sustained. In r. III, which declares the objects of the union, I find this:

> "The objects and benefits of the union are subject to the conditions of membership hereinafter appearing as follows: (1) To promote and to provide funds to extend the adoption of trade union principles . . ."

I need not read further. The words are wide; they are intended to be wide; and so long as trade union principles are adopted, then it is quite plain from the words used that one of the objects of the National Union of Seamen is to provide funds, and to provide funds not merely for the adoption, but also to extend the adoption, of trade union principles. It appears to me, therefore—and, indeed, it was with some difficulty that this point was kept upon its legs in the argument presented to us—to be almost unarguable that there was not power by a properly constituted resolution for a sum to be given to any object which fulfilled the simple conditions of being intended to extend the adoption of trade union principles. The other smaller points that are raised, that the word "movement" was used in the resolution, and that the loan is to be without interest, that no express hand is indicated to receive the money, that no particular document is adumbrated as forming the security or giving the terms upon which the loan is made, seem to me to be points

A which cannot militate against, or prevent, the action of the union in determining, if they are so minded and regularly minded, to extend by a loan the adoption of trade union principles. Looking at the resolution itself once more, it appears to me to be one which was perfectly understood as well at the executive meeting as on Aug. 1, and that the terms of the resolution, which, in fact, were adopted on Aug. 1, just precisely meet some of the criticisms which have been directed against B it, because it leaves a certain amount of discretion to the executive council in its very terms, which are

> "that if it appears desirable to the executive council to provide funds out of the funds of the union for the purposes aforesaid, this meeting approves of and sanctions such a course; without prejudice to the generality of the foregoing this meeting approves of and authorises the executive council to make a loan C of not more than £10,000."

I desire to make this observation. These resolutions are passed by men who are well versed in trade union principles and procedure; they are adopted at meetings where there are men well accustomed to manage their own affairs; and if it be that some criticism could be directed by lawyers as to the terms of the resolution, D or as to want of precision in the language used, it may well be that those meetings constituted, as I have already indicated, a very perfect understanding, as conveyed by the terms of the resolution, and those resolutions can be made effective in the manner in which it is intended they should be carried out by the persons who vote in favour of them. I forbear, therefore, to apply a close scrutiny, such as could be applied by a man well versed in conveyancing or drafting, to the terms which E are used. It appears to me that the purpose embodied in the resolution is one which falls well within r. III (1), and thus within the objects for which the trade union is founded, and can be carried out in the manner which is adopted for such matters by the National Union of Seamen, and was intended to be, if not expressed, impliedly indicated in the terms of the resolution.

If that be so, and if the question of ultra vires is not sustainable by the plaintiffs, F what is left of the complaints made about what are called these £10,000 resolutions? They are matters really of irregularity, and no more, and counsel for the defendants has argued that on such questions the doctrine of *Foss* v. *Harbottle* (1) applies. *Foss* v. *Harbottle* (1), which was decided as far back as 1843, is usually used to convey a reference to the doctrine that where a constitution is given by incorporation to a company, whether under the Companies Acts or under statute, the G corporation itself can put right what apparently is wrong, and that matters of irregularity do not enure to defeat the purpose and end for which the transactions or resolutions have been adopted, but are mere matters of internal management which do not give a right to individual members of the corporation or company to come in their individual characters and seek to put an end to these proceedings, for they have no power and no right to speak on behalf of the whole body—the whole H entity—and that the entity itself could put itself right by holding fresh meetings to cure the irregularities. In the case which is coupled with *Foss* v. *Harbottle* (1), namely *MacDougall* v. *Gardiner* (2) (1 Ch.D. at p. 25), the principle is explained by Mellish, L.J.:

> "Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous I member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation. In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there

can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

That being so, applying that principle, if it is applicable, it would appear to cover all the objections which are taken, and which I have catalogued.

There is only one objection to which I will refer—I think it is due to the general president that I should refer to it—and that is the objection that on July 7 he was disqualified from taking any part in the meeting because he was a person interested, and it is said that by sub-r. (2) of r. XVIII:

"No officer or member of the executive council shall be entitled to take part in any discussion or to vote on any matter in which he is personally interested otherwise than as a member of the union."

Those words are not very easy to construe. What is said against the general president, Mr. Havelock Wilson, is this: At some date before July 7, in order to advance the cause of the National Seamen's Union, and to carry out what he conceived to be its intention, he had already, out of funds belonging to him, made an advance of £3,000 to this union or movement, in the belief that that conduct of his, as general president, would be not only accepted but ratified, and, more than that, carried in a large measure into effect by the resolutions which were submitted at the executive meeting, and afterwards at the special general meeting. It is doubtful whether such action on his part could in any way be brought within the rule which says that he is not to vote on any matter in which he is personally interested otherwise than as a member of the union. Whether the action criticised is the action which disqualified him may well be a matter which is open to doubt, but I agree with the view which is taken on this point by ROMER, J., in which he points out that assuming that that conduct was within para. 2 of r. XVIII, the interest that Mr. Havelock Wilson had at the meeting of July 7 was to get the earliest adoption of a loan by the National Union of Seamen to the non-political union or movement, and out of that loan to get recoupment to himself of the money which he had advanced; his interest, therefore, was such that it would militate against his agreeing to any delay, whereas in truth and in fact his conduct in suggesting that there should be a special general meeting, and in reserving the question of the actual form of the assistance to be given to the non-political movement, prevented the immediate passing of a resolution and carry it into effect in accordance with what was his interest, and, therefore, he was not personally interested, but rather acting against his personal interest, in his conduct of the executive meeting. I have referred to that particular objection because I thought that, inasmuch as it was of a personal nature, it was right that some particular reference should be made to it in this judgment; but with regard to all the other irregularities, it appears to me that they do come within, and are covered by, the doctrine of *Foss* v. *Harbottle* (1) and the passage which I have read from the judgment of MELLISH, L.J., in *MacDougall* v. *Gardiner* (2).

It has been argued, and forcibly argued, by Sir Henry Slesser for the plaintiffs, that no case has yet decided that the principle of *Foss* v. *Harbottle* (1) can be applied to a trade union. It is said that a trade union is of a different nature from an incorporated company, and that the doctrine does not apply to trade unions. The nature of trade unions, he says, is to be found by reference to s. 8 of the Trade Union Act, 1871, which provides that

"All real and personal estate whatsoever belonging to any trade union registered under this Act shall be vested in the trustees for the time being of the trade union, appointed as provided by this Act, for the use and benefit of such trade union and the members thereof."

Considering those words very closely, he points out that the phrase used is not merely the "benefit of such trade union," but also the "benefit of the members thereof." The individuality, therefore, of the members composing the trade union,

A he says, is not lost sight of; they are not, he contends, corporators; they have individual rights, although for certain purposes under the Act of 1871 trade unions were made legal, and were given certain rights and privileges before the law. It appears to me that this point is really governed by authority—if not in terms, at any rate, in reason. When the question was considered, What are Trade Unions? it was said by Lord Lindley in *Taff Vale Rail. Co.* v. *Amalgamated Society of* B *Railway Servants* (3) ([1901] A.C. at p. 444), referring to s. 8, which I have read, "The property so held is, however, the property of the union; the union is the beneficial owner"; and in the judgment of Farwell, J. (as he then was), which was definitely accepted in the House of Lords, he said ([1901] A.C. at p. 429) this:

> "Now, although a corporation and an individual or individuals may be the only C entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark D to say of such an association that it is unknown to the common law. The legislature has legalised it, and it must be dealt with by the courts according to the intention of the legislature."

I need not refer to other passages to which our attention has been called, but I will refer to a passage by Farwell, L.J., in *Osborne* v. *Amalgamated Society of Railway Servants* (4) where he says this ([1909] 1 Ch. at p. 191):

E

> "A registered trade union is thus a statutory legal entity, anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents."

With those passages before us it appears to me clear that we must treat a registered trade union as a legal entity—a legal entity which holds the property, no doubt, F on the trusts pointed out by Lord Lindley, but still a legal entity which can work through its agents and is governed by the code which is contained in its registered rules. If that be so, there is no reason which would prevent the application of the doctrine as laid down in *MacDougall* v. *Gardiner* (2). Its entity is to be controlled, and is controlled, by action taken under its rules, with the result that in the present case, if some irregularity has been committed, it would be quite G possible for the legal entity, by means of further meetings, further notices, and the like, to make regular what apparently, or what is argued, is irregular. Reason and good sense would certainly dictate that the principle which applies to the entities of incorporated companies should also apply to entities which have become entities because they are registered under the Trade Union Acts.

That really covers all the points. I should like to mention, though, that in H *Bloxam* v. *Amalgamated Marine Workers' Union* (5) Russell, J., who now sits beside me, said:

> "I would just add this, that, taking the view that I do of the points, the question which Mr. Bennett raised as to the *Foss* v. *Harbottle* (1) decision preventing this action being brought at all does not arise. I need not discuss I it. I only say that I express my own view at the moment to be that the point taken by Mr. Bennett is a good one, that this is really an attempt by two members of the union to quarrel with the validity of the appointment of officers of the union; that is to say, they are raising a matter which is not a matter being ultra vires, but are merely raising the question that the union has done irregularly that which might have been done regularly—that being my view, that the *Foss* v. *Harbottle* (1) decision would operate so as to prevent these defendants bringing an action in respect of such matters in their own name as the only persons who can properly complain of it being a union."

By a sequence of authority it has been held that a registered trade union is a legal entity: if it is a legal entity, with its own code whereby it is governed, any mistake or irregularities by the imperfect carrying out of, or imperfect attention to, those rules can be corrected, and, if so, then the principle of *Foss* v. *Harbottle* (1) applies.

One word more, in answer to the argument presented to us in reply by counsel for the plaintiffs. He said that in passages which he quoted from LORD SHAND'S speech in the *Taff Vale Case* (3) ([1901] A.C. at p. 441) and in the passage which he quoted from *Osborne* v. *Amalgamated Society of Railway Servants* (4) ([1911] 1 Ch. at p. 567), a distinction had been drawn whereby the members were referred to as having some individual rights. That may be, and for the purposes of the passages where they occur the words used are correct, but they are really a reference only to the words of s. 8 of the Trade Union Act, 1871, and they do not in any way controvert the plain and clear reservations, made by the authorities that I have quoted, that a trade union has become a legal entity and as such is analogous to an incorporated company.

For these reasons, as well as for the reasons which appear in the very careful judgment of ROMER, J., it appears to me that this appeal fails, and that the judgment of ROMER, J., must be affirmed, and the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree. This litigation is the outcome of a difference of opinion which has unfortunately arisen between the members of the union as to the advisability of adopting the policy of helping forward the miners' non-political movement, and more particularly as to whether the union should give financial support to that movement by making an advance or otherwise providing money out of its funds. The majority of the members of the union is in favour of adopting that policy and of advancing a sum of not less than £10,000 out of the funds of the union to help forward that movement. There is, however, a minority which holds the opposite view, and the plaintiffs are members of that minority. The main relief which the plaintiffs seek in this action is to prevent the funds of the union being applied to further the miners' non-political movement.

The first question which naturally arises is: Is the application of the funds of the union for such a purpose ultra vires the union? If it is, there can be no question that every member of the union is entitled to restrain such application. It is contended that this application is ultra vires on two grounds, being the only grounds on which counsel for the plaintiffs told us that he based his contention on this point. The first is that under the resolution the loan is to be made to a movement, which is not defined, which is neither a person nor a body corporate or incorporate and is not capable in law or in fact of receiving or giving a receipt for money. The second ground is that the loan was to be made without interest. The validity or invalidity of these two grounds depends, first, on the true meaning of the resolution, and, secondly, on the true meaning of r. III, para 1, which defines the objects of the union. I am clearly of opinion that on the fair construction of the resolution, regard being had particularly to the first branch of it, it means that the executive council is authorised to lend money in support of the miners' non-political movement. The policy which the meeting adopted by the first branch of the resolution was to promote, apply and extend trade union principles without political activities and then it "recommends the executive council to support the establishment and growth of movements and unions having a similar policy amongst workers in general and in particular concerning the miners." The movement referred to in the latter half of the resolution is one of the movements which the executive council was recommended to support, and in my judgment there is nothing in the point taken by counsel for the plaintiffs that this resolution was intended to enable the executive council to lend money to a non-existent person, an assumption which ROMER, J., described as ridiculous.

The next point is whether the fact that the loan was to be made without interest can in any way be said to be ultra vires the union. The objects of the union as

defined by r. III, para. 1, were "to promote and to provide funds to extend the adoption of trade union principles." In the present case the provision of funds takes the form of advancing money without interest to extend the trade union principles by financially supporting the miners' non-political movement. The provision of funds within the rule would, in my opinion, clearly include either a gift of money or an advance of money, or the provision in any other manner of money to forward such a movement. Whether the advance be with or without interest is a matter to be determined by the union or by the executive council and clearly comes within the objects as defined by the rule. The result is that in my judgment both grounds fail, and the resolution is not ultra vires the union.

But then it is said that the resolutions were irregularly passed, and the plaintiffs have tabulated a number of technical irregularities which they allege have taken place in convening and holding the relevant meetings, and in the constitution of the personnel of the general meeting. The nature of these irregularities can be stated quite shortly. It was said first that no special general meeting can be held unless it is resolved upon as being necessary by the executive council, and that in this case the notice convening the executive council for the purpose of resolving upon the special general meeting was not sufficient to justify such a resolution being passed. Next it was said that at the meeting of the executive council the general president took a part in the proceedings and voted upon the resolution to convene the special general meeting having a personal interest which disentitled him to take any such part or give any such vote. Then it is said that the notice of the special general meeting for Aug. 1 having been sent out properly by the secretary, two further notices were subsequently sent out irregularly extending the business to be conducted at the special general meeting which business had not been mentioned by the executive council. Lastly, it was said that the constitution of the general meeting was wrong in that the officers of the union had been elected by a different electorate from that of the ordinary members, and that under r. XVII the districts, whatever they might be, ought to be the same both for the election of officers and for the election of ordinary members. I have stated the nature of these irregularities with a view to emphasising the fact that they are all irregularities in matters affecting the internal management of the union which could be regularised by the majority of the members assembled at a properly convened general meeting of the union.

That being so, it becomes necessary to consider whether the rule in *Foss* v. *Harbottle* (1) applies to such a union as this, or whether, as is contended by the plaintiffs, any member of the union can come to the court and obtain an injunction restraining a resolution of the union or of the executive council being carried into effect if there has been any irregularity in the proceedings under the rules. Bearing in mind the nature of such a union as this, the position in life of the members, the fact that the rules are obviously framed without legal assistance, and the fact that the persons who manage the affairs of the union, convene meetings and arrange for the election of delegates are not lawyers, I think that it would be lamentable if a technical breach of the rules were held to entitle a dissentient member or minority to obtain an injunction to restrain the carrying out of a resolution of the union. The rule in *Foss* v. *Harbottle* (1), so far as applicable to the facts of the present case, can be quite generally stated as follows: If an act is intra vires the corporation, and therefore one which could be sanctioned by the majority of the corporators properly assembled in general meeting, the court will not entertain any proceedings to restrain the doing of the act resolved upon unless such proceedings are brought by the majority of the corporators and in the name of the corporation itself. If dissentient members desire to restrain an intra vires act the action must be brought in the name of the corporation, which is the only proper plaintiff in such a case. It may often be a matter of dispute whether the plaintiffs in such an action are entitled to use the name of the corporation, and in such a case the question can be tested at once by the court directing that a general meeting of the corporation should be held. In my opinion the Court of Appeal in *Howden* v. *Yorkshire*

Miners' Association (6) was distinctly of opinion that the rule in *Foss* v. *Harbottle* (1) should be applied to trade unions unless, as STIRLING, L.J., said [(1903] 1 K.B. at p. 336), there be something in the Trade Union Acts, or in the nature of the constitution of trade unions, to prevent the application of that rule. It is obvious, to my mind, that the learned Lord Justice, after having considered the relevant parts of the Act of 1871, had not observed any such obstacle. It is contended by counsel for the plaintiffs that the fact that the property of the union is vested in trustees, who by s. 8 are declared to be trustees not only for the union, but also for the members thereof, prevents the application of the rule. He put it as high as this, that under that section the trustees are trustees of the property for the individual members of the union, and that the trustees are not entitled to part or deal with the trust property if any single member objects unless it is shown that the letter of the rules has been strictly complied with; and that if there be any irregularity in summoning or holding a meeting the trustees cannot properly act on a resolution passed at such a meeting unless they first obtain the consent of every member of the union. In my judgment that contention is not well founded. It has been held that the property of the union is vested in the trustees for the benefit of the union and not for the benefit of the individual members in the sense contended for. LORD LINDLEY, in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (3), said ([1901] A.C. at p. 426): "The property so held is, however, the property of the union; the union is the beneficial owner." What the position might be where the union is not registered under the Act need not be considered, because I agree with what has been said during the argument by my colleagues, such a case would depend on an investigation of the rules of the union concerned. Here we have the case of a union which is registered and is the primary beneficiary of the trust created by s. 8 of the Act. Whatever may be the effect of the addition of the words "and the members thereof" in the section, the crucial fact remains that the disposal of the property is, in the present case, in the hands of the executive council or in the hands of the majority of the members assembled in general meeting, and I cannot find anything in the Acts or in the constitution of this union to prevent the application of the rule in *Foss* v. *Harbottle* (1). I do not propose to go through the cases which have already been carefully reviewed both by the Master of the Rolls and by ROMER, J., for the purpose of showing that the rule in *Foss* v. *Harbottle* (1) is applicable by analogy to trade unions of the kind we have here. All I desire to say is that the trend of the decisions is in favour of that view, and that in my opinion, as already indicated, there are strong reasons for applying the rule to such bodies as trade unions. For these reasons I agree that this appeal ought to be dismissed with costs.

RUSSELL, L.J.—I am of the same opinion, and I can state my reasons briefly. The first point that we have to deal with is to construe the resolution in respect of which this action now survives. I say "now survives" because under the stress of the argument all claim is given up to relief in respect of the various resolutions set out in the statement of claim with the exception of a portion of one, and the portion in question is that contained in the last four lines of para. 6 (a) of the statement of claim, which runs as follows:

> ". . . Without prejudice to the generality of the foregoing this meeting approves of and authorises the executive council to make a loan of not more than £10,000 without interest to the miners' non-political movement."

In my opinion, reading those words in the light of the previous part of the resolution, it is quite clear that the meaning of that resolution is this: It is a resolution approving of the application of the union's funds up to an amount of £10,000 for the purpose of supporting the miners' non-political union movement, and the method of support was to be by way of loan without interest. Having so construed the resolution, the next question is: Is that a resolution which it was within the powers of the trade union to pass? In my opinion, clearly it was in view of the provision of para. 1 of r. III, which includes amongst the objects of the union to

provide funds to extend the adoption of trade union principles. Having arrived at that conclusion that this is a resolution intra vires the trade union, the next question is this: Is it open to individual members of the union to complain of that proposed intra vires application of the trade union funds?

In considering that question I am going to assume in favour of the plaintiffs that all and every the allegations of irregularities concerning both the meeting of the executive council on July 7 and 8, and concerning the special general meeting on Aug. 1, are true allegations. I am not saying that they are, but I am going to assume they are; and on that assumption let me repeat my question: Is it open to individual members of this trade union to complain of the proposed intra vires application of the union funds? In my opinion, no; the reason for the negative answer being the rule in *Foss* v. *Harbottle* (1), and, as I understand that rule, it is this: that the only possible plaintiff in an action to stop an intra vires act, an act intra vires a corporation, is the corporation itself. In reply to that it was suggested by counsel for the plaintiffs that the rule in *Foss* v. *Harbottle* (1) has no application to any registered trade union; and the reason for that argument was this: that, as he alleged, the members of a registered trade union have a proprietary interest in the union's funds which they are individually entitled to protect; and for that he relies on the words of s. 8 of the Act of 1871, which provides that—I read it shortly—"all the real and personal estate whatsoever belonging to any trade union under this Act shall be vested in the trustees for the time being of the trade union appointed as provided by this Act for the use and benefit of such trade union and the members thereof." That is the relevant portion of the section. But notwithstanding those words relating to the members, it is, in my opinion, clear, as was stated by LORD LINDLEY in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants* (3) ([1901] A.C. at p. 444), that the beneficial owner of the funds is the union and not the individual members of the union. Whatever the exact nature of the interest of the members may be this must be observed, and it is, I think, the answer to this argument. Whatever the nature of the interest of the members may be, it is subject to the uncontrollable power of the union to apply the union funds for intra vires purposes; and so the opportunity for the application of the *Foss* v. *Harbottle* (1) rule equally applies.

The second argument against the application of the *Foss* v. *Harbottle* (1) rule was that in regard to this particular trade union it was inapplicable because the general meetings were not meetings of the members of the union but were meetings only of delegates. That is a perfectly true allegation, because that is, as I read it, the effect of r. XVII, that the general meetings, whether they are annual general meetings or special general meetings, are composed of delegates appointed by the members, and are not composed of the body of members themselves. But, in my opinion, that makes no difference to the application of the rule. That appears to me to be only a question of the machinery by which, under the constitution of the particular society, you are to ascertain the views and desires of the society.

The rule in *Foss* v. *Harbottle* (1) really works by means of something in the nature of a dilemma, and the dilemma is this. The only possible plaintiff to stop an intra vires act is the corporation itself or the body itself. You are either in a position to be able to use that name, in which case the majority are agreeing with you, or you are not in a position to use that name, in which case the majority are in disagreement with you; and in those circumstances you are not entitled to bring an action in your own individual name.

For these reasons I agree that the appeal fails, and should be dismissed with costs.

Appeal dismissed.

Solicitors: *White & Co.*; *Vizard, Oldham, Crowder & Cash.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

Re HOW. HOW *v.* HOW

[CHANCERY DIVISION (Maugham, J.), June 13, 14, 1929]

[Reported [1930] 1 Ch. 66; 99 L.J.Ch. 1; 142 L.T. 86]

Will—Gift for "good works" assisted by testator and wife—Inclusion of charitable objects.

B

The testator, who was a member of the sect known as Plymouth Brethren, by his will gave all his property to his wife for life and thereafter he directed that a certain part of his property should be distributed among "the various good works" which his wife and he had been in the habit of assisting in such sums as the trustees should consider best. He died in 1919 and the widow in 1927. The testator and his wife had been in the habit of assisting some fifteen charities, of which several were philanthropic but not religious. On a summons to ascertain whether this was a good and charitable gift, and as to what were the "good works," evidence was tendered that among Plymouth Brethren "good works" was a phrase commonly used to indicate distinctly religious and not merely philanthropic or benevolent works.

C

D

Held: the evidence did not establish that the phrase "good works" was always used by Plymouth Brethren in such a sense as to exclude charitable objects which were not distinctly religious, and so could not be admitted to cut down the natural meaning of the phrase, which would in general include such charitable objects.

Notes. Applied: *Re Moon's Will Trusts, Foale* v. *Gillians*, [1948] 1 All E.R. 300.

E

As to the admissibility of extrinsic evidence of the objects of a charitable trust, see 4 HALSBURY'S LAWS (3rd Edn.) 217, para. 577; and as to ascertainment of the founder's intention, see ibid. 288, para. 596; and for cases on the subject, see 8 DIGEST (Repl.) 406 et seq., *979* et seq.

F

Cases referred to:

(1) *Re Rees, Jones* v. *Evans*, [1920] 2 Ch. 59; 89 L.J.Ch. 382; 123 L.T. 567; 8 Digest (Repl.) 389, *830*.

(2) *Re Kenny, Clode* v. *Andrews* (1907), 97 L.T. 130; 8 Digest (Repl.) 389, *829*.

(3) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355; 5 Scott, N.R. 958; 8 E.R. 450, H.L.; 8 Digest (Repl.) 406, *980*.

G

(4) *Re Good, Harington* v. *Watts*, [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 53 W.R. 476; 21 T.L.R. 450; 49 Sol. Jo. 445; 8 Digest (Repl.) 347, *278*.

(5) *Re Donald, Moore* v. *Somerset*, [1909] 2 Ch. 410; 78 L.J.Ch. 761; 101 L.T. 377; 53 Sol. Jo. 673; 8 Digest (Repl.) 418, *1100*.

Adjourned Summons as to the validity and construction of a testamentary gift.

H

Sidney Radcliffe How, by his will dated June 23, 1917, gave and bequeathed "unto my wife Mary Elizabeth How the whole of my property for her sole use during her life, and at her death the portion remaining to be divided as to one-half between my two sons Francis Radcliffe How and Allan Sidney How on their attaining the age of thirty years, and the other half I ask my trustees to distribute between the various good works which my wife and I have been in the habit of assisting in such sums as they the trustees may consider best."

I

The testator and his wife were members of the sect known as "Plymouth Brethren." He died on May 15, 1919, and his will was proved on July 22, 1919, and his widow died on April 12, 1927. This summons was then taken out asking whether the direction to the trustees in the will constituted a good and valid charitable trust or whether there was an intestacy. Also, if and so far as necessary, an inquiry as to the "good works," as construed by the court, which the testator and his wife had been in the habit of assisting. By the direction of the Master the Attorney-General was added as a party to the summons. There was evidence to the effect

that among the "Brethren" "good works" was a phrase in common use to indicate works distinctly religious—i.e., Christian—as distinguished from works merely philanthropic or benevolent, and that the testator probably used the phrase in reference to religious charitable works only. The testator and his wife had been in the habit of assisting some fifteen charitable objects.

Galbraith, *K.C.*, and *W. G. H. Cook*, for the trustees, referred to *Re Rees*, *Jones* v. *Evans* (1), *Re Kenny* (2), and *Shore* v. *Wilson* (3).

H. B. Vaisey, *K.C.*, and *L. B. Tillard* for the testator's sons.

Stafford Crossman, for the Attorney-General, referred to *Re Good*, *Harington* v. *Watts* (4) and *Re Donald*, *Moore* v. *Somerset* (5).

MAUGHAM, J. (after stating the facts, continued): It is necessary to decide whether I can, within the recognised principles applying to such a case, admit this evidence so as to justify me in putting upon the phrase "good works" the limited meaning that the works are to be religious. The result of so doing would be to hold that the testator did not use the phrase in the ordinary sense which I attribute to it, which certainly includes ordinary charitable purposes. Under the limited meaning, several of the objects described in the evidence as objects which the testator and his wife were in the habit of assisting would be excluded, e.g., the Home for Fatherless Girls, the Mission to Lepers, the Royal Sailors' Rests and Miss Pearks' Soldiers' Homes.

It has been argued that the well-known decision in *Shore* v. *Wilson* (3), and the opinions of the judges as there given, ought to lead me to admit the evidence. But it is to be observed that the members of the House of Lords who formed the court decided the case solely on the ground that the evidence before them—which they confined to evidence as to the meaning of phrases used many years before in and by a particular society of which the donor was a member—was in effect no more than evidence merely "of the circumstances by which the author of the instrument was surrounded at the time." *Shore* v. *Wilson* (3) raised the question of the construction, about the year 1834, of deeds executed in 1704; and all the judges came to the conclusion that even when language to be construed appears to have a clear and unambiguous meaning, yet if it was used at a remote date the court is bound to inquire what was the meaning of the words at the date when they were used, and may not take it for granted that they have the same meaning when they are being construed as they had when they were used. I note that the judges were of opinion that the phrase "pure and godly preachers" would, if used at the date when the case was before them, have been free from ambiguity; and I gather also that the majority came to the conclusion that, had the deed been executed in 1830 instead of 1704, their decision would have been the other way. The opinions of the judges are clearly in favour of rejecting the evidence tendered by the trustees.

Re Kenny (2) and *Re Rees* (1) are distinguishable from the present case. In the first, a decision of WARRINGTON, J., the testatrix directed her trustees to pay trust moneys to her friends to be applied to "missionary objects." It was argued that the words "missionary objects" were too vague, and WARRINGTON, J., added that he was entitled to consider "who Dr. Maclean"—named in the will—"was, and that he was engaged for many years in the work of Christian missions, and that he was known to the testatrix." He therefore concluded that the phrase was used in its ordinary sense, and that the gift created a good and valid charitable trust. That seems to be a case in which the court was being informed that the person who was to administer the fund was engaged in missions and was known to the testatrix.

In the second of these two cases, which was a decision of SARGANT, J., the property in question was bequeathed to one George Jeffreys for missionary purposes, and the evidence admitted was as to the donee's identity, the work carried on by him from a preceding date, that he had often met the testatrix and discussed religious subjects with her, and that she from time to time sent him sums of money

to help him in his work; and it was held that that was evidence of surrounding circumstances tending to show that he was to have the carrying on of the work, after her death in the same way as before. The evidence was thus admitted to show that the testator used the words "missionary purposes" in the popular sense of "Christian missionary work."

In the present case I have no evidence of the significance with which the testator was accustomed to use the phrase "good works." All that I have is a statement that the phrase is known to be in use among the "brethren" in application to works distinctly religious. I do not regard that as establishing that it is always used in such a sense as to exclude a charitable object such as a hospital. I am satisfied that in general such objects would be included, and I am unable to admit the evidence as cutting down the natural meaning of the words. The remaining questions on the summons must be determined on that footing.

Solicitors: *Stunt & Son*; *Boyce, Evans & Sheppard*; *Treasury Solicitor.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

KIRBY *v.* WILKINS

[Chancery Division (Romer, J.), March 21, 22, 26, 1929]

[Reported [1929] 2 Ch. 444; 142 L.T. 16]

Company—Shares—Transfer—Voluntary transfer to chairman for benefit of company—Validity—Effect—Power of chairman to vote in respect of such shares.

A voluntary transfer without any consideration whatsoever moving from the company of a certain number of shares of a company to the chairman thereof upon trust to use them or sell them for the benefit of the company (i) is not a transfer to the chairman upon trust to hold the shares for the benefit of the individual shareholders, but is a transfer to him upon trust at his discretion to sell them, and, pending sale, upon trust for the benefit of the company; (ii) is not a purchase by the company of its own shares or a surrender thereof or improper trafficking therein and so is valid: *Trevor* v. *Whitworth* (1) (1887), 12 App. Cas. 409, and *Bellerby* v. *Rowland and Marwood's Steamship Co., Ltd.* (2), [1902] 2 Ch. 14, distinguished; and (iii) entitles the chairman, pending sale and unless and until he receives a direction from the company how he should vote, to vote in respect of such shares as his conscience dictates in the interests of the company.

Addison's Case (3) (1870), 5 Ch. App. 294, and *Re Guardian Assurance Co.* (4), [1917] 1 Ch. 431, considered.

Notes. Since this decision further restrictions on membership by a body corporate or its nominee of its own holding company have been imposed by the Companies Act, 1948, s. 27, but these do not appear to affect the principles stated in this case. The Companies Consolidation Act, 1908, has been repealed: s. 206 of the 1948 Act, the current Act, corresponds to s. 120 of the 1908 Act.

Considered: *Re Buckingham, Oswell* v. *John Dobell, Ltd.* (1943), 113 L.J.Ch. 23. Referred to: *Lowe* v. *Peter Walker (Warrington) and Robert Cain & Sons, Ltd.* (1935), 80 Sol. Jo. 32. Applied: *Re Castiglione's Will Trusts*, [1958] 1 All E.R. 480.

As to persons who may not be members of a company, see 6 Halsbury's Laws (3rd Edn.) 206, para. 422; and as to the transfer of shares to a nominee for the company, see ibid. 264, para. 547; and for cases on the subject, see 9 Digest (Repl.) 402, *2573–2575.*

Cases referred to:

(1) *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457; 36 W.R. 145; 3 T.L.R. 745, H.L.; 9 Digest (Repl.) 435, *2844*.

(2) *Bellerby* v. *Rowland and Marwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14; 71 L.J.Ch. 541; 86 L.T. 671; 50 W.R. 566; 18 T.L.R. 582; 46 Sol. Jo. 484; 9 Mans. 291, C.A.; 9 Digest (Repl.) 435, *2845*.

(3) *Re Patent Paper Manufacturing Co., Addison's Case* (1870), 5 Ch. App. 294; 39 L.J.Ch. 558; 22 L.T. 692; 18 W.R. 365, L.J.; 9 Digest (Repl.) 437, *2854*.

(4) *Re Guardian Assurance Co.*, [1917] 1 Ch. 431; 86 L.J.Ch. 214; 116 L.T. 193; 33 T.L.R. 169; 61 Sol. Jo. 232; [1917] H.B. 113, C.A.; 9 Digest (Repl.) 705, *4679*.

(5) *Cree* v. *Somervail* (1879), 4 App. Cas. 648; 41 L.T. 358; 28 W.R. 34, H.L.; 9 Digest (Repl.) 528, *3482*.

(6) *Rowell* v. *John Rowell & Sons, Ltd.*, [1912] 2 Ch. 609; 81 L.J.Ch. 759; 107 L.T. 374; 56 Sol. Jo. 704; 19 Mans. 371; 9 Digest (Repl.) 436, *2846*.

Witness Action.

The following statement of the facts is substantially taken from his Lordship's judgment: A company known as Derby Paper Staining Co., Ltd., purchased the business it carried on from four vendors, two Messrs. Kirby and two Messrs. Walker, who had been carrying on business in partnership together. The price paid by the company to the vendors for the business was approximately £16,000, which was satisfied by the allotment to the vendors of 16,000 fully paid shares in the company. After a time it was discovered by the company's auditor that the value of the stock in trade sold by the vendors to the company had been arrived at by the vendors on an erroneous principle, and that in point of fact the company had paid £3,000 more for the business than the sum which would probably have been paid had the stock been valued on a proper basis. In those circumstances, the four vendors were desirous, as far as they were able to do so, of putting the matter right, and it was agreed by two of them—Mr. Kirby, sen., and Mr. Harold Walker—on behalf of themselves and their co-vendors, to place at the disposal of the company 3,000 of the fully paid shares which had been allotted to them. In due course those 3,000 shares were transferred by the vendors to the individual defendant in this action, the chairman of the company's board of directors, upon trust.

The plaintiffs in this action, one of them being one of the vendors, and the other a shareholder in the company who was not one of the vendors, claimed that the trusts upon which the defendant held these 3,000 shares were trusts for the benefit of the individual shareholders in the company. The defendant and also the company, which had, by amendment, been added as a defendant, claimed that the trusts were not for the benefit of the shareholders individually, but for the benefit of the company itself.

The plaintiffs also sought an injunction restraining the individual defendant from voting at any meeting of the company in respect of those shares.

Gover, K.C., and *W. F. Swords*, for the plaintiffs, referred to *Addison's Case* (3), *Trevor* v. *Whitworth* (1), *Bellerby* v. *Rowland and Marwood's Steamship Co., Ltd.* (2), *Re Guardian Assurance Co.* (4).

Topham, K.C., and *G. P. Slade*, for the defendants, referred to *Cree* v. *Somervail* (5), *Rowell* v. *John Rowell & Sons, Ltd.* (6).

ROMER, J.—As to the facts of this case, I do not feel any doubt at all. The law applicable to those facts is not quite so easy. [His Lordship stated the facts as above set out and continued:] There was no claim which the company could enforce against the vendors, whether by way of damages or otherwise. No one suggests that there was any right to rescind the agreement for sale because of this miscalculation on the part of the vendors. Still less can anyone suggest that there

was any claim for damages against the vendors by virtue of any improper misrepresentation. The action of the vendors, therefore, in transferring these shares was a voluntary act on their part. The trusts upon which the individual defendant held the 3,000 shares were stated by him at a general meeting of the company held on Feb. 28, 1927, and he said this, after referring to the unsound method of stocktaking that had been adopted at the formation of the limited company, and to the opinion expressed about it by the auditors: "I am pleased to record that upon receipt of this opinion my colleagues on the board" (those were the vendors) "expressed an anxiety to rectify as far as possible any loss through their errors of judgment in the past in this connection. As far as this could be ascertained, it represented an amount of about £3,000, and acting on your behalf I have accepted from the directors the surrender of 3,000 shares that can be used or sold for the benefit of the company." [His Lordship then pointed out that at an earlier stage of the proceedings he had mentioned shortly the circumstances which had induced him to come to the conclusion on the evidence that the trusts upon which the individual defendant held the 3,000 shares were not for the benefit of the individual shareholders, but for the benefit of the company itself, and continued:] In my opinion, these shares were held by the defendant, Mr. Wilkins, on trust for sale at such time and for such considerations as he in his discretion should think fit and pending a sale on trust for the benefit of the company.

It is contended by counsel for the plaintiffs, though this is a contention which can only avail the plaintiff, Mr. Kirby, who was one of the original transferors, that, in the circumstances, there was a resulting trust of these 3,000 shares for the vendors, on the ground that the transfer of these shares to a trustee for the company was an invalid transaction: that the trusts were invalid, and, accordingly, that there was a resulting trust for the transferors. In support of that contention, the plaintiffs rely on the decision in *Trevor* v. *Whitworth* (1). The grounds of the decision in *Trevor* v. *Whitworth* (1), which decided that a company may not purchase its own shares, are stated in this way in Buckley on the Companies Acts (10th Edn.), p. 140 [13th Edn. at p. 135]:

> "The grounds of the decision in *Trevor* v. *Whitworth* (1), and the principles which it affirms, may be summarised thus: (1) Purchase by a company of its own shares is not forfeiture or surrender or anything like it. Forfeiture is valid, the Act recognises it; the company parts with no money, but resumes dominion of a share upon which something has been paid, and this because a further payment cannot be obtained. Surrender may be valid, e.g., where the company could forfeit and the member dispenses with the formalities. Each case of surrender must be determined upon its merits. Where money is paid or consideration given by the company it is a purchase, and purchase is neither forfeiture nor surrender."

The reference there to consideration given by the company as opposed to money paid by the company has reference, no doubt, to the decision of the Court of Appeal in *Bellerby's Case* (2), in which the Court of Appeal pointed out that where shares which are not fully paid up are surrendered to a company in consideration of the company purporting to release the transferors or surrenderers from their further liability in respect of the shares, that is in effect the equivalent of a purchase by the company of its shares, and is invalid.

The second principle is stated in Buckley on the Companies Acts to be this:

> "(2) The company cannot be a member of itself; (3) the purchase of its own shares is a reduction of capital. The Act, in sanctioning reduction of capital under certain conditions and with certain restrictions, impliedly prohibits it unless the prescribed conditions and restrictions are observed; (4) the Act impliedly prohibits the return of capital to members. The payment of capital to one shareholder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount to all the shareholders rateably; (5) the transaction cannot be justified as 'incidental'

A to the company's objects, e.g., in a private company where it is desired to keep the shares in the hands of a few. To the creditor whose interests the Act intends to protect it makes no difference what the object of the purchase is."

If that be a true statement of the principles enunciated in *Trevor* v. *Whitworth* (1), and, in my view, it is, adding perhaps thereto *Bellerby's Case* (2), it is difficult to B see which of those principles is infringed by the transfer that has been made in the present case. The company has not parted with one penny of its money, either in cash or money's worth. The company does not become a member of itself. The member of the company in respect of these 3,000 shares is Mr. Wilkins, the defendant. It has not purchased its own shares, nor has there been a reduction of the company's capital. The capital issued, nominal and paid up, remains C precisely what it was before. It is said, however, that there are two authorities which indicate that a transfer of shares to a trustee for a company is as objectionable as a transfer of shares to the company itself. If money be paid for the transfer, I agree. If money's worth be paid for the transfer, I agree. If, as consideration for the transfer, the company purports to release the transferor from uncalled liabilities on the shares, I agree. But I know of no case that has decided D that in a case such as the present one there is any objection to the transfer.

I will now deal with the two authorities in question. The first is *Addison's Case* (3), of which the headnote is this:

"A., being desirous of lending money to a company, accepted 100 shares of £5 each, and paid £500, the whole amount of calls due thereon, upon con- E dition that if he gave notice within a certain time his money should be repaid and the shares cancelled. He afterwards gave notice in pursuance of the agreement, and thereupon the money was repaid to him, and he executed a transfer of the shares to a nominee of the company, and his name was removed from the register of shareholders. Eight years afterwards the company was wound-up. Held (affirming the decision of the Master of the Rolls), that A. F was a contributory."

There it will be observed that the company paid cash for the transfer of the shares, and though the money was paid in respect of a promise given at the time the shares were originally allotted to A., that, of course, could make no difference. In the course of his judgment, however, GIFFARD, L.J., said this:

"The company had no power to cancel shares, nor to buy up shares, but what G Addison did, was to transfer those shares to a trustee for the company, that transfer could be of no avail; his liability is exactly the same as if his name had remained on the register till the winding-up commenced."

I doubt whether the lord justice was directing his mind to a question anything like the one which I have to consider. He was considering the liability of the trans- H feror, and was pointing out, and I think only intended to point out, that the transferor's liability was exactly the same as if his name had remained on the register. In the events that had happened A. had never paid for the shares and his liability to do so could not be got rid of by a transfer to a nominee for the company. That consideration, I think, reconciles *Addison's Case* (3) with the dictum of LORD HATHERLEY in *Cree* v. *Somervail* (5). There LORD HATHERLEY I was dealing with the possibility of shares in a company becoming vested in a trustee for them without the company necessarily becoming a purchaser of them, and he said this:

"As to their being trustees for the company, that might be perfectly legitimate and lawful, whatever view be taken of this case. I am not, as I have said, pronouncing any opinion as to what would have happened if the nature of the transaction had been different, if it had been for the purpose of merging the shares. But those shares might have become vested in a variety of ways in trustees for the company, without their being necessarily the purchasers of

them. For instance, Mr. Thomson by his own will might, if he thought fit, or if he had thought that such a course was desirable for his own purposes, have made a bequest of these very shares to certain persons as trustees for the company, or he might have made a bequest of them to the company itself, and the company might have found trustees to hold the shares as trustees for them, and to be answerable to third parties in respect of them." A

That, no doubt, was before *Trevor* v. *Whitworth* (1), but it is in no way inconsistent with what was said by LORD WATSON in that case. LORD WATSON said this: B

"Accordingly, when a company buys and holds its own shares, the device is sometimes resorted to of taking the transfer to a nominee, who is entered in the register and holds the shares as trustee for the company, which undertakes to indemnify him from future calls. In that case, if the company goes into liquidation before its capital is fully paid up, the trustee is liable personally as a contributory for the amount then unpaid; but the amount withdrawn is never restored, and calls made upon the shares whilst the company is a going concern brings no addition to its capital." C

If he had thought that in such a case a transfer of shares on which there was a liability to a trustee for the company was a nullity, he would not have said that D the trustee is liable personally, as a contributory for the amount unpaid. It seems to me that he contemplated that where the company had not paid cash for shares, or purported in consideration of the transfer to a nominee to liberate the transferor from liability, there was no objection to a transfer of such shares to a nominee for the company, inasmuch as the nominee himself would be liable for the shares. It may be, however, and I think that in BUCKLEY ON THE COMPANIES ACTS the cases E I have referred to are treated as authority for this, that although a transfer of partly paid shares to a nominee of the company leaves the transferor liable, because the company cannot purchase its own shares, yet in the case last put the transferee may himself be made liable. On the other hand, I cannot find in *Addison's Case* (3) any clear authority for the proposition that in the case of a transfer of fully paid shares to a company without any consideration moving from the company, the F transfer is invalid.

The other authority on which the plaintiff relied is a passage in the judgment of YOUNGER, J., in the *Guardian Assurance Co. Case* (4). In that case YOUNGER, J., was asked to sanction a scheme of arrangement come to between the Guardian Assurance Co. and its shareholders, and it was a case in which the scheme provided that the shareholders in the Guardian Assurance Co. should make over certain G proportions of their shares to another company called the Reliance Co., or to the shareholders in that other company, and the transfer of those shares was in effect to be part of the consideration paid by the Guardian Assurance Co. for the acquisition of the business of the Reliance Co., or for the acquisition of 80 per cent. of the shares in the Reliance Co. YOUNGER, J., thought that, although the scheme was advantageous, it was not an arrangement within the meaning of s. 120 of the H Companies (Consolidation) Act, 1908, because there was no kind of dispute or difficulty involved that required to be resolved by a compromise or arrangement. But he did say this, apart from that objection to the petition:

"It is, I think, possible to read this present scheme as one which in fact requires, or at least permits, a surrender of shares to the company in circumstances which would not justify a forfeiture, and such a transaction is ultra vires the company: see *Bellerby* v. *Rowland and Marwood's Steamship Co., Ltd.* (2)." I

In point of fact, I doubt whether the *Bellerby Case* (2) decided anything quite so wide as that, as pointed out by WARRINGTON, J., later in *Rowell* v. *John Rowell & Sons, Ltd.* (6). Then he goes on:

"It is, of course, true that the shares of the members taken here are, so far as words go, to be transferred by direction of the company and not surrendered

to the company. But the transferee need not be the shareholder in the Reliance Co. who is ultimately to get the shares; he may be, and presumably in most cases will be, a nominee or trustee for the Guardian Co. pending the ascertainment of the ultimate transferee. If so, the transfer would for the time be nothing but a surrender."

With great respect to the learned judge, I cannot myself see how the transaction would be a surrender. If the shares remain in the names of a nominee for the company, the shares have not been surrendered. If the company paid money for that transfer, then no doubt it would be trafficking in the shares of the company, and that would be invalid. YOUNGER, J., goes on as follows:

"I recognise, however, that this objection to the scheme may, for the reason just suggested, not be open. I proceed, therefore, to the other, which, on the authorities, is less open to doubt."

The matter went to the Court of Appeal, and the Court of Appeal came to the conclusion that the scheme of arrangement was one within the terms of s. 120 of the Act, and they sanctioned it. They did not in terms deal with this clause relating to the transfer of shares. They did not express any view about it, but, inasmuch as they sanctioned the scheme, it must be, I think, taken that the Court of Appeal did not see any difficulty arising from the transfer such as was felt by YOUNGER, J.

In my opinion, this transfer of shares does not offend against any principle which has been laid down by any of the decided cases, nor, so far as I have been able to ascertain, any principle to be deduced from a consideration of the Companies Acts. I do, however, realise this difficulty, and it is one which gives pause for consideration. The defendant, Mr. Wilkins, was proposing, pending a sale of these shares, to exercise his voting power in respect of them in a way that did not commend itself to the plaintiffs in this action, and it is said that, assuming that a transfer such as I have to deal with in the present case is otherwise unobjectionable, the effect of the transfer cannot be that the company obtains a power of voting through its nominee in respect of these shares. As I have already pointed out, one of the principles established in the cases is that a company cannot be a member of itself, but the company does not become a member of itself merely because a trustee of certain shares votes in respect of those shares as may be from time to time directed by the company. Nor can I see any reason why shares should not be held upon trust that the holder of the shares shall exercise his voting power as the company may from time to time direct. Supposing these four vendors, instead of transferring their shares, had agreed with the company that they would at all times exercise their voting power in respect of these shares as the company might from time to time direct. What is there in principle to render such an arrangement invalid? I confess that I can see none, and if such an arrangement between the four vendors and the company would not have been invalid, it cannot be invalid for the four vendors to transfer their shares to a nominee on trusts which involve an obligation on the trustee to vote in respect of the shares as the company may from time to time direct. It does not appear to me, therefore, that the fact that the company can control the voting power in respect of these shares is an objection to the validity of the transfer.

It is said, however, that in any case the defendant ought not to have exercised his voting power in respect of the shares without the direction of the company. I do not think that that contention is sound. Where a shareholder holds shares as a bare trustee for a third person, he is no doubt obliged to exercise his voting power in the way that the cestui que trust desires, but unless and until the cestui que trust has indicated his wish as to the way in which the voting power should be exercised, there is no reason why the nominee should not exercise the voting power vested in him as a trustee. He holds that voting power upon trust, but, unless and until the cestui que trust intervenes, he must exercise it according to his discretion in the best interests of his cestui que trust.

Now here I do not know that the company ever actually intervened, either through its board of directors, or by means of the general meeting of its shareholders in the sense of giving any direction to the defendant Mr. Wilkins as to how he should vote in respect of these shares, and that being so, unless and until he receives any such direction, he was in my opinion justified in voting in respect of them as his conscience dictated in the interests of the company. In point of fact, the defendant says that he does not intend in future to exercise this voting power except as he may be from time to time directed, and having regard to the very great difference of opinion which apparently exists in this company between one class of shareholder and another, I think he is very wise in coming to that conclusion. However that may be, it seems to me that in this action which is brought for the purpose of obtaining a declaration that Mr. Wilkins holds the 3,000 shares on trust for the individual shareholders, and therefore on trust as regards certain of the shares for the plaintiffs themselves, and which asks for an injunction to restrain Mr. Wilkins from voting in respect of the portion of those shares except as the plaintiffs may direct, the plaintiffs fail, and the action must be dismissed.

Judgment for the defendants.

Solicitors: *Braund & Hill*, for *Holbrook, Gretton & Richardson*, Derby; *Taylor, Jelf & Co.*, for *Randolph Eddowes & Co.*, Derby.

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

Re WELLS

[Chancery Division (Romer, J.), May 7, 1929]

[Reported [1929] 2 Ch. 269; 98 L.J.Ch. 407; 141 L.T. 323; [1929] B. & C.R. 119]

Distress—For rent—Tenant dying intestate and insolvent—Subsequent occupation of demised premises by administratrix—Administration order—Continued occupation by receiver and manager—Rent due for period after death before and after administration order—Landlord's right of distress—Bankruptcy Act, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 35, *s.* 130 (5)—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *s.* 23), *s.* 34 (1), *Sched. I, Part I.*

Bankruptcy—Administration in bankruptcy of the estate of a person dying insolvent—Distress for rent—Applicability of bankruptcy rules in restraint—Bankruptcy Act, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 35, *s.* 130 (1), (5)—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34 (1), *Sched. I, Part I.*

A tenant whose rent fell due each quarter-day died intestate and insolvent on March 26, 1928. His administratrix paid the rent due on June 24, 1928, but no further rent was paid although the administratrix continued to occupy the demised premises. An administration action was begun, and on Dec. 12, 1928, an order for administration was made. On Feb. 26, 1929, a receiver and manager was appointed, and he continued the tenant's business at the demised premises. On a summons in the administration action by the landlord for leave to exercise his right of distraint for the three quarters' rent which had accrued due in September and December, 1928, and in March, 1929, the receiver contended that by virtue of s. 130 (5) of the Bankruptcy Act, 1914, which applies certain provisions of that Act, including s. 35, "to the case of an administration order under this section," the landlord was entitled to distrain only for the one quarter's rent due on the date of the order for administration.

Held: the landlord was entitled to distrain for all the rent due because (i) s. 130 (5) had no application to any order other than an order made by the Bankruptcy Court, and in any case, as all the rent due accrued due either within six months of, or after, the making of the administration order, and so was not barred from distress by s. 35 or any other section of the Act (*Ex parte Hale* (1) (1875), 1 Ch.D. 285, applied); there was nothing in s. 130 (5) to prevent the landlord from distraining; (ii) the requirement of s. 34 (1) and Sched. I, Part I (2), to the Administration of Estates Act, 1925, that the bankruptcy rules "as to the priority of debts and liabilities" should be applied to the administration of an insolvent estate did not apply the restrictions upon the right of the landlord to distrain for rent to such an administration.

Bankruptcy—Administration in bankruptcy of the estate of a person dying insolvent—Right of creditor to interest—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34 (1); *Sched. I, Part I, s.* 2—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 66 (1).

Section 66 (1) of the Bankruptcy Act, 1914, is not made applicable in the administration of an insolvent estate by virtue of s. 34 (1) and Sched. I, Part I (2), of the Administration of Estates Act, 1925, and so where an intestate dies insolvent proof can be made in respect of interest claimed by a creditor at the rate of 7 per cent. per annum calculated down to the date of payment.

Re Agricultural Wholesale Society, Ltd. (2), post, p. 643, applied.

Notes. Section 207 of the Companies (Consolidation) Act, 1908, is now s. 317 of the Companies Act, 1948.

As to landlord's right to distrain, see 2 HALSBURY'S LAWS (3rd Edn.) 567–570, paras. 1128–1136; and for cases on the subject, see 5 DIGEST 956 et seq., *7837* et seq. For the Bankruptcy Act, 1914, s. 35, s. 66 (1), s. 130 (1), (5), see 2 HALSBURY'S STATUTES (2nd Edn.), pp. 370, 398 and 425. For the Administration of Estates Act, 1925, s. 34 (1), Sched. I, Part I, see 9 ibid. 737 and 766. For the Companies Act, 1948, s. 317, see 3 ibid. 698.

Cases referred to:

(1) *Re Binns, Ex parte Hale* (1875), 1 Ch.D. 285; 45 L.J.Bcy. 21; 33 L.T. 706; 24 W.R. 300; 5 Digest 960, *7868*.

(2) *Re Agricultural Wholesale Society, Ltd.*, post, p. 643; [1929] 2 Ch. 261; 98 L.J.Ch. 396; 141 L.T. 551; 45 T.L.R. 467; [1929] B. & C.R. 54; 10 Digest (Repl.) 981, *6753*.

(3) *Re Fryman's Estate, Fryman* v. *Fryman* (1888), 38 Ch.D. 468; 57 L.J.Ch. 862; 58 L.T. 872; 36 W.R. 631; 5 Digest 956, *7841*.

Adjourned Summonses in an administration action.

By a lease dated April 26, 1926, the lessor demised to Benjamin Wells ("the intestate") for a term of years from March 25, 1926, a farm at the annual rent of £161 3s., and by a further lease dated Aug. 27, 1927, the lessor demised to the intestate some fields for six years from March 25, 1927, at the annual rent of £53. Benjamin Wells died on March 26, 1928, intestate and insolvent. His administratrix paid rent in respect of the quarter ending June 24, 1928, since which date no further rent had been paid, but the administratrix continued to occupy both the premises until Feb. 26, 1929, on which date a receiver and manager was appointed, this administration action having meanwhile been commenced. The receiver and manager carried on the intestate's business at the premises. The order for administration had been made on Dec. 12, 1928, by which date one quarter's rent had accrued due.

Subsequently the lessor took out a summons in the action, asking for leave to exercise his right of distraint for the rent then accrued due since June 24, 1928, namely, three quarters' rent amounting to the sum of £160 12s. 3d.

A summons in the action was also taken out by the administratrix asking whether a creditor of the intestate might be allowed interest on his debt of £665 4s. 5d. at the rate of 7 per cent. per annum calculated to the date of payment.

By the Bankruptcy Act, 1914:

"Section 35. (1) The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt with his limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for six months' rent accrued due prior to the date of the order of adjudication and shall not be available for rent payable in respect of any period subsequent to the date when the distress was levied, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which distress may not have been available. (2) Where any goods of a debtor have been taken in execution, the limit on the amount of rent which the party at whose suit the execution is sued out is liable to pay to the landlord under s. 1 of the Landlord and Tenant Act, 1709, or which the landlord is entitled to be paid under s. 160 of the County Courts Act, 1888, shall, unless notice of claim for rent due has been served on the sheriff or bailiff or other officer levying the execution by or on behalf of the landlord before the commencement of the debtor's bankruptcy, be six months' rent, instead of one year's rent, and the rights of the landlord under the said provisions shall not extend to any claim for rent payable in respect of any period subsequent to the date of such notice, unless such notice was served as aforesaid before the commencement of the debtor's bankruptcy. (3) Nothing in the last preceding subsection shall be construed as imposing any liability on the sheriff, bailiff or other officer levying the execution, or on the person at whose suit the execution was sued out, to account for any sum actually paid to the landlord by him before notice was served on him that a receiving order had been made against the debtor, but the landlord shall be liable to pay to the trustee in the bankruptcy any sum he may have received from such sheriff, bailiff, officer or person as aforesaid in excess of the amount which he was entitled to be paid, without prejudice, however, to the right of the landlord to prove for the amount of such excess.

Section 130. (1) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against the debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy . . . (5) With the modification hereinafter mentioned all the provisions of Part II of this Act (relating to the administration of the property of a bankrupt) and, subject to any modification that may be made therein by general rules under sub-s. (11) of this section, the following provisions, namely, s. 25 of this Act (which relates to inquiries as to the debtor's conduct, dealings, and property); s. 83 of this Act (which relates to the costs of trustees, managers, and other persons); s. 129 of this Act (which relates to the summary administration of small estates); and sub-s. (4) of s. 93 of this Act so far as it relates to the effect of the release of official receivers; shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act and sub-s. (1) of s. 35 of this Act shall apply as if for the reference to an order of adjudication there were substituted a reference to an administration order under this section."

By the Administration of Estates Act, 1925:

"Section 34. (1) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I of the First Schedule to this Act.

A First Schedule.—Part I—Rules as to payment of debts where the estate is insolvent.—(1) The funeral testamentary and administration expenses have priority. (2) Subject as aforesaid the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities respectively and as to the priorities of debts and liabilities as may be in force for the time B being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

Cyril Radcliffe, for the lessor, referred to *Re Binns, Ex parte Hale* (1).
Church for the receiver.
Radcliffe, in reply, referred to *Re Fryman's Estate, Fryman* v. *Fryman* (3).

C **ROMER, J.**—This is an application in an administration action by the lessor of two sets of premises of which the intestate had been the lessee. The estate was insolvent, and the lessor claimed to be at liberty to distrain on the leasehold premises in respect of rent due to him. The intestate died in March, 1928. The defendant in the action is his administratrix. The order for administration was made on Dec. 12, 1928. The last payment of rent was made for the quarter D ending June 24, 1928. Since that time no rent has been paid to the lessor, but the administratrix occupied the two leasehold premises until Feb. 26, 1929, on which date a receiver and manager was appointed, and from that date the receiver has carried on the business for the benefit of the creditors. At the present time three quarters' rent is due to the lessor of which one quarter's rent became due in September, 1928, antecedent to the judgment for administration. The rest of E the rent has become payable since the order was made.

The application is opposed by the receiver on the ground that there is something in the Bankruptcy Act, 1914, or, failing that, in the Administration of Estates Act, 1925, which prevents the Court from acceding to the application in full. First, as regards the Bankruptcy Act, 1914, it is provided as follows: [His Lordship read s. 35 (1), (2) and (3), and s. 130 (1) and (5), and continued:] It is said F that within the meaning of sub-s. (5) of s. 130 the order of December, 1928, must be treated as an administration order. In the first place, sub-s. (5) has, in my opinion, no application to any order other than an order made by the Bankruptcy Court: it does not apply to such an order as that in the present case. Secondly, I am of opinion that in any case there is nothing in the subsection preventing the landlord from distraining under the order in the present case. The rent due in G September accrued due within six months of the administration order and s. 35 has no reference to the rent due after the making of the order: see *Ex parte Hale* (1). In that case BACON, C.J., pointed this out when dealing with the corresponding section of the Act of 1868. There the trustee in bankruptcy did not disclaim the lease, but continued in occupation of the premises for the purposes of winding-up the estate, and the landlord accordingly levied distress in respect of the rent H which became due after the making of the order. The action was commenced for the purposes of restraining the landlord, and it was argued that the corresponding section disentitled the landlord from proving for more than twelve months' rent. BACON, C.J., said:

I "If I were to accede to Mr. Beaumont's argument, the consequence would be that a trustee in bankruptcy might make use of a man's property without paying any rent for it, and might snap his fingers at him. The meaning of s. 34 is that, if a landlord has been so weak as to allow his tenant to get into arrear with his rent for more than a year he can in the event of the tenant's bankruptcy only prove as an ordinary creditor for the arrears beyond the year. It does not restrain his rights in any other way. There is no ground whatever for this injunction."

It is now necessary to consider the Administration of Estates Act, 1925. It is provided by s. 34 (1) of that Act that: [His Lordship read the subsection and

Part I of Sched. I and continued:] I have asked what part of that rule ought to induce me to refuse the landlord's application, and the only answer suggested was the words "as to the priorities of debts and liabilities." But the restrictions upon the right of the landlord to distrain for rent do not seem to me to have anything to do with the priorities of debts and liabilities. Even if it were otherwise, priority is given in respect of six months' rent accrued due before the order of administration, and, as regards rent accruing due after the commencement of the bankruptcy, there is, as I have already pointed out, not anything in the Bankruptcy Act which interferes with the landlord's right to distrain.

In my opinion, leave ought to be given to the landlord to distrain for the three quarters' rent in question. It is said that there are no distrainable assets on one of the premises, and, that being so, the landlord must be given liberty to re-enter so far as there are distributable assets on the other premises.

Leave to the landlord to distrain and to re-enter accordingly.

Vannech for the administratrix.—With regard to the second summons the creditor is entitled to interest at 7 per cent. per annum: see *Re Agricultural Wholesale Society, Ltd.* (2).

Church for the receiver.

ROMER, J.—I shall follow the decision of MAUGHAM, J., in *Re Agricultural Wholesale Society, Ltd.* (2), which was a decision given not on Sched. I of the Administration of Estates Act, 1925, but on the words of s. 207 of the Companies (Consolidation) Act, 1908. The only substantial difference is that in the schedule these words, which are not to be found in the former section, appear: "And as to the priorities of debts and liabilities." I do not think, however, that those words are sufficient to distinguish the two cases and I hold that s. 66 (1) of the Bankruptcy Act is not made applicable in the administration of an insolvent estate by virtue of s. 34 (1) and s. 2 of Part I of Sched. I of the Administration of Estates Act, 1925. The result is that the creditor must be allowed interest on his debt at the rate of 7 per cent.

Interest at 7 per cent. allowed.

Solicitors: *Vandercam, Stanton & Co.*; *Sherrard & Sons*; *Foster, Spicer & Foster.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

A

Re TAYLOR'S SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* TAYLOR

[Chancery Division (Eve, J.), January 11, 1929]

B [Reported [1929] 1 Ch. 435; 98 L.J.Ch. 142; 140 L.T. 553; [1929] B. & C.R. 15]

Bankruptcy—Property available for distribution—Power exercisable "by the bankrupt for his own benefit"—Special power of appointment exercisable by bankrupt for the joint benefit of himself and another—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s. 38 (b)*.

C A special power of appointment which is exercisable by a settlor for the joint benefit of himself and another person is not a power exercisable by him for his own benefit within the meaning of the Bankruptcy Act, 1914, s. 38 (b), and so does not vest in his trustee in bankruptcy.

Notes. As to property over which a bankrupt has powers of disposition, see D 2 Halsbury's Laws (3rd Edn.) 411, para. 826; and for cases see 5 Digest 697 et seq., *6130* et seq. For the Bankruptcy Act, 1914, s. 38 (b), see 2 Halsbury's Statutes (2nd Edn.) 373.

Adjourned Summons to determine whether a special power of appointment retained by a bankrupt settlor was exercisable by his trustee in bankruptcy.

By a voluntary settlement made on Dec. 24, 1913, between the settlor, of the E one part, and the Public Trustee, of the other part, certain funds and property set out in the schedule thereto and accretions and accumulations of income thereof were to be held by the trustee upon trust during the settlor's life to accumulate the income thereof by investment in authorised investments, but if prior to or during any year the settlor should give notice to the trustee in writing that he required the income or the residue thereof for the year to be paid as to one moiety F to him, and as to the other to H. J. Murray for her life, or if dead, that he required the whole income to be paid to him, then such income was to be paid accordingly. On the settlor's death the whole income was to be paid to H. J. Murray for her life without power of anticipation and subject thereto the trust fund was to go to the settlor's children therein named. H. J. Murray subsequently became the wife of the settlor. A receiving order was made against the settlor on July 20, 1927, G and on Aug. 2 he was adjudicated a bankrupt. On Aug. 9 he gave notice to the trustee to pay the income for the rest of the year in moieties to himself and wife. This summons was then taken out.

Stafford Crossman for the trustee of the settlement.
W. N. Stable for the trustee in bankruptcy.
Tindale Davis for the bankrupt.
H *Wilfred Hunt* for the wife.
Fergus Morton for the children.

EVE, J.—By a settlement dated Dec. 24, 1913, the bankrupt transferred certain funds into the name of the Public Trustee upon trust to accumulate and invest the income thereof subject to a proviso. Helena Jane Murray was married to the I settlor shortly after the date of the settlement, and during their joint lives the settlor had under the earlier part of the proviso I have just read power to suspend from time to time the operation of the trust for accumulation of the income and to direct payment thereof to himself and his wife in equal shares. He became bankrupt in August, 1927, and thereupon gave notice to the trustee exercising the power for the then current year. The question now raised is whether the power passed to the trustee in bankruptcy under sub-s. (b) of s. 38 of the Bankruptcy Act, 1914, and can be exercised by him for the benefit of the creditors. The subsection so far as material is as follows: Section 38.

"The property of a bankrupt divisible among his creditors . . . shall comprise the following particulars: . . . (b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge . . ."

In other words, is this a power which at the date of the bankruptcy can properly be described as one which might have been exercised by the bankrupt for his own benefit? I do not think it is—the bankrupt cannot exercise it for his own benefit alone during his wife's lifetime. He can only exercise it for their mutual benefit, and although if he does exercise it any benefit he may derive therefrom will pass to the trustee, I do not think a power to appoint to oneself and another can properly be described as a power to appoint for one's own benefit. I think the operation of the subsection is limited to powers capable of being exercised for the benefit of the bankrupt alone. The questions raised by the summons as to the validity of attempts to exercise the power as to one moiety only must be answered in the negative.

Declaration accordingly.

Solicitors: *King, Wigg & Brightman*; *Woolfe & Woolfe*; *G. R. Cran*; *Theodore Goddard & Co.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

SHAW *v.* PUBLIC TRUSTEE

[House of Lords (Lord Buckmaster, Viscount Dunedin and Viscount Sumner), April 23, June 14, 1929]

[Reported 141 L.T. 465]

Will—Annuity—Bequest of two annuities payable out of residue—Bequest of remaining income of residue to wife—"On the cesser of any of the said annuities" corpus to be held in trust for appointee of testator's son—Inclusion of widow's life interest.

The testator, by his will dated Jan. 11, 1877, gave his residuary estate to the executors therein named on trusts out of the rents and profits thereof to pay to W.C.F. one annuity of £100 during his life and to pay to his son one annuity or yearly sum of £150 during his life and to pay the residue of such rents and profits to his wife during her widowhood and "on the cesser or falling in of any of the said annuities to stand possessed of the corpus of my said trust estate sufficient to answer or provide for the payment of every such annuity so ceasing or falling in as aforesaid" upon trust for such person or persons and for such purposes as his son should appoint and in default of such appointment upon trust for the child or children of his son, and if there should be no children of his son upon trust for his three brothers equally.

Held by Viscount Dunedin and Viscount Sumner (Lord Buckmaster dissenting): the expressions "any of the said annuities" and "every such annuity" included not only the annuities to W.C.F. and to the son, but also the widow's life interest in the residue of the rents and profits.

Decision of the Court of Appeal (139 L.T. 556) affirmed.

Notes. As to the meaning of "annuities" in a will, see 34 Halsbury's Laws (2nd Edn.) 252, para. 305; and for case on the subject, see 44 Digest 708, *5520.*

Cases referred to:

(1) *Secretary of State in Council of India* v. *Scoble*, [1903] A.C. 299; 72 L.J.K.B. 617; 89 L.T. 1; 51 W.R. 675; 19 T.L.R. 550; sub nom. *Scoble* v. *Secretary of State for India*, 4 Tax Cas. 618, H.L.; 28 Digest 65, *337*.

(2) *Hutchinson* v. *National Refuges for Homeless and Destitute Children*, [1920] A.C. 795; 89 L.J.Ch. 469; 123 L.T. 439; 64 Sol. Jo. 496, H.L.; 44 Digest 882, *7386*.

(3) *Gordon* v. *Gordon*, *Gordon* v. *Gordon* (1871), L.R. 5 H.L. 254, H.L.; 44 Digest 542, *3592*.

(4) *Hamilton* v. *Ritchie*, [1894] A.C. 310, H.L.; 44 Digest 578, *3976*.

(5) *Grey* v. *Pearson* (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 44 Digest 533, *3502*.

(6) *Cave* v. *Horsell*, [1912] W.N. 19; 106 L.T. 147; 28 T.L.R. 184; affirmed, [1912] 3 K.B. 533; 81 L.J.K.B. 981; 107 L.T. 186; 28 T.L.R. 543, C.A.; 44 Digest 583, *4054*.

(7) *Slingsby* v. *Grainger* (1859), 7 H.L.Cas. 273; 28 L.J.Ch. 616; 5 Jur.N.S. 1111; 11 E.R. 109, H.L.; 44 Digest 561, *3781*.

(8) *Homer* v. *Homer* (1878), 8 Ch.D. 758; 47 L.J.Ch. 635; 39 L.T. 3; 27 W.R. 101, C.A.; 44 Digest 630, *4619*.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., and LAWRENCE, L.J.; RUSSELL, L.J., dissenting), reported 139 L.T. 556; sub nom. *Re Fitch's Will Trusts*, *Public Trustee* v. *Nives and others*, affirming a decision of CLAUSON, J., given on Feb. 27, 1928, in which he had said that, notwithstanding the fact that this question was not res judicata and that there was no estoppel, he felt himself bound to follow the decision of CHITTY, J., a judge of co-ordinate jurisdiction, on the same point arising in the administration of the same will, otherwise great confusion would arise in the administration of justice. His Lordship held that there was no intestacy and made the same order as CHITTY, J.: "This court doth declare that the testator did not die intestate as to any part of his estate" and ordered costs to come out of the estate. The facts, which are summarised in the headnote, are fully stated in the opinion of LORD BUCKMASTER. The Court of Appeal held (RUSSELL, L.J., dissenting) that the words "any of the said annuities" and "every such annuity" were apt to embrace all three of the annual payments whether they were of a sum certain or the uncertain amount dependent upon what the rents and profits of the balance of the corpus should yield to the wife, and that the word "annuity" should not be given too rigid an interpretation: see *Secretary of State in Council of India* v. *Scoble* (1) ([1903] A.C. at p. 302). The whole court held that all parties were entitled to have their costs out of the estate. RUSSELL, L.J. (dissenting), considered that the expression "the said annuities" referred only to the two annual sums of £100 and £150, and that it was impossible to describe the widow's interest as an annuity, and that there was no special context in the words of the will which required that her interest should be construed as an annuity, but the clause postulated that the annuities with which it was dealing should be annual sums of fixed amounts. Mrs. Shaw, one of the next-of-kin, appealed.

H. B. L. Braund and *L. R. Norris*, for the appellant, contended for an intestacy.
A. de W. Mulligan and *Alan Ellis* for the respondents.

The House took time for consideration.

June 14. The following opinions were read.

LORD BUCKMASTER.—George Fitch, who died on Oct. 10, 1877, made a will dated Jan. 11, of same year, by which he bequeathed the residue of his estate and the property over which he had a power of appointment under a marriage settlement in the following terms:

"All the residue of my estate and effects real and personal and over which I have any disposing power and particularly such as I have under the settlement made on my marriage with my said wife I give devise and bequeath

unto the said George Hills Cook and my said wife Kate their heirs executors administrators and assigns. Upon trust out of the rents issues and profits thereof to pay unto William Charles Fitch one annuity of £100 during his life without power of anticipation or alienation. And upon further trust to pay to my son George Fitch the younger one annuity or yearly sum of £150 during his life without power of alienation or anticipation. And upon further trust to pay the residue of the rents issues and profits of my said trust estate unto my said dear wife Kate during her widowhood. And on the cesser or falling in of any of the said annuities to stand possessed of the corpus of my said trust estate sufficient to answer or provide for the payment of every such annuity so ceasing or falling in as aforesaid. Upon trust for such persons or person and for such purposes as my said son George shall appoint by any writing under his hand. And in default of such appointment then upon trust for the children or child if only one of the said George Fitch the younger. And if there be no such children or child of the said George Fitch the younger then upon trust for my said three brothers equally to be divided between them."

The wife referred to in the will was his second wife, by whom he was survived. He had three children by a former marriage, namely, William Charles Fitch, George Fitch, and a daughter, but his second marriage was childless. The property he left chiefly consisted of a very large number of small freehold houses, about forty in all, in Kentish Town, and a small sum of Consols. The property subject to the marriage settlement mentioned in the will was £3,600 Egyptian Government Loan. George Fitch, the son, died on March 31, 1891, a bachelor, and without having exercised the power of appointment conferred upon him by the will, and the other son, William Charles Fitch, died on Oct. 27, 1894. Thereupon, proceedings were taken to determine how the provisions of the will with regard to the corpus of the estate representing the annuities should be disposed of and asking definitely whether there was an intestacy as to any part of the estate. The necessity for this later question does not appear to have been immediate, since the trust for the three brothers had become operative, so far as the corpus representing the annuities was concerned, while the question as to intestacy would only definitely arise on the death of the widow. As, however, the point must ultimately have been decided, it was dealt with under the summons, and the learned judge declared there was no intestacy. These proceedings did not embrace all the persons who might be interested if an intestacy occurred, and no representation order was made. Kate Fitch, the widow, died on Nov. 24, 1925, and as all the parties had not been bound by the previous judgment, the proceedings out of which this appeal has arisen were instituted for determining again whether there was an intestacy on the death of the widow. It is unnecessary to investigate and state the different relationships of the parties to this action. It is sufficient to say that the present appellant is interested in contending that there was an intestacy. The respondents, apart from those appearing in a fiduciary capacity, are interested in the opposite contention. CLAUSON, J., before whom the case first came, followed, as he was bound to do, the judgment by the learned judge on the former occasion. The Court of Appeal have supported that judgment, RUSSELL, L.J., dissenting from the Master of the Rolls and LAWRENCE, L.J.

In my opinion, the view of RUSSELL, L.J., was correct. It is unnecessary to repeat what was said in *Hutchinson* v. *National Refuges for Homeless and Destitute Children* (2) as to the principles that must guide the construction of obscure wills. To words that have a definite meaning, that definite meaning must be assigned, unless there is something in the will itself from which it can be ascertained that the words questioned were used in an unusual and irregular sense, but that guide cannot be afforded by the mere consideration that apart from such construction there would be an intestacy. In the present case the whole question depends upon the meaning to be given to the phrase "cesser or falling in of any of the said annuities," and of the succeeding words "every such annuity." The annuities

mentioned as annuities in the will were two and two only, and they were payable out of the income of the estate in priority to every other payment. The residue of the income, necessarily of an uncertain and fluctuating character, was all that was given to the wife. According to the judgment appealed from, that residuary income is included in the phrase "said annuities." An annuity, however, has a well-known and a well-defined legal meaning. It is that of a fixed sum annually payable. The utmost industry of counsel has been unable to find any case in which that meaning has been departed from. The question, therefore, becomes whether this strict meaning was, according to the terms of the will, a meaning that the testator did not intend, and the whole of this hangs upon the true value of the word "any" in the clause quoted and the word "every" in the succeeding paragraph.

I attach no importance to the use of the two words "cesser" or "falling in." If all the three gifts were equally annuities I can see no distinction that would give separate meaning to the two words arising from the fact that two are of fixed sums and the third residuary and ending with widowhood. With regard to the word "any," it must be admitted that it as well as "every" is not properly applicable to describe one of two; on the other hand, it does not seem to me so totally inappropriate as to compel the application of the word "annuity" to an interest that does not answer that description. I agree with RUSSELL, L.J., that, though the will is drawn in legal form, there are passages which show that it is couched in clumsy language, and in my opinion more violence is done to the use of plain words by making the interest during widowhood into an annuity than by saying that "any" is equivalent to "either." Further difficulties also present themselves on the acceptance of the judgment now under appeal. According to its effect, if the widow had died first or re-married, it would have been necessary to allocate part of the corpus of the estate representing her annual interest and immediately to have divided it. There is no power in the will in that event to provide any margin for the two annuities that undoubtedly have priority, and no test established to determine what was for purposes of such calculation to be taken as the measure of the residuary estate. It appears to me that in such circumstances it would have been impossible to have carried out the provisions of the will, and this is, I think, an added reason why a strained and unnatural meaning should not be given to the word annuity, but that it should be kept to itself and not permitted to stray beyond its proper legal boundaries.

For these reasons I think the appeal should succeed.

VISCOUNT DUNEDIN.—It would be easy to cull a perfect anthology of judicial dicta as to the duty of a court in construing a will where it finds a word or words which have a technical or an ordinary sense and yet is confronted with the difficulty from other expressions in reading the words in the technical or ordinary sense. I shall content myself with very few quotations.

LORD CHELMSFORD, in *Gordon* v. *Gordon* (3), says (L.R. 5 H.L. at p. 271):

> "I admit the canon of construction that you are in the first place to determine the natural and ordinary meaning of the words employed; and to this you must adhere unless other parts of the will, or the general scope and object of it, plainly manifest that the testator meant them in a different sense."

LORD WATSON, in *Hamilton* v. *Ritchie* (4), says ([1894] A.C. at p. 313):

> "A testator who uses words which have an intelligible conventional meaning is not to be held to have used the words with any other meaning, unless the context of the instrument shows that he intended to do so."

I have no desire to depart from the rules so laid down, but I would like to express my attitude in the words used by LORD ST. LEONARDS in *Grey* v. *Pearson* (5) (6 H.L.Cas. at p. 99):

> "Nobody is more disposed than I am to abide by clear words, and to give to them their natural and grammatical meaning, but I never did, and I never

can, come to this conclusion, that the words of a will cannot admit of modification according to the real intention of the testator, as you find it from other expressions, or from the whole context of the will." A

I admit at once that annuity is the proper description of the two annuities left in the will and that it is not the proper description of the residue left to the widow Kate during her widowhood. So far, however, the estate is not in whole disposed of, and the testator knows it, for he proceeds to talk of what he calls the corpus of the estate. The first part of the clause is just blundered whichever way cesser and falling in were construed. Assuming that they applied to only the annuities proper, how can the trustees hold the corpus of the estate to satisfy an annuity so ceased or fallen in. That clause, therefore, flies off, and the next comes into play—the trust for George's appointment and so on, under which final provision, as things have happened, the three brothers take. What then is the meaning of the word "annuities" in the expression ceasing or falling in of any of which the further trust is to take effect? For on that turns what the testator meant by "corpus." I lay great stress on the word "any" as showing that in this testator's view he was entitled to call the only payment to his widow of the residue an annuity. Obviously the word "any" points to more than two, the word "either" being the proper word if only two annuities were referred to. In this sort of question no case exactly rules another, but there is a case which is worth quoting. As it was not quoted by any of the numerous band of counsel who addressed your Lordships on behalf of the respondents, I am constrained to think that it escaped their notice. It is *Cave* v. *Horsell* (6). In that case the defendant, being owner of five shops numbered 2 to 6, in a street, let No. 4 to the plaintiff and covenanted that he would not during the continuance of the lease let any of the adjoining shops belonging to him for the purpose of various businesses specified, such businesses being of the same class as that carried on by the plaintiff. He did let No. 6 for the purposes of one of the excluded businesses, and the plaintiff brought an action for damages on the covenant. The defendant pleaded that "adjoining" meant numbers 3 and 5, but not No. 6, and what helped to turn the scale was the use of the word "any" instead of "either." The plaintiff won his case by the judgments of MOULTON and BUCKLEY, L.JJ., VAUGHAN-WILLIAMS, L.J., dissenting. The judgment confirmed the judgment of PHILLIMORE, J., sitting without a jury. B C D E F

So far for the wording of the will; now for the general purposes. I am moved by the argument, which was well presented by one of the learned counsel, that the testator's reference to the corpus is entirely inimical to an intestacy of a great part of the estate, and shows that he meant his expression "annuity" as applicable to annual payment. G

It was strongly pressed by the other side, and has found favour with your Lordship on the Woolsack, that if the widow had died first there was no way of working out his view because to pay away what the widow had been enjoying de facto might defeat the real annuities which were a first charge. I myself am not impressed with that argument. I do not suppose for a moment that the testator either knew or was thinking of how the will would be worked out. I am, therefore, though with diffidence in view of your Lordships' contrary view, of opinion that the judgment below, which is also the judgment of CHITTY, J., long ago, is right, and that this appeal ought to be dismissed, and I move accordingly. H

VISCOUNT SUMNER.—The issue here is the correct construction of the words beginning "and on the cesser or falling in" and ending "so ceasing or falling in as aforesaid" in the will of George Fitch, deceased. The scheme of the will, after sundry legacies have been provided for, is to vest everything in trustees (a) to secure certain temporary interests, and (b) to carry out certain dispositions in reversion thereupon. The first class of purposes is exhaustive of the produce of the estate during the continuance of those interests; the second is, on the respondents' construction, equally exhaustive after their termination, but, on that of the appellant, it involves an intestacy as regards a large part of the testator's property. On the I

other hand, on the construction of the respondents, the will presented the trustees and the court with a difficult problem of administration if the widow had predeceased her step-sons, as in the course of nature she might well have done, and this problem the appellant's construction would avoid. These considerations seem to me to assist us singularly little. Courts are said to lean against intestacy and are yet constrained to pronounce in favour of it by foolish words or confused thought on the part of a testator or rather, as a rule, of some careless adviser. It is unlikely that this testator contemplated intestacy, and it is still more unlikely that he had any inkling at all of the difficulties of administration that would arise if his widow's interest came to an end before the interests of her step-sons; but we get no further on this road.

The claim in question makes comprehensive reference to dispositions previously made and that reference, according to the grammatical sense which we are bound to put on it, that is the sense of good English, means and in effect says that the dispositions so referred to are not two but are more than two. This is the plain and inexorable effect of the use of the two words "any" and "every." They would have been "either" or "each" had the dispositions so referred to been two only. So far as they go, I think that the use of the words "cesser or falling in" supports this. The clause, however, calls these dispositions by the name of "annuities" and by no other name, and the short question is whether, in such a connection, the technical legal term "annuity" is to be read in so restricted a sense as to defeat what the testator has plainly expressed as to the number and the previous dispositions referred to by his words "any," "every" and "said." At most this is falsa demonstratio; and I do not think that a testator's error in a description of something, which he has already brought into effect, ought to be pressed so far as to contradict his language as completely as if a "dozen" were substituted for a "score." The case is not, as was *Slingsby* v. *Grainger* (7), one in which an attempt was made to enlarge a gift, already clearly limited by its terms, in the supposition that the testatrix could not really have meant to give the legatee concerned less than she had already given to another legatee similarly circumstanced, but must have made a mistake in describing what she meant to give. If I ask myself, as FRY, J., asked himself in *Homer* v. *Homer* (8) (8 Ch.D. at p. 768), whether there is any constat of the subject-matter referred to, independently, of the word "annuities," I think that there is in the words "any," "every" and "said," and that, accordingly, this loose reference is not conclusive. The reference here is purely for the purpose of fixing a time when other clear dispositions are to take effect. I suppose a summary reference "the three bequests aforesaid" would not be allowed to fail in its object merely because there were two bequests, followed by one devise, and that "my three children aforesaid," when they had been previously named, would not be turned into two, regardless of consequences, merely because one, though indeed a child, was a natural one. Anomalies of interpretation are bound to occur in the case of wills; something less of the rigour of the game is demanded than in the case of conveyances, but something more than merely the meaning of the testator, for it has to be the meaning of the testator as expressed in his will. The courts have tried to bridge the gap between a testator's mind and a draftsman's words, but it cannot be always done with strict consistency. The last thing I desire to do or conceive that I am doing is to disregard anything that is settled in this branch of the law, but, fortified by the opinions of CHITTY, J., and of the majority of the Court of Appeal, I think that there was no intestacy in this case or on this will. I think that the respondents should have their costs out of the estate.

Appeal dismissed.

Solicitors: *Arthur C. Dowding*; *Alfred Allistone*; *Welman & Sons.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

BURROWES *v.* BURROWES

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Sankey, L.JJ.), April 9, 10, 1929]

[Reported 141 L.T. 201; 45 T.L.R. 401]

Divorce—Maintenance of wife—Enforcement of order against husband—Sequestration—Repeated defaults—Statement by husband of intention not to pay in future unless forced—Order for payment to wife of dividends receivable by husband.

A wife was granted a decree of judicial separation in an undefended petition on the ground of her husband's cruelty and an order for permanent alimony for herself and her four children was made at the rate of £950 a year. The husband had capital investments worth at least £40,000. When each instalment of alimony became due he adopted an attitude of passive resistance, and on three successive occasions the wife secured payment only by execution on her husband's household effects, and on a subsequent occasion she secured a charging order on certain of his securities for the payment of a monthly instalment accrued due. Arrears of alimony and costs amounting to £395 16s. 8d. were still unpaid by the husband. On an application by the wife for an order to secure, under the control of the court or of a receiver, sufficient of the husband's capital from which payments of the monthly instalments could be made to her as they became due, the husband stated that he would pay nothing until he was forced.

Held: the husband could not be treated as in contempt with regard to future payments and so no order in the nature of sequestration should be made: dictum of WILLES, J., in *Hulbert and Crowe* v. *Cathcart* (1), [1894] 1 Q.B. at p. 246, approved and applied; but an order should be made (i) restraining the husband from receiving dividends on his investments to the extent of £395 16s. 8d., and providing that such sum would be received by the husband's solicitor and paid over by him to the wife, and (ii) giving the wife liberty to apply in chambers for a similar order in case of future default: *Willcock* v. *Terrell* (2) (1878), 3 Ex.D. 323, applied.

Notes. Section 190 (1), (2) and (4) of the Judicature Act, 1925, has now been repealed, and replaced by the similar provisions of s. 19 (2), (3), and s. 20 (2) of the Matrimonial Causes Act, 1950.

As to enforcing payment of alimony, see 12 HALSBURY'S LAWS (3rd Edn.) 430, para. 964; as to circumstances in which a receiver will be appointed therefor, see ibid. 476, para. 1065; and as to injunctions to restrain dealings with the property a party to a divorce suit, see ibid. 477, para. 1068; and for cases on the subject, see 27 DIGEST (Repl.) 683–684, *6518–6543*. For the Matrimonial Causes Act, 1950, s. 19 (2), (3), s. 20 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 407–408.

Cases referred to:

(1) *Hulbert and Crowe* v. *Cathcart*, [1894] 1 Q.B. 244; 63 L.J.Q.B. 121; 70 L.T. 558, D.C.; 21 Digest 591, *1720*.

(2) *Willcock* v. *Terrell* (1878), 3 Ex.D. 323; 39 L.T. 84, C.A.; 8 Digest (Repl.) 565, *173*.

(3) *Oliver* v. *Lowther* (1880), 42 L.T. 47; 28 W.R. 381; 27 Digest (Repl.) 681, *6505*.

(4) *Holmes* v. *Millage*, [1893] 1 Q.B. 551; 62 L.J.Q.B. 380; 68 L.T. 205; 57 J.P. 551; 41 W.R. 354; 9 T.L.R. 331; 37 Sol. Jo. 338; 4 R. 332, C.A.; 21 Digest 666, *2460*.

(5) *Edwards & Co.* v. *Picard*, [1909] 2 K.B. 903; 78 L.J.K.B. 1108; 101 L.T. 416; 25 T.L.R. 815, C.A.; 21 Digest 669, *2492*.

(6) *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch.D. 275; 47 L.J.Ch. 833; 39 L.T. 244; 27 W.R. 3, C.A.; 21 Digest 665, *2454*.

(7) *Sansom* v. *Sansom* (1879), 4 P.D. 69; 48 L.J.P. 25; 39 L.T. 642; 27 W.R. 692; 21 Digest 594, *1754.*

(8) *Hyde* v. *Hyde* (1865), 4 Sw. & Tr. 80; 34 L.J.P.M. & A. 63; 12 L.T. 235; 13 W.R. 545; 164 E.R. 1445; 27 Digest (Repl.) 680, *6493.*

(9) *Fanshawe* v. *Fanshawe*, [1927] P. 238; 96 L.J.P. 133; 137 L.T. 496; 43 T.L.R. 666; 71 Sol. Jo. 762; 27 Digest (Repl.) 684, *6535.*

(10) *Bullus* v. *Bullus* (1910), 102 L.T. 399; 26 T.L.R. 330; 54 Sol. Jo. 343; 27 Digest (Repl.) 683, *6519.*

(11) *Clinton* v. *Clinton* (1866), L.R. 1 P. & D. 215; 14 L.T. 257; 14 W.R. 545; 27 Digest (Repl.) 493, *4325.*

(12) *Carter* v. *Carter*, [1896] P. 35; 65 L.J.P. 48; 44 W.R. 400; 12 T.L.R. 37; 27 Digest (Repl.) 684, *6534.*

Interlocutory Appeal by a wife petitioner from the refusal of HILL, J., on an appeal from a registrar, to make an order vesting in the court or a receiver sufficient securities belonging to her husband, against whom a decree of judicial separation had been granted, out of which the monthly instalments of alimony ordered to be paid to the wife could be paid as and when they became due.

Leave to appeal was given by HILL, J. The facts are stated in the judgment of LORD HANWORTH, M.R.

By s. 190 (1) of the Supreme Court of Judicature Act, 1925, the court might on any decree for divorce or nullity of marriage, order that the husband

> "shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable."

By sub-s. (2) the court might either in addition to the aforesaid order or instead of it,

> "direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable."

Subsection (4) provided:

> "Where any order for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just."

B. M. Cloutman for the wife.

Bayford, K.C. (with him *Clifford Mortimer* and *William Latey*), for the husband.

[The following cases were referred to in argument: *Oliver* v. *Lowther* (3), *Holmes* v. *Millage* (4), *Edwards & Co.* v. *Picard* (5), *Anglo-Italian Bank* v. *Davies* (6), *Willcock* v. *Terrell* (2), *Sansom* v. *Sansom* (7), *Hyde* v. *Hyde* (8), *Fanshawe* v. *Fanshawe* (9), *Bullus* v. *Bullus* (10), *Clinton* v. *Clinton* (11), *Carter* v. *Carter* (12).]

LORD HANWORTH, M.R.—This is an appeal from a decision of HILL, J., who felt himself reluctantly compelled to refuse to make an order as asked upon the application before him. The facts of the case are these. The parties were married and there were four children. On May 24, 1928, the wife obtained a decree of judicial separation on the ground of the husband's cruelty, and she was given the custody of the four children of the marriage. On June 21 the wife was granted an order for the payment of permanent alimony by her husband. That alimony was fixed at the rate of £500 gross per annum for herself and £125 gross in respect of each of the two sons, and £100 gross in respect of each of the two daughters, which makes a total sum of £950, and that annual sum was to be paid by monthly payments on the first of each month. Thus under that order for alimony there would be paid month by month a total sum of £79 3s. 4d. The husband has not complied with the order for the payment of these monthly sums. He failed to pay in July, August, and September of last year, and the wife was compelled to enforce the

payment of those monthly sums by writs of fi. fa., issued on July 13, Aug. 7, and Sept. 7 of last year. The husband has, therefore, up to that date, indicated that he did not intend to comply with the order of the court. He was prepared to subject himself to what, after all, is not a pleasant process, having a fi. fa. issued against his goods, and perhaps having regard to his conduct he was not unmindful that there might be some possible stigma attaching to his wife by forcing and compelling her to proceed by way of fi. fa. He did not pay in October, and on Nov. 6 she obtained a charging order nisi. He has not paid any further sums at all; and he is thus in default for a considerable amount. When the matter came before HILL, J., the husband was represented by counsel, and his counsel stated that the husband had "taken up the position of a passive resister; he is minded to pay nothing until he is forced."

This man, who has separated from his wife under an order of judicial separation based on his cruelty towards his wife, has now taken up the attitude that he will not willingly obey the order of the court under which this cruel husband is bound to pay a monthly sum for the support of his wife and of his four children. There is evidence before us which shows that he is the possessor of a sum of not less than £40,000; indeed, in a frank affidavit which has been filed his solicitor tells us that as on April 3, this very month, the husband's securities in British companies, which are held on his behalf by his bankers, are more than when those securities were considered in the alimony proceedings. Whether or not that means that there is more than £40,000 worth, or whether there has been a transfer to British companies of some of the money that was previously invested otherwise, I do not know, but, at any rate, it is quite plain that this husband is possessed of a total capital of not less than £40,000. The probability is that those figures are not far amiss, for in fixing the sum which is to be paid to the wife and the children, namely, £950 per annum, attention is always paid to the means of the husband who has to pay permanent alimony.

In this case the spouses were separated under an order for judicial separation. Section 190 (1) of the Judicature Act, 1925, under which orders are made for alimony, provides that

> "on any decree for divorce or nullity of marriage . . . the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or annual sum of money for any term not exceeding her life as having regard to her fortune, if any, to the ability of her husband, and to the conduct of the parties the court may deem to be reasonable."

Subsection (1) does not in terms apply to a case where the spouses separated under a judicial separation, but there is power to make the order for alimony. HILL, J., in his careful judgment, expands this point and points out that there is the opportunity here for a necessary amendment of the law to be made, for it is both illogical and difficult to reconcile with common sense that, although an order requiring the husband to secure to his wife, according to his ability and according as the court may deem reasonable, a sum, there is no such power applicable in a case of judicial separation; I share with HILL, J., the view that some amendment of the law on this point is desirable. We have, however, to deal with the law as it stands. Is it to be said that the court is powerless to aid the wife, who is entitled to every consideration and who under the order of the court ought to receive from her husband this monthly sum? The application that was made to HILL, J., was an application that there should be a sufficient sum of the securities standing to the credit of the husband transferred into court for the purpose of making provision for the payment of the monthly instalments, and that until further order the securities should be under the control of the Paymaster-General. HILL, J., for reasons which are pointed out in his judgment and which I have shortly referred to, felt unable to make any such order bringing these securities within the ambit of the powers of the court, but his attitude in the matter cannot be mistaken. On Dec. 19 he granted an injunction to restrain the husband from in any way dealing

A with the securities mentioned in the wife's affidavit until he had had an opportunity of hearing the case in full argument, and the case was adjourned for such argument till Feb. 7. HILL, J., reserved judgment, and delivered it on March 8, reluctantly coming to the opinion that he was unable to accede to the application which was made by the summons. His view was that the husband has brought all this trouble upon himself, and he made an order that the costs of the proceedings B should be the wife's costs. He further gave leave to appeal, and expressed the hope that this court might find some method by which the wife could be assisted. We have had our attention drawn to various cases, and counsel for the wife has varied the application which he originally made upon the summons before HILL, J. We have assented to an amendment, and upon that amendment being made counsel for the husband, who is placed in a very unpleasant and difficult position owing to C the attitude of this husband, has felt that it is difficult to resist the order which the court have clearly indicated in the course of the argument they are minded to make.

There are many objections to making some charging order or to proceed by way of sequestration, which is a somewhat cumbrous method. As WILLS, J., said in *Hulbert and Crowe* v. *Cathcart* (1) ([1894] 1 Q.B. at p. 246):

D

> "There is yet another objection to this order, namely, that it is quite contrary to principle to make an order in the nature of an order in contempt, as a writ of sequestration is, when the person against whom it is made is not in contempt."

We have therefore to remember very carefully that the present position is that the E husband has not paid and is not intending to pay the instalments which have already accrued due to the wife, and he has in the clearest possible terms expressed to the court his intention to resist future payments. However, he is not to be treated as in contempt in respect of the future, for he may come to a wiser frame of mind, and, as WILLS, J., said, it would be contrary to principle to make an order in the nature of an order for contempt when the person against whom it is made F is not in contempt. We have therefore to deal with the situation under which at the present time there are a number of instalments unpaid, and there is also due to the wife a certain sum in respect of costs for which an allocatur has not yet been issued.

Turning now to the authorities, it appears quite clear that in *Willcock* v. *Terrell* (2) a careful order was made in circumstances where there had been a default in G obeying an order made by the court for payment of instalments. The case was one which was dealt with by LINDLEY, J., and also, in the Court of Appeal, by COTTON, L.J., and both those learned and accurate judges were careful to draw up an order which would be at once effective and at the same time not overstep the limitations which were in the mind of WILLS, J. The order that was there made was an order granting an injunction against the defendant receiving the sums H payable to him by way of dividend or interest on his securities so long as the sums in respect of which he was already in default remained unliquidated; and a further order was made that in the case of further default an application could be made at chambers based on that further default if and when it should occur. I think, as HILL, J., points out in his judgment, that the order in *Willcock* v. *Terrell* (2) was carefully moulded to apply so far as the injunction went to the extent of the arrears I then due, and that with regard to the future it was specifically said "Let them"—that is the sequestrators—"apply for a fresh order at chambers for the future sums as they become due; that in substance will be the proper order." That order was made, and it is an order moulded on the same lines as that which we intend to make in the present case. It is not in every case by any means that the court would make such an order, but in view of the attitude adopted by this husband, his declared intention of defeating and disobeying the order of the court so far as he possibly can do, we think it right to make the order. The order will be one in the terms of that made in *Willcock* v. *Terrell* (2), moulded to fit the present facts, and

I think the actual terms of the order had better be drawn up by junior counsel on either side and mentioned to us again on Friday morning if any difficulty has arisen in respect of it. A

The result will be that there will be an injunction upon the husband from receiving any of the dividends until this sum now due and payable by him has been liquidated, and a further authorisation to some person, the solicitor for the wife if no other person is suggested as being more suitable, or is desired as being more suitable, for him to receive the moneys directly from the source at which they are payable. Notice of that order can be served, as notice of the injunction of Dec. 19 was served, on the various companies, who will therefore have to take notice of the order now made; and with regard to the future there will be liberty to apply so that the terms of the order can be immediately made available if and when a further default should be made in the payment of the sums due. The appeal succeeds as a whole, and the appeal will be allowed; and the costs of the appeal will be the wife's costs. B C

LAWRENCE, L.J.—I agree. I have sketched out an order which counsel will have the opportunity of seeing, and on Friday it can be mentioned to the court and approved. D

SANKEY, L.J.—I agree.

The order finally approved by the court was as follows:

"It is ordered that the respondent be restrained from receiving by himself or through his bankers or agents any dividends or other moneys now payable or hereafter to become payable in respect of the investments set out in the schedule to this order to the extent of £395 16s. 8d., being the arrears of alimony ordered to be paid pursuant to an order dated June 21, 1928, and costs incurred in respect of a writ of fieri facias, and that the solicitor of the respondent do receive from the various companies and corporations whose names appear in the schedule to this order or from some or one of them the said sum of £395 16s. 8d. out of the dividends or other moneys now payable or hereafter to become payable in respect of the investments set out in the schedule hereto and on receiving the same to pay the same to the petitioner. And it is further ordered that the petitioner be at liberty to apply at chambers in case of future default by the respondent. And it is further ordered that the respondent do pay to the petitioner the costs of this appeal." E F

Solicitors: *Stoneham & Sons*; *Collisson, Pritchard & Barnes.* G

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re GATES. GATES *v.* CABELL

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), June 6, 7, 1929]

[Reported [1929] 2 Ch. 420; 98 L.J.Ch. 360; 141 L.T. 392; 45 T.L.R. 522; 73 Sol. Jo. 429]

Will—Money—"I leave all my money"—No context or surrounding circumstances to alter strict sense of "money."

A testator's will provided: "I leave all my money to A.G.C." At his death, the testator's estate consisted of cash in the house, in the hands of his solicitors, and on current account at his bank, stocks and shares, furniture, and an equity of redemption in freehold land.

Held: there being nothing in the context or the surrounding circumstances to prevent the strict meaning being given to the word "money," only the cash in the house, in the hands of the solicitors and at the bank passed.

Re Taylor (1), [1923] 1 Ch. 99, applied.

Order of Clauson, J. ([1928] P. 128), varied.

Notes. Considered: *Jones* v. *Treasury Solicitor* (1932), 48 T.L.R. 615. Referred to: *Perrin* v. *Morgan*, [1943] 1 All E.R. 187.

As to the construction of the word "money" in a will, see 34 Halsbury's Laws (2nd Edn.) 253–257, para. 307; and for cases, see 44 Digest 720–731, *5692–5850*.

Cases referred to:

(1) *Re Taylor*, *Taylor* v. *Tweedie*, [1923] 1 Ch. 99; 91 L.J.Ch. 801; 127 L.T. 684; 38 T.L.R. 850; 66 Sol. Jo. 693, C.A.; 44 Digest 723, *5737*.

(2) *Re Skillen*, *Charles* v. *Charles*, [1916] 1 Ch. 518; 85 L.J.Ch. 383; 114 L.T. 692; 60 Sol. Jo. 387; 44 Digest 728, *5808*.

(3) *Prichard* v. *Prichard* (1870), L.R. 11 Eq. 232; 40 L.J.Ch. 92; 24 L.T. 259; 19 W.R. 226; 44 Digest 726, *5793*.

(4) *Re Emerson*, *Morrill* v. *Nutty*, [1929] 1 Ch. 128; 98 L.J.Ch. 145; 140 L.T. 217; 44 Digest 720, *5696*.

(5) *Dowson* v. *Gaskoin* (1837), 2 Keen, 14; 6 L.J.Ch. 295; 48 E.R. 533; 44 Digest 726, *5783*.

Appeal from a decision of Clauson, J.

The facts appear in the judgment of Lord Hanworth, M.R.

Alexander Grant, *K.C.*, and *L. W. Byrne* for the appellant, A. G. Cabell.

W. P. Spens, *K.C.*, and *Charles Harman* for the respondents, the next-of-kin.

Wilfrid M. Hunt for the administrators with the will annexed.

LORD HANWORTH, M.R.—This case raises an interesting point and not the less so from the argument put forward and the examination of the cases. It is an appeal from Clauson, J. The testator made his will on March 21, 1927, and he died on April 21 of that year. He did not appoint any executors of his will. The question arose whether there should be a grant of administration with the will annexed, and a motion to determine that came before the President of the Probate, Divorce and Admiralty Division on Jan. 27, 1928, judgment being reserved and given on Feb. 14, 1928 (138 L.T. 714; [1928] P. 128). Persons interested in an intestacy opposed the motion which was brought by the universal legatee and devisee under the will, Alfred George Cabell, for a grant to him of administration with the will annexed, but the motion failed, the President deciding that the estate had not been wholly disposed of, and that the grant ought to be to two of the persons entitled on an intestacy in priority to a legatee. The President expressed an opinion as to the effect of the will and the matter came before this court on June 5, 1928, by way of appeal, when we determined that the right course was to allow the parties to go before a Chancery judge to have the effect of the will determined. The case went before Clauson, J., and he felt constrained to follow the

decision of the President and he gave no specific judgment himself. From his decision this appeal is taken. The will merely consisted of the words: "I leave all my money to Alfred George Cabell." Mr. Cabell was a friend of the deceased and had looked after him during a lengthy illness before his death. It is clear that Mr. Alfred George Cabell was a man to whom the testator was much indebted for the services rendered to him. The testator was a mercantile man possessed of a certain amount of property, so it is not a case of an illiterate testator. CLAUSON, J., made an order, the effect of which was that, under the words in the will, "All my money," there passed to Mr. Cabell the whole estate, including stocks and shares, excepting only real estate and personal chattels, including furniture and jewellery.

The estate consisted of £800 outstanding on mortgage and the equity of redemption of three freehold cottages and the right to receive under an appointment under a will a sum of £450 secured thereon by mortgage, and the personal chattels were the furniture in the testator's house. We have before us a table of the various items of the estate and it shows that the testator also died possessed of (i) cash in the house £2 17s., (ii) cash at the testator's solicitors £1 13s. 4d., (iii) an uncashed cheque for £5 5s. on Barclays Bank, and (iv) about £1,600 on current account at the testator's bank. Treating these four items as cash the total is about £1,610. The testator was also possessed of £500 nominal 5 per cent. War Loan, some 4 per cent. inscribed consolidated stock and shares in various companies not of large value. He also had certain chattels and books as well as furniture. CLAUSON, J., directed that everything should pass to Mr. Cabell, except the real estate and personal chattels including the furniture. Mr. Cabell appeals from that to this court on the ground that the phrase "all my money" meant all the testator's personal estate, though he does not contend here that it should include the real estate. The cross-appeal by one of the next-of-kin asks that the declaration should be confined to such part of the estate only as consisted of cash in the strict sense, namely, items (i) to (iv) which I have mentioned.

The case can be put forward that this testator intended to make a will and not die intestate, and it is said that he used the words "all my money" in the popular sense, as when a person asks "What did he do with his money?" "Who has got his money?" In conversation, the word "money" was used to embrace all the possessions of which a man died possessed, and, therefore, it is said that it must here be interpreted in that case. And it is said that here the word is not only "money," but the words "all my money," which is all-embracing; but it is admitted that the words would not pass the real estate. Therefore, the question is whether this court is entitled to give these words "all my money" that wide interpretation. Counsel for the appellant was right in asserting that there is no absolute technical rule that the word "money" is to be confined to liquid cash. Money at a bank is treated as cash as being able to be taken advantage of immediately. It is not true that the court is free to interpret the word "money" as it pleases, because there are a number of decisions as to what are limits to the interpretation of the word. The matter has been investigated recently in this court in *Re Taylor*, *Taylor* v. *Tweedie* (1). That case was an appeal from PETERSON, J., and his judgments form an exhaustive catalogue of all the cases on this point, and this court treated that judgment as comprising all the cases material. LORD STERNDALE, M.R., said ([1923] 1 Ch. at p. 105):

> "The authorities are very fully discussed by PETERSON, J., and I do not propose to repeat the discussion. I agree that they establish the proposition that the word 'money' when used in a will means money in its strict sense, unless there is a context which is sufficient to show that the testatrix used it in a more extended sense."

And he goes on:

> "There are also two other guides to the construction of the word. I agree with SARGANT, J., in *Re Skillen*, *Charles* v. *Charles* (2), that a comparatively slight context will enlarge the strict meaning of the words."

A Lower down the page he says:

> "I also think that when a will is not drawn by a skilled lawyer, as is the case here, the words used may be looked at less strictly than in a case where it is so drawn."

That judgment was supported by the other judges of the court. Warrington, L.J., B says (ibid. at p. 108):

> "Now the only principle established by the authorities is, I think, correctly stated by the learned judges in the following words: ' "Money" is to be treated in the strict sense unless there be a context which shows something to the contrary.' 'Money in the strict sense' means, as I understand, money actually in hand as cash, or at a bank on drawing account, and certainly does not C include such items of property as in this case have been held to pass."

Therefore the rule is that the word "money," when used in a will, means money in the strict sense unless there is a context to show otherwise. What is meant by "context"? An illustration of what is meant by the word is to be found in *Prichard* v. *Prichard* (3). The testator in that case declared that the income arising from his principal money should be paid to his wife, while unmarried, for D the support of herself and the education of his children, and at her death or marriage to be divided among them, and his sisters were to have the care of his mother. At his death he left his wife and six children surviving him. His property consisted of two freehold houses and a freehold rentcharge; his personal property was £36,657, the value of his share in a partnership; £3,860, the value of his share in a second partnership; household furniture valued at £2,976; and E cash at his bankers £239: therefore he left £40,000. Was it possible to confine the words "principal money" to the £239, or was it indicated by the context that that phrase ought not to be read in the strict sense, but was intended to embrace the provision for the support of his wife and children? There it was held that the whole of the personal property passed, including leaseholds, but not the freeholds, illustrating thereby the effect of the context on the extent of the property to pass F under the words "principal money."

There is one other case I should refer to, *Re Emerson, Morrill* v. *Nutty* (4). In that case, the testatrix at her death had no cash at her bank, but she owned certain investments and £2 17s. only in cash in her house. Under the terms of the will three legatees were given legacies amounting to £250, and specific bequests were made of furniture. By a codicil, the testatrix bequeathed to her adopted niece G "the residue of money at the time of my death," and it was held that that carried the residuary personal estate. It is clear that the amount of the cash in the house there was negligible, and it is also clear that the context in that case had enabled the court to say that the word "money" must have been used in another sense than that of merely cash. In *Dowson* v. *Gaskoin* (5), a testatrix, whose personal property consisted chiefly of stock, after giving a number of pecuniary and specific H legacies, bequeathed "whatever remained of money to the five children of E.D." And it was held that that latter bequest referred to her general personal estate.

But in the present case we have the words simply "all my money." It is said that it would not be mere speculation to say that the testator by these words intended to leave all his personal estate, but, even if the rules laid down with regard to the interpretation of the word "money" allowed of that, it would be difficult to I share that opinion or view, as there is no context here which would allow of it. The testator might have intended to deal with all his property or to have given his friend £1,610, and to say everything goes to him is to form an opinion on speculation and not on the meaning of the words actually used. The rules are that the word "money" used in a will means money in the strict sense unless the context shows a different interpretation is warranted. Is there here such a context? While intending to give a substantial sum to his friend, the testator, no doubt, was careless as to what happened to the rest of the estate. His central thought was to make provision for this friend. There is here no context to allow the interpretation of

the words "all my money" in any other way than in the strict sense. Following, therefore, the principles laid down in *Re Taylor, Taylor* v. *Tweedie* (1), what passes under this will is the liquid assets of the testator's estate, namely, the items (i) to (iv) I have mentioned. Therefore the appeal fails, and equally the cross-appeal must succeed. The order of CLAUSON, J., will, therefore, be varied, and the order must be that what passes to the appellant are the items (i) to (iv). A

LAWRENCE, L.J.—I agree. In *Re Taylor, Taylor* v. *Tweedie* (1) it was held by this court that the word "money," when used in a will, means money in the strict sense unless there is some context to show that the testator intended to use the word in a more extended sense. We are bound by that decision, which was only reached after an exhaustive examination of the earlier cases. The only question, therefore, is whether there is any context here which enables the court to give a more extended meaning to the word. The only surrounding circumstances which can legitimately be taken into consideration here were that the legatee was a friend of the testator to whom the testator owed a debt of gratitude; that the testator had a brother and two sisters as well as some nephews and nieces, the children of deceased brothers; and that the testator had at the date of the will a substantial sum of money in the strict sense in addition to other items of property which included an equity of redemption in a piece of freehold land. The money items consisted of money at his bank, money in his house and money with his solicitors. The will was a holograph will, and was drawn up without the assistance of a lawyer. The will is the shortest will I have come across in my professional experience. Is there any context which would enable this court to give to the word "money" in this will the extended meaning? The only context suggested is that the testator used the word "all." It is said that, in this gift, the emphasis is on that word, and the use of it shows that the testator intended to include the whole of his personal estate. In my judgment, the word "all" does not enlarge the meaning of the word "money" or affect the character of the gift, but merely refers to the quantum which it was intended to cover, that is to say, it was used to show that the gift was to embrace all items of money at the time of his death in his possession. The surrounding circumstances do not in any way help us to the conclusion that the testator has used the word "money" in the wider sense contended for. Our duty is to construe the will not according to what we think the testator intended, but according to the true meaning of the words he has used. B C D E F

RUSSELL, L.J.—I agree. We are bound by *Re Taylor, Taylor* v. *Tweedie* (1) to hold here that the words in the will "all my money" must be construed in their strict sense as only surrounding circumstances or the context would enable us to give those words a different and more extended meaning, but, in my opinion, there are no such surrounding circumstances, nor any such context. G

Appeal dismissed; cross-appeal allowed.

Solicitors: *Bartlett & Gregory*, for *Bartlett & Sons*, Sherborne; *Reynold, Sons & Gorst.* H

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

J. GLIKSTEN & SON, LTD. *v.* GREEN

[House of Lords (Lord Buckmaster, Viscount Dunedin and Lord Warrington), February 22, 1929]

[Reported [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 45 T.L.R. 274; 14 Tax Cas. 364]

Income Tax—Profits—Trade receipt—Stock destroyed by fire—Moneys received from insurance company.

A company carrying on business as timber merchants had a considerable part of its stock of timber destroyed by fire. The company received the replacement value of the timber so destroyed from insurance companies with which the stock had been insured.

Held: the whole of the sum received from the insurance companies constituted a trading receipt which must be brought into the company's profit and loss account for the purpose of assessing the company's liability to income tax.

Decision of the Court of Appeal ([1928] 2 K.B. 193) affirmed.

Notes. Applied: *R.* v. *British Columbia Fir and Cedar Lumber Co., Ltd.*, [1932] All E.R.Rep. 147. Considered: *Gray* v. *Lord Penrhyn*, [1937] 3 All E.R. 468. Applied: *Aris-Bainbridge* v. *Turner Manufacturing Co., Ltd.*, [1950] 2 All E.R. 1178. Considered: *Davies* v. *Shell Co. of China, Ltd.* (1951), 32 Tax Cas. 133. Applied: *London Investment and Mortgage Co., Ltd.* v. *I.R.Comrs.*, [1957] 1 All E.R. 277. Referred to: *Rownson, Drew and Clydesdale, Ltd.* v. *I.R.Comrs.* (1931), 16 Tax Cas. 595; *Thomas Merthyr Colliery Co.* v. *Davis* (1932), 148 L.T. 32; *Van den Berghs, Ltd.* v. *Clark*, [1935] All E.R.Rep. 874; *Forsyth* v. *Thompson*, [1940] 3 All E.R. 465; *Birmingham Small Arms Co.* v. *I.R.Comrs.* [1951] 2 All E.R. 296; *Higgs* v. *Olivier*, [1951] 2 T.L.R. 298; *Evans Medical Supplies, Ltd.* v. *Moriarty*, [1956] 2 All E.R. 706.

As to trade receipts, see 20 Halsbury's Laws (3rd Edn.) 149 et seq.; and for cases see 28 Digest 22 et seq.

Appeal from an order of the Court of Appeal (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.) ([1928] 2 K.B. 193) on a Case stated under s. 149 of the Income Tax Act, 1918, by the special commissioners of income tax for the opinion of the King's Bench Division of the High Court of Justice.

The Case Stated was as follows:

At meetings of the commissioners, held on June 25, 1924, and April 6, 1925, for the purpose of hearing appeals, Gliksten & Son, Ltd. (hereinafter called "the company") appealed against an assessment to income tax in the estimated sum of £100,000 for the year ending April 5, 1924, made upon them under the provisions of the Income Tax Acts.

The company was incorporated under the Companies Acts, 1862 to 1900, on Dec. 14, 1905, and carries on business as timber merchants at Carpenters Road, Stratford. On Aug. 8, 1921, a large quantity of timber, which was stored in the company's timber yard, was destroyed by fire. In respect of the timber so destroyed the company received in February, 1922, £477,838 from various insurance companies. The timber so destroyed consisted mainly of the best class of hard wood, which was purchased by the company seasoned, unseasoned, or partly seasoned. A large quantity of seasoned wood, which had been taken into stock before the war, was destroyed by the fire.

The company's accounts were made up to June 30 in each year, stocks being valued (following the usual practice) at cost or market value whichever was the lower, and for the purposes of this valuation large sums were in the last two years of account prior to the said fire written off the original cost prices of the stock in respect of depreciation, in order to arrive at the closing stock values; and the reduced sums so arrived at were adopted each year in order to ascertain the company's profits for income tax purposes. In respect of the stock on hand at June 30,

1921, which was the subject-matter of this appeal, the sums so from time to time written off the stock values amounted in the aggregate to £107,000 or thereabouts, and the total stock on hand at that date was thus valued in the company's accounts at £266,831 after writing off the said sum of £107,000. A

For many years past the company had kept its stock-in-trade insured against loss or damage by fire, and had in computing its profits for income tax purposes been allowed to deduct the premiums paid by it in respect of the policies of insurance as an expense of its business. For the purposes of fire insurance the stock-in-trade of the company was valued at replacement value. At the date of the fire the value of timber of the kind which constituted the greater part of the company's stock was very high, and the company accordingly claimed from the insurance companies concerned, and was paid by them, in respect of the replacement value of the stock so destroyed, the sum of £477,838 2s. 4d. Out of the said sum of £477,838 2s. 4d. so received by the company the sum of £160,824 (being part of the said sum of £266,831, the value of stock in hand at June 30, 1921), estimated by the company to be the written-down value of the timber so destroyed, has been brought into the company's accounts for the year ending June 30, 1922, as a trading receipt. After deducting the sum of £2,845 for law charges, the sum of £1,000 for expenses of clearing the yard, and the said sum of £160,824, the balance of the moneys received from the insurance companies in respect of the destroyed timber, amounting to £313,168, was carried into the balance sheet for the year ending June 30, 1922, as a reserve, but was not brought into the profit and loss account. B C D

Mr. F. W. Gower, chartered accountant and advisory accountant to the Commissioners of Inland Revenue, who was examined on behalf of the appellant, stated in evidence that in his experience as a chartered accountant extending over twenty years the normal commercial method of dealing with moneys recovered by a trader under a policy of insurance in respect of stock destroyed by fire was to include the actual amount received in the accounts as an ordinary trading receipt in the same way as the proceeds of an ordinary sale of stock. E

During the war the greater part of the company's trade consisted in supplying seasoned and specially selected timber of various kinds to government departments and various aircraft contractors. The timber required for these purposes being of a special character had to be and was picked out from the company's stocks. The whole of the company's stocks of the required types of timber such as silver spruce, mahogany, walnut, and English ash had (before the fire) been gone over in this way and the company was at the date of the fire left in possession only of such portions of those stocks as had not been found suitable for the above-mentioned purposes. F G

Since the Armistice the company had done an increasing business with the motor body building and like industries, and this class of business had led to demand for and the company had stocked timber of types and qualities different from those stocked by the company during and before the war. For this reason only a small portion of the timber destroyed by the fire had been replaced, viz., to an amount of £18,000 or thereabouts. The word "replaced" in this paragraph includes the purchase of timber suitable for purposes similar to those for which the destroyed timber was used as well as timber of a precisely similar nature. The replacements by timber of a precisely similar nature to that destroyed were almost negligible. H

At the date of the fire there was a boom which was being prolonged by the adoption on the part of the larger timber merchants of a policy of holding up stocks. The high prices obtaining at that time and on the basis of which the insurance companies paid the company's claim were due to this boom. The timber destroyed was of such a character that it would have been practically impossible to have put it on the market without causing a glut and destroying the market for the time being. I

It was contended on behalf of the Crown (inter alia) that: (a) the whole sum received from the insurance companies in respect of the destroyed timber, namely,

A £477,838, constituted a trading receipt, and as such should have been brought into the profit and loss account for the year in question; (b) that the amount of the assessment should be the sum of £85,456 less £373 for wear and tear.

It was contended on behalf of the company that: (a) no part of the sum received by the company from the insurance companies in respect of the destroyed timber constituted a trading receipt; (b) no part of the difference between the said B £160,824 and the said £477,838 constituted a trading profit.

Having considered the arguments and evidence, the commissioners gave the following interim decisions: 1. We are satisfied that the sum of £477,838, the sum recovered from the insurance companies, does not represent a trade receipt, and no part of the said sum is assessable as trade profits under Case I of Sched. D. 2. We are of opinion that the burned timber which has been replaced should be C brought into stock at the original cost price of the timber.

The Court of Appeal held, affirming the decision of ROWLATT, J., that the sums so received formed part of the receipts of the trade and must be brought into computation of profits for income tax.

The company appealed.

Macmillan, K.C., *Latter, K.C.*, and *Cyril King* for the company.

D *The Attorney-General* (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the Crown were not called on to argue.

LORD BUCKMASTER.—The company carries on business as timber merchants at Stratford, London. In August, 1921, it had a large quantity of timber stored on its premises, and on Aug. 8, 1921, a fire broke out and destroyed a considerable E quantity of the company's goods. The goods had, in the due course of business, been insured, and as the result of the insurance the company received £477,838 from the insurance companies. But the timber had stood in its books and balance sheets as representing the figure of £160,824, and accordingly the company sought to bring only that latter figure in for the purposes of assessment to income tax, while the Inland Revenue authorities asserted that they were bound to bring in the F larger sum.

The accounts of the company's business are set out and they show that the ordinary method of accounting is followed. It brings in on the debit side of its balance sheet the stock in trade it has at the beginning of the year, the amount it purchases, the various charges that it incurs in connection with it, and, on the other side, its sales and its stock in trade at the end of the accounting period. It G therefore follows that if, in the place of stock-in-trade that was brought forward on the credit side it introduced this £477,000, there would be a large sum of profit which would be liable to assessment for tax. In point of fact the way in which it sought to bring it in was by entering the figure merely under the head of "Timber destroyed at estimated cost prices" at the lower sum of £160,000. The special commissioners thought that it was right in that course: ROWLATT, J., and the H Court of Appeal have unanimously thought that it was wrong.

The company seek to fortify its argument by a consideration of the rules that apply to Sched. D under the Income Tax Act, 1918. It points out that under that schedule the tax is to apply to a trade and is to be computed on the amount of the profits and gains of the trade; and it says that whatever was received in relation to this fire was not a profit or gain of the trade, but that it was something received I from the insurance, that the real business that it was carrying on was not that of insuring the timber, but its purchase and its sale. Further it says that by sub-head (k) under r. 3 there is an express provision that there shall not be deductible from the profits and gains any sum recoverable under an insurance or contract of indemnity, and they suggest that that means by implication there is a prohibition against bringing in on the other side the moneys that are received under such a contract. I am quite unable to take that view. All that (k) does is to prevent them from bringing in a loss which they have incurred that is covered by insurance, when, in fact, the amount of that loss is capable of being covered by the policy

moneys that they may receive; it goes no further than that and, so far as it does extend, it is, I think, destructive of that part of the argument of the company which consisted in saying that, if it was bound to bring in the moneys that it received from the insurance company on the one hand, it could bring in the equivalent amount of losses on the other; this subsection, which is in language not specially ambiguous, has expressly provided that they shall not do anything of the kind.

There remains this question: Ought the total amount of these insurance moneys to be regarded as part of the profits and gains of the trade? In my opinion they ought, and for this reason: What has happened has been that the timber which the company held has been converted into cash. It is quite true that it has been converted into cash through the operation of the fire, which is no part of its trade, but from which it is protected through the usual trade insurances, and the timber has been realised. It is now represented by money, whereas formerly it was represented by wood. If this results in a gain as it has done it appears to me to be an ordinary gain—a gain which has taken place in the course of its trade—none the less because, as counsel for the company put it, it is no part of a timber merchant's business to trade in fires. I think that a few words in the judgment of SARGANT, L.J., express the whole matter in a sentence, and to them it is unnecessary to add anything more. He says:

> "To my mind the book value of the timber in the company's books has nothing at all to do with the amount of the loss or with the amount which has been recovered in respect of the loss. That amount is a gain of the company in the course of its business no less than the sale price of the timber would have been if the timber had been sold in the course of ordinary sales during the continuance of the company's business; and in estimating the balance of the profits or gains which the company has to bring into account for the purposes of income tax, the amount of the excess of the sum recovered over the book value of the timber in the company's books has to be brought into account just as fully and completely as if there had been a sale in the ordinary course of business at that price."

For these reasons I think that this appeal should be dismissed.

VISCOUNT DUNEDIN.—I agree. In these Income Tax Act cases one has to try, as far as possible, to tread a narrow path, because there are quagmires on either side into which one can easily be led, and I think we were tempted to be led into one of those quagmires when the argument turned on the question what may be debited. I do not think that this case has anything to do with debiting losses. The whole point is, that the business of the company is to buy and sell timber, and when it sells timber it turns it into money. This particular timber was turned into money, not because it was sold, but because it was burned and the company had an insurance policy over it. The whole question comes to be whether that is a turnover in the ordinary course of its business. I think that it was. It had that amount of timber, which it disposed of and for which it obtained a certain price, and then it could begin again. The result of this fire was that it got rid of so much timber and received the insurance money at that figure, and that seems to me precisely the same position as if it got rid of it by giving it to a customer. If that is so, that is exactly the view of ROWLATT, J., and I think he arrived at the right result.

LORD WARRINGTON.—I agree, and I have nothing to add except to say that to me, at all events, it is some comfort to think that the decision we are giving is in accordance with the commercial practice, because I notice that the chartered accountant who alone gave evidence on the point says that in his experience as a chartered accountant extending over twenty years the normal commercial method of dealing with moneys recovered by a trader under a policy of insurance in respect

of stock destroyed by fire was to include the actual amount received in the accounts as an ordinary trading receipt in the same way as the proceeds of an ordinary sale of stock.

Appeal dismissed.

Solicitors: *Ward, Perks & Terry*; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re BAIN. PUBLIC TRUSTEE *v.* ROSS

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), July 18, 1929]

[Reported [1930] 1 Ch. 224; 99 L.J.Ch. 171; 142 L.T. 344; 45 T.L.R. 617]

Charity—Religion—Gift to vicar of church "for such objects connected with the church as he shall think fit"—Trust vested in vicar virtute officii—Objects relating to church and not parish.

A testatrix devised and bequeathed all the residue of her estate "unto the vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the church as he shall think fit."

Held (RUSSELL, L.J., dissenting): the bequest was a valid charitable bequest, being admittedly to the vicar as holder of his office on trust, since the words "for such objects connected with the church as he shall think fit" must be construed as relating to the church and not to the parish.

Notes. Applied: *Re Stratton, Stratton* v. *A.-G.*, [1930] 2 Ch. 151. Followed: *Re Martley, Simpson* v. *Bourne* (1931), 47 T.L.R. 392. Considered: *Re Davies, Lloyds Bank, Ltd.* v. *Mostyn* (1932), 48 T.L.R. 539; *Re Ashton's Estate, Westminster Bank, Ltd.* v. *Farley*, [1938] Ch. 482. Applied: *Re Eastes, Pain* v. *Paxon*, [1948] 1 All E.R. 536. Referred to: *Re Stratton, Knapman* v. *A.-G.*, [1930] All E.R.Rep. 255; *Re Lawton, Lloyds Bank, Ltd.* v. *Longfleet St. Mary's Parochial Church Council*, [1940] Ch. 984; *Ellis* v. *I.R.Comrs.* (1949), 93 Sol. Jo. 678.

As to gifts for religious purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 221–226, paras. 500–505; and for cases see 8 DIGEST (Repl.) 331–342, *127–234*.

Cases referred to:

(1) *Re Kenny, Clode* v. *Andrews* (1907), 97 L.T. 130; 8 Digest (Repl.) 389, *829*.

(2) *Re Rees, Jones* v. *Evans*, [1920] 2 Ch. 59; 89 L.J.Ch. 382; 123 L.T. 567; 8 Digest (Repl.) 389, *830*.

(3) *Re Garrard, Gordon* v. *Craigie*, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 23 T.L.R. 256; 51 Sol. Jo. 209; 8 Digest (Repl.) 391, *847*.

(4) *Thornber* v. *Wilson* (1858), 4 Drew. 350; 28 L.J.Ch. 145; 32 L.T.O.S. 115; 22 J.P. 769; 4 Jur.N.S. 1263; 7 W.R. 24; 62 E.R. 135; 8 Digest (Repl.) 428, *1180*.

(5) *Re White, White* v. *White*, [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 41 W.R. 683; 37 Sol. Jo. 249; 2 R. 380, C.A.; 8 Digest (Repl.) 334, *150*.

(6) *Bruce* v. *Deer Presbytery* (1867), L.R. 1 Sc. & Div. 96, H.L.; 8 Digest (Repl.) 406, *975*.

(7) *Re Williams, Public Trustee* v. *Williams*, [1927] 2 Ch. 283; 96 L.J.Ch. 449; 137 L.T. 477; 71 Sol. Jo. 605; 8 Digest (Repl.) 331, *129*.

(8) *Re Davidson, Minty* v. *Bourne*, [1909] 1 Ch. 567; 78 L.J.Ch. 437; 99 L.T. 222; 24 T.L.R. 760; 52 Sol. Jo. 622, C.A.; 8 Digest 396, *883*.

(9) *Dunne* v. *Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 28 T.L.R. 257; 56 Sol. Jo. 324, P.C.; 8 Digest (Repl.) 392, *858*.

(10) *Re Scowcroft, Ormrod* v. *Wilkinson*, [1898] 2 Ch. 638; 67 L.J.Ch. 697; 79 L.T. 342; 15 T.L.R. 4; 43 Sol. Jo. 11; 8 Digest (Repl.) 328, *109*.

(11) *Re Grove-Grady, Plowden* v. *Lawrence*, ante, p. 158; [1929] 1 Ch. 557; 98 L.J.Ch. 261; 140 L.T. 659; 45 T.L.R. 261; 73 Sol. Jo. 158, C.A.; varied on appeal sub nom. *A.-G.* v. *Plowden*, [1931] W.N. 89; 171 L.T.Jo. 308; 71 L.Jo. 329, H.L.; 8 Digest (Repl.) 348, *294*.

(12) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 331, *128*.

(13) *Re Delaney, Conoley* v. *Quick*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 51 W.R. 27; 18 T.L.R. 741; 8 Digest (Repl.) 325, *89*.

Appeal from an order of EVE, J.

By her will, dated May 29, 1909, Caroline Margaret Boswell Bain, after bequeathing certain specific legacies and making bequests of her share and interest in any money belonging to her in the Nailstone Colliery, devised and bequeathed all the residue of her estate whatsoever and wheresoever "unto the vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the church as he shall think fit." The testatrix died on July 10, 1909, and her will was proved on Sept. 3, 1909. Owing to difficulties in realising the testatrix's interest in the Nailstone Colliery, Bagworth, the administration of her estate was greatly delayed and the expenses of administration rendered considerably greater. After the payment of these expenses and of the legacies, the residue was found to be insufficient to pay the whole of the estate duty. In July, 1926, the trustees of the testatrix's will learned that, under the will of her father, she had become entitled, in the events which had happened, to about £2,500. Out of this sum, death duties were in course of being satisfied, and it was anticipated that a sum of about £2,000 would remain as residue. The appellant, the Reverend H. Ross, was the present vicar of St. Alban's Church, Brooke Street, Holborn. An originating summons was taken out by the Public Trustee asking (inter alia) (i) whether the gift of residue in the testatrix's will was, on the true construction of the will, (a) a gift to the person who was at the date of the testatrix's death vicar of the said church, or (b) a gift to the vicar for the time being of the said church; and (ii) whether, in the alternative, (a) the gift had failed by reason of the said vicar's death or was a good charitable gift, and in the latter event by whom the objects to which the gift was to be applied should be selected.

EVE, J., said that the first question he had to determine was whether the residuary gift was a gift to the individual or to the holder of the office for the time being. In his opinion it was a gift to the holder of the office and created a trust for such objects connected with the church as the holder should think fit. First it was said that these objects were the maintenance of the fabric of the church, but he (his Lordship) could not accept that view. Secondly, it was said that the language was equivalent to, or at any rate ought to receive the same construction as would be given to, the expression "for religious purposes." These were not, however, the terms of the gift. He had no real knowledge of what objects were connected with the particular church. It might be, as had been argued, that the church (which he believed belonged to the Anglo-Catholic body) might be engineering an agitation against this or that revised Prayer Book. There was nothing in the language of the gift to indicate that the objects for which the residue was to be held were necessarily charitable. He was not prepared to say that the objects were so limited by the expressions used in the will as to exclude objects which were not of a charitable nature. In these circumstances he came to the conclusion that the gift failed. The vicar appealed.

On appeal, an affidavit by the vicar was read by leave of the court for the purpose of giving information as to the objects connected with St. Alban's Church, and it stated (cl. 3) that the offertories for general church expenses and other

A general income applicable for purposes in connection with St. Alban's Church were applied (i) in maintaining the music of the church by paying the salaries of an organist and an assistant organist and the expenses of the hydraulic blowing and tuning of the church organ; (ii) in doing the necessary repairs to the fabric of the church; (iii) in lighting and heating the church; (iv) in paying the salary of a verger; (v) in insuring the church against fire and burglary; (vi) in paying for B certain essentials of the church services; and (vii) in defraying certain miscellaneous expenses of small amount. In cl. 3 it was stated that, in addition to general church expenses, there were in connection with St. Alban's Church certain other purposes or objects of which the accounts were distinct from the churchwardens' accounts. These were the St. Alban's district mission house, the income of which went to maintain the mission house and to give assistance to poor parishioners; the C St. Alban's nursery, where young children of poor parents were looked after while their parents were away at work; the St. Alban's schools emergency fund, used for painting and repairing schools connected with the church; St. Alban's men's club, a branch of the Clewer Sisterhood, a community which gave services without payment to the poor; a church magazine fund; a choir fund, the Mackonochie chapel fund; and the St. Alban's missionary association.

D It was admitted on the appeal that the residuary gift was to the vicar as holder of the office on trusts.

Norman Daynes, for the appellant, cited the following cases as showing that the gift was primâ facie for charitable objects: *Re Kenny*, *Clode* v. *Andrews* (1), *Re Rees*, *Jones* v. *Evans* (2), *Re Garrard*, *Gordon* v. *Craigie* (3), *Thornber* v. *Wilson* (4), *Re White*, *White* v. *White* (5), *Bruce* v. *Deer Presbytery* (6), *Re Williams*, E *Public Trustee* v. *Williams* (7). He distinguished *Re Davidson*, *Minty* v. *Bourne* (8) and *Dunne* v. *Byrne* (9).

Stafford Crossman, for the Attorney-General, supported the argument for the appellant, and referred in addition to *Re Scowcroft*, *Ormrod* v. *Wilkinson* (10).

J. N. Gray for the Public Trustee.

F *Belsham*, for the next-of-kin, referred to *Dunne* v. *Byrne* (9), *Re Kenny*, *Clode* v. *Andrews* (1), *Re Rees*, *Jones* v. *Evans* (2), *Re Garrard*, *Gordon* v. *Craigie* (3), and *Re Grove-Grady*, *Plowden* v. *Lawrence* (11).

LORD HANWORTH, M.R.—This is an appeal from Eve, J., who gave judgment on March 7 on the construction of the will of Mrs. Caroline Margaret Boswell Bain. [His Lordship stated the facts and continued:] A dispute arose whether G the direction as to residue was good or bad, and this summons came before Eve, J., for the determination of that question. Eve, J., decided that the words in the will dealing with residue were ambiguous and uncertain and, therefore, that the bequest of the residue was void. The words disposing of the residue are these:

> "I devise and bequeath all the residue of my estate whatsoever and wheresoever unto the vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for H such objects connected with the church as he shall think fit."

Eve, J., has held that "objects connected with the church" are so wide and vague that they may fall far outside any religious purposes, and thus that no trust could be executed in respect of them, and, therefore, that the bequest is void. He says there is nothing to make the objects connected with the church necessarily charitable. The appeal has been argued before us and it has the support of the Attorney-I General, who by Mr. Stafford Crossman has added to the argument in support of the appeal.

The question lies in the narrowest possible compass, as has been rightly said by counsel for the next-of-kin. We have to put a construction on these words, guided, of course, by rules which have been laid down. It is quite clear that if the words to be interpreted are so wide that it is impossible to give anything but a wide interpretation to them, that interpretation must be given, with the result that the bequest is void. As an illustration of that I refer to two cases. In *Re Davidson*, *Minty* v. *Bourne* (8) there was

"a residuary bequest in trust for the Roman Catholic Archbishop of Westminster for the time being, to be distributed by him between such charitable, religious, or other societies, institutions, persons, or objects . . . as he shall in his absolute discretion think fit,"

and it was held that the bequest was not a good charitable bequest but void for uncertainty. FARWELL, L.J., says ([1909] 1 Ch. at p. 572) with great cogency that, inasmuch as the testator had himself specified the special objects, charitable, religious or other societies, and dissociated the one from the other, it was not possible for him, when the testator had so distinguished between charitable and religious societies, "to say that by religious societies he means only such as are charitable, and does not mean to extend the gift to the wider area" which he had himself mentioned. Equally, in *Dunne* v. *Byrne* (9) it was held that a bequest failed for similar reasons, the terms of the bequest being

"to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese."

The words obviously show that the objects were some which were conducive, and in that sense stood outside the immediate religious purposes.

On the other hand, the proposition is not disputed that, where possible, a construction ought to be given to the terms of a will which will enable it to be upheld. Thus, in *Bruce* v. *Deer Presbytery* (6) LORD CHELMSFORD, L.C., said:

"When it is said that charitable bequests must receive a benignant construction, the meaning is, that when the bequest is capable of two constructions, one which would make it void, and the other which would render it effectual, the latter must be adopted."

I cite that to show that the court ought not to be astute or officious to try and find some means of rendering the words of the bequest of no effect. Then in *Re White*, *White* v. *White* (5) there was a bequest to "the following religious societies" with a blank after these words which was not filled up. The court came to the conclusion which has been somewhat criticised by LORD MACNAGHTEN in a later case, but what LINDLEY, L.J., whose words are always worthy of attention, said on this very question of how the words of a will ought to be interpreted was as follows ([1893] 2 Ch. at p. 52):

"It is, however, impossible, we think, seriously to deny that the testator intended his property to be given to some religious societies for religious purposes. His property was to be divided amongst certain societies; but what for? The only rational answer to this question must, we think, be 'for the purposes of these societies'; and the societies being themselves described as 'religious societies,' the purposes for which the testator gave his property must be treated as religious purposes. It is true that these are not necessarily 'charitable' purposes, and in a particular case a 'religious' society may be shown not to be a 'charitable' society."

Then he cites in reference to that the well-known case of *Cocks* v. *Manners* (12), and goes on:

"But the authorities show that a bequest to a religious institution, or for a religious purpose, is primâ facie a bequest for a 'charitable' purpose, and that the law applicable to 'charitable' bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose."

With those cases before me and with those rules to apply, I have to come to a conclusion as to the proper interpretation to be given to the words of the bequest in the present case. The words that we have to construe are "for such objects connected with the church." Observe that the testatrix does not refer in any way to the parish of St. Alban's. The centre of thought appears to be the church. It

A is not disputed before us, nor was it in the court below, that the bequest was to the vicar virtute officii. It was not a personal bequest, and it is not disputed that the vicar takes as trustee. We have to see whether he can take at all, and it is said that he cannot. He would, in exercise of the discretion given to him, have power to decide on the objects for which he would dispose of the funds, for I think the words "as he shall think fit" give him a discretion, but only a discretion within B the field marked out by the previous words. It comes to this, that the bequest is to the vicar as the vicar of St. Alban's Church and not St. Alban's Parish for objects connected with the church. I quite agree that, if one allows one's mind to play over the objects which are parochial and illustrative of wide activities, such as are common to a great number of parishes, a loose interpretation can be given to these words embracing activities which could not be properly considered religious, and, C therefore, an interpretation covering such a wide field as to prevent the bequest standing good. But, having regard to the words of Lindley, L.J., that I have cited, is it right to try and find an interpretation for these words which might be given to them by the person called the man in the street, or ought we to construe them in the strict grammatical sense? It appears to me that the words "such objects connected with the church," that is the church of St. Alban's, are to be interpreted D narrowly or rather, perhaps, as relating to the church in contradistinction to relating to the parish; and it is not disputed that, if the objects were confined to the support of the church, its fabric and its services, that would be a good charitable bequest. I see no reason to import into "objects connected with the church" parochial activities which would embarrass our interpretation as against an interpretation connecting the use of the funds to the specific church indicated of which E the recipient is the vicar.

I have come to the conclusion that, if we were to give a loose interpretation to the words "objects connected with the church," we should be violating the rule which requires us to make an effort to give an effective interpretation to the testratrix's words; and I also think that we should be importing from outside something into those words which they do not necessarily convey. It is because we F have got the church as the centre of this bequest and not the parish that I think we are right in rejecting outside considerations and in saying that this is a good bequest to the vicar as a trustee for the purposes of his church, that is, for the fabric and for the services which are conducted therein. I may say that I have come to this decision not without some hesitation, because I find I am in disagreement with Eve, J., to whose experience I would naturally wish to pay atten- G tion, and also with my brother Russell, L.J., for whose opinion I have the very greatest respect. The appeal will be allowed.

LAWRENCE, L.J.—I agree. The bequest in question is to the vicar of St. Alban's Church as an ecclesiastical corporation, and it is, therefore, a gift to a religious institution. Primâ facie, such a gift is a bequest for a charitable purpose. H Lindley, L.J., in delivering the judgment of the Court of Appeal in *Re White*, *White* v. *White* (5), said ([1893] 2 Ch. at p. 52):

> "The authorities show that a bequest to a religious institution, or for a religious purpose, is primâ facie a bequest for a 'charitable' purpose, and that the law applicable to 'charitable' bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, I or for a religious purpose."

It is true that Lord Macnaghten, in *Dunne* v. *Byrne* (9), after stating that, in *Re White* (5), Kekewich, J., had held a gift "to the following religious societies, namely," to be void and that the Court of Appeal had held it to be a valid charitable bequest, said ([1912] A.C. at p. 4):

> "Whether they were right in so construing the unfinished sentence before them may perhaps be doubted, but it is perfectly clear that they did not mean to lay down any new law, or to extend the law as laid down in former decisions.

All they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift. It was too late in their opinion to depart from long-established decisions, although the Master of the Rolls did observe that 'a religious society may or may not be a charitable society in the sense in which that expression is used.' " A

This passage, however, does not show that LORD MACNAGHTEN doubted the correctness of the law as stated by the Court of Appeal in *Re White* (5) but only expressed a doubt whether it was rightly applied to the facts of that case. B

The question then arises, there being here a gift which is primâ facie a bequest solely for charitable purposes, whether the addition of the words "for such objects connected with the church as he shall think fit" operates to convert the gift into a bequest for purposes which include non-charitable purposes. The answer to that question depends on the true meaning of the words "objects connected with the church." I read the additional words as meaning "for such church purposes in connection with St. Alban's Church as the vicar shall think fit." The discretion vested in the vicar is, in my judgment, limited to directing the mode of application of the bequest within the scope of the indicated church purposes, which are described as "objects connected with the church" otherwise than meaning the church purposes which are well known and defined. The cases where the gifts were for purposes conducive to the good of a religion or to the good of a particular church are, in my opinion, distinguishable from the present case. Here the words, to my mind, are apt and proper to describe objects which are directly connected with the church in contra-distinction to objects which are only conducive to the welfare of the parishioners, or to the congregation who attend the church; and I think that the words in question do not have the operation of extending and thus defeating the primary gift to the ecclesiastical body. The facts of this case resemble somewhat closely the facts in *Re Garrard, Gordon* v. *Craigie* (3). There the gift was to the vicar and churchwardens for the time being of Kington "to be applied by them in such manner as they shall in their sole discretion think fit." The words gave the widest power as to the application of the bequest, but JOYCE, J., held that they merely directed that the particular mode of the application within the charitable purposes of the legacy should be settled by the vicar and churchwardens. Applying that decision to the words in the present case, I hold that they merely direct that the particular mode of application within the charitable purposes of the bequest in the present will is to be in the discretion of the vicar of St. Alban's Church. C D E F

I, therefore, agree that the appeal should be allowed and that a declaration should be made that the gift is a valid charitable bequest. G

RUSSELL, L.J.—I hold the contrary view, and I need hardly say that I differ from the Master of the Rolls and LAWRENCE, L.J., not only with regret but with diffidence; but, having formed the view that EVE, J., was correct in the conclusion at which he arrived, I feel bound to state my reasons.

The gift here is a very short one. It is H

"to the vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the church as he shall think fit."

There is no difference of opinion amongst us that that is a gift to the vicar of St. Alban's Church, Brooke Street, for such objects connected with St. Alban's Church, not with the Church at large, as he shall think fit. Further, I think there is no difference between the members of the court on any question of principle. It is common ground that, if this be a gift which gives the vicar a power of selection in the exercise of which he could select an object which was not charitable, the whole gift is bad, even though he might, in the exercise of his discretion, apply the whole fund to objects strictly charitable. The difference of opinion which has arisen in this court is purely on the question of construction and nothing else. Speaking for myself, I have derived no assistance from any of the authorities which have been cited. There has been no case cited which is, in my opinion, near the present I

one. Two of the cases cited to us are *Re Delany, Conoley* v. *Quick* (13) and *Re Rees, Jones* v. *Evans* (2). In *Re Delany* (13) the phrase to be construed directed that the fund was to be applied for missionary objects, and in *Re Rees* (2) "for missionary purposes." All that those cases decided was that, whereas the phrase "missionary objects" or the phrase "missionary purposes" without a context would include objects both charitable and non-charitable, in the particular documents in question there was sufficient context, when all the relevant facts were known, to confine the meaning of these phrases to charitable objects. I get no assistance from either of those cases in dealing with the present question. *Re Garrard, Gordon* v. *Craigie* (3) was a case which, I venture to think, was looked on with some doubt in this court in *Re Davidson* (8). What was decided in *Re Garrard* (3) was that, where there were no words purporting to define or limit the objects to which the gift applied, the good charitable gift survived and the whole gift was charitable. *Re White, White* v. *White* (5) is of no relevance here at all. In *Re Williams, Public Trustee* v. *Williams* (7), which was a decision of Clauson, J., the only question was whether, under cl. 12 of the will, the persons there mentioned could authorise the application of the fund to non-charitable objects, and it was held on the construction of the words of that will that they could not, and, accordingly, that the good charitable gift created by cl. 5 of the will survived and remained. These are the only cases cited in favour of the present appellant. From the two cases cited as being in favour of the respondent, *Re Davidson, Minty* v. *Bourne* (8) and *Dunne* v. *Byrne* (9), again I get no assistance. They were cases dealing with wills phrased in different language.

I now turn to the words in the present will. In my opinion, the natural meaning of the words used by the testatrix is that she wishes the fund to be applied to some or all of the various objects run by or under the ægis of the church of St. Alban's. That seems to me, so far from being a loose construction of the words used, to be their natural construction, and I see no justification on the general contents of this will, or on any other ground, for cutting these words down so as to confine the objects to objects which my Lords have described either as repair of the fabric of the church, or expenses in connection with the church services, or church purposes generally. It appears to me that to give that meaning to the words used would be to substitute different language for the language used by the testatrix. It is common knowledge that churches do carry on under their ægis various objects. I do not pause to enlarge on that, because in this case we have evidence of the fact. An affidavit, which I venture to think is of considerable importance in this case, has been filed. It is made by Mr. Ross, the present vicar of St. Alban's. He tells us in that affidavit that there are various objects in connection with St. Alban's Church, and he enumerates them. There are the St. Alban's district mission house, the St. Alban's nursery, the St. Alban's schools emergency fund, the St. Alban's men's club, and various other objects which he specifies in his affidavit as being objects connected with St. Alban's Church. That class of objects appears to me to fall naturally and literally within the words used by the testatrix in her will, and, when I look at the nature of these objects, I find certainly that one or more are not charitable objects. I take the men's club, and I find in the exhibit filed that a third of the income of that object is derived from payments made for playing billiards, and that about one-fifth of the expenditure of that object is expenditure incurred in connection with whist drives. It seems to me impossible to say that such a club is a charitable object. But it is sufficient to say that at any time there may arise an object which is not charitable, but which is an object in connection with St. Alban's Church within the meaning of the words used by the testatrix, so that it would be within the power of the donee outside the perpetuity period—for that, after all, is what we are considering here—to apply the whole or part of the funds in favour of a non-charitable object. I find no justification for giving the words used by the testatrix any meaning other than their natural meaning, and I find myself in complete agreement with the concluding portion of Eve, J.'s judgment when he said:

"There is nothing I think in this language which indicates that the objects for which this residue can be held are necessarily charitable, they are only objects which are connected with the church. I think there may be many objects which are not of a charitable nature; at any rate, I am not prepared to say that the objects are so limited by the expressions used in this will as to exclude objects which are not of a charitable nature."

Appeal allowed.

Solicitors: *Wing & Eade*; *Treasury Solicitor*; *Wing & Eade*; *King, Adams & Co.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re GOOCH. GOOCH *v.* GOOCH

[CHANCERY DIVISION (Clauson, J.), March 1, 1929]

[Reported [1929] 1 Ch. 740; 98 L.J.Ch. 285; 141 L.T. 150]

Administration of Estates—Direction by testator that share of residue be held by trustees on trusts of marriage settlement of cestui que trust "so far as applicable and capable of taking effect"—Dissolution of marriage—Variation of settlement.

A testator directed that a certain share of the residue of his estate should go to his son, E., and that a moiety of the share should be held by his trustees on the same trusts as those of a settlement made on the marriage of E. with G. "so far as the same should be then applicable and capable of taking effect." The marriage of E. with G. was dissolved and an order made varying the trusts of the marriage settlement.

Held: the trustees should continue to hold the moiety of E.'s share on the same trusts as those of the settlement as they existed before the date of the order varying those trusts.

Notes. Referred to: *Re Shelton's Settled Estates, Shelton* v. *Shelton*, [1945] 1 All E.R. 283; *Re Hickman's Will Trusts, Re Playfair, Palmer* v. *Playfair*, [1950] 2 All E.R. 285.

As to referential trusts, see 29 HALSBURY'S LAWS (2nd Edn.) 803–804, para. 1110; and for cases see 43 DIGEST 603–608, *492–529*.

Cases referred to:

(1) *Re Finch and Chew's Contract*, [1903] 2 Ch. 486; 72 L.J.Ch. 690; 89 L.T. 162; 43 Digest 603, *501*.

(2) *Re Campbell's Trusts, Public Trustee* v. *Campbell*, [1922] 1 Ch. 551; 91 L.J.Ch. 433; 127 L.T. 236; 43 Digest 602, *495*.

Adjourned Summons.

Charles F. Gooch, by his will made on May 5, 1908, gave his residuary estate to trustees in trust for all his children who should attain the age of twenty-five years or marry under that age in equal shares. By a codicil made on Oct. 17, 1916, the testator declared that the share of his son Eric in his residuary estate should be held as to one moiety thereof in trust for him absolutely, and as to the other moiety in trust to pay and make over the same to the trustees of a settlement dated Sept. 23, 1916, to be held by them on the trusts of that settlement "so far as the same should be then applicable and capable of taking effect." By the settlement so referred to, which was made after the marriage of Eric with his wife Gwynedd, a certain fund of £6,000 was vested in trustees to pay the income to

A the husband during his life and afterwards to the wife during her widowhood and, subject thereto, to hold the fund in trust for the issue of the husband as well by his wife Gwynedd as by any future wife as he should by deed or will appoint, and, subject to any such appointment, in trust for his children by her or any future wife and, in default of any child, then subject to any general testamentary appointment by the husband, in trust for his statutory next-of-kin as therein mentioned. The B testator died on April 12, 1917, leaving Eric and three other children surviving him. By orders made respectively on Aug. 2, 1927, and March 24, 1928, by the Supreme Court of Kenya, at Nairobi, on the petition of Gwynedd, her marriage with Eric was dissolved, and by an order of the same court made on June 29, 1928, also on the petition of Gwynedd, her husband consenting thereto, the trusts of the settlement were varied, with the result that Eric was deprived of any benefit thereunder C and of the right of exercising any power thereunder, and the whole benefit thereunder was given to Gwynedd for life and afterwards to Pamela Gooch, the only child of the marriage, on her attaining twenty-one years or marrying under that age.

This summons was taken out by Eric Gooch for the determination of, inter alia, the question whether the moiety of Eric's share in the residuary estate directed to be paid to the settlement trustees ought to be held by them on the original trusts D of the settlement or on the trust as varied by the order of the Kenya court.

Gover, K.C., and *R. R. Formoy* for the plaintiff, Eric Gooch.

W. G. Hart, for Gwynedd Gooch, referred to *Re Finch and Chew's Contract* (1).

C. Montgomery White, for the trustees of the settlement, referred to *Re Campbell's Trusts* (2).

E *C. E. Shebbeare* for the defendant, Pamela Gooch.

CLAUSON, J.—On Sept. 23, 1916, the late Mr. Charles Fulthorpe Gooch was minded to make a settlement on his son, Eric Daniel Gooch, his wife, Mrs. Gwynedd Gooch, and future issue. By that deed certain trusts were declared for the benefit of the spouses and their issue and also, to some extent, for the benefit of future issue of the husband by a future wife, if any. The settlement having F been executed, the settlor proceeded a very short time afterwards, on Oct. 7, that is to say, to execute a codicil to his will. I need not trouble about the terms of the codicil, beyond stating that he revoked certain previous testamentary provisions relating to the share of his son, Eric Gooch, in the residuary trust fund and declared that such share should be held as to one moiety thereof in trust for his absolute use and benefit and as to the other moiety in trust to pay and make over G the same to the trustee or trustees for the time being of the settlement of Sept. 23, 1916, to be held by such trustee or trustees on the trusts of such settlement "so far as the same shall be then applicable and capable of taking effect." At the moment when the testator died on April 12, 1917, the trusts of the settlement were, in every sense of the word, applicable and capable of taking effect, and there was no difficulty at that date in reading those trusts into the will as applying to Eric's H share in his father's residuary estate. Mr. Eric Gooch and his wife resided in Kenya, but I have no evidence before me one way or the other as to their domicil. The court in Kenya has pronounced a decree dissolving their marriage and varying the trusts of the settlement of 1916. That court, so I am informed—and I accept it for the purpose of this hearing—has, under local ordinances, precisely the same jurisdiction with regard to divorce and with regard to variation of settlements as I this court has in this country; and, indeed, I am told that the local ordinance with regard to the variation of settlements follows the words of the relevant statutory provisions which prevail in this country. I have not, however, before me, materials which enable me to form any judgment whether or not the divorce decree was a valid one. Further, I have heard no argument to assist me in determining whether, assuming the divorce decree to be valid, the court in Kenya had jurisdiction which would be recognised by this court to vary a settlement executed in England, the trustees of which are English. For the purpose of my decision, I will assume that the decree of the court in Kenya is binding just as if it were a

decree of the English court for the dissolution of the marriage between the spouses domiciled in this jurisdiction. The question which then arises and which the trustees of the settlement are anxious to have determined is whether the effect of the order of the Divorce Court varying the trusts of the settlement fund extended also to the husband's share in his father's residuary estate to which he was entitled under the trusts declared of that share by the codicil by reference to the settlement; with the result—if that were the effect of the order—that, from and after the date of the order, the wife became entitled for her life to that share in his place under and by virtue of the trusts declared by the codicil. It was contended that, by reason of the terms of the codicil, the life interest of the husband under the settlement having now become the property of the wife, she, to the extent of that interest, is a cestui que trust under the settlement with the result that, in ascertaining what trusts are applicable to the fund which under and by virtue of the codicil has been transferred to the trustees of the settlement on the trusts of the settlement, the court is bound to treat the trusts of the settlement as varied by the order as the trusts now applicable to the husband's share under the codicil. Now that argument leads to a very odd result, because it is perfectly plain from the whole tenor of the order varying the settlement that the court, and, presumably, the parties before it—because the wife was the applicant and the husband assented—intended to deal with and, in so far as the order shows, had not the slightest intention of dealing with anything other than the interests of the parties and the children under the settlement in the particular fund which was, in fact, settled by the settlement—namely, £6,000 invested in £5 per cent. debenture bonds. The order varies the settlement in a particular way. Of course, if, as the result of the language used in the codicil, the order varying the interests of the parties in the fund originally comprised in the settlement must have the effect—totally unforeseen, as I suspect, either by the court or by the parties—of varying the corresponding rights of those parties in the fund, for all I know a much larger fund which was settled by the codicil—if that must be the effect, as a matter of law, there is an end of the question, but, if I am forced to hold that to be the effect, then I can only say that the order would entirely fail to give effect to the intention either of the court or of the parties to that order. However, as I read the language of the codicil, I do not feel myself forced to the conclusion that the language used has the effect so suggested. The argument is that the effect of the codicil is to put the will fund into the settlement, that, from and after the testator's death, every change in the beneficial interest in the particular fund originally settled will necessarily be accompanied by a corresponding change in the beneficial interest in the fund, which is added to the settlement fund by the codicil. I cannot accept that argument. I hold the words in the codicil to mean that the trusts imposed on the fund are the trusts actually stated in the settlement, and that the codicil does not impose on the fund such trusts as may ultimately, in the course of the administration of the settlement fund, have to be regarded by the trustees of the settlement.

By my own unaided efforts I should come to that conclusion, but I come to it with all the more satisfaction because, in my view, any other decision would be contrary to the view expressed and, I think I may say, to the principle laid down by RUSSELL, J., in his decision in *Re Campbell's Trusts* (2). I do not propose to travel through the facts of that case. I will merely content myself by saying that, in arguing before RUSSELL, J., counsel for one of the parties who was contending in favour of the view which I am disposed to accept said: "If that were not so, an assignee or mortgagee of a share in the testator's residuary estate could claim to share in the other funds," and RUSSELL, J., says this ([1922] 1 Ch. at p. 565):

> "In my opinion upon the true construction of these wills, neither Eric nor Claude purported to exercise the power given to them by the memorandum of direction and the deed poll, and their widows could only succeed in claiming such an interest if Mr. Turner's argument which was put forward by Mr. Harman were right."

A Then he proceeds to deal with that argument, which seems to me to be the argument, in substance, though in relation to different facts, of counsel for Gwynedd Gooch in the present case. That argument was as follows (ibid.):

> "That by virtue of the express language used in the memorandum of direction and in the deed poll, the trusts were that the funds thereby settled were to be treated as an addition to the corpus of the share of the residuary estate, and to follow its destination, and that, therefore, an effective appointment of a life interest in the residuary estate crystallises the trusts upon which, under the memorandum of direction and the deed poll, the funds, the subject of the trusts, are to be held. The effect would be that the wife would not take a life interest in those funds under an appointment in her favour in her husband's will, but would take it as a cestui que trust under the memorandum of direction and the deed poll, by reason of the fact that in the events which had happened she was a cestui que trust for life in regard to the residuary estate. That is a somewhat startling proposition. It really amounts to this, that an assignee of a cestui que trust under the trusts of the will in regard to the residuary estate, could claim to be a cestui que trust under the memorandum of direction and the deed poll. It would also have the result that although, under the memorandum of direction and the deed poll, the trust funds, subject to their operation are to be subject to the same trusts and powers as were contained in the will concerning the residuary estate, yet they would not be subject to a power of appointment, because the whole of this argument depends on the fact that the power of appointment given by the will, and exercised in respect of the residuary estate, crystallises the trusts upon which the trust funds are to be held under the memorandum of direction and the deed poll, and, although the memorandum of direction and the deed poll fund are settled by reference to the trusts of the residuary estate, it would not be open to one of the sons to appoint the residuary estate one way and the deed poll fund another. That would be an extraordinary result, which I do not think I should bring about, unless I am driven to so do by the terms of the memorandum of direction and the deed poll."

His Lordship then continued to study the terms of the document in order to see whether he should come to that conclusion. I, in the same way, hold that I am not driven to come to the startling conclusion put forward by counsel. I am, accordingly, of opinion that, on the true construction of the will and codicil in the events which have happened, the moiety of the share of residue of the plaintiff, Eric, directed to be paid over to the trustees of the settlement "so far as the same shall be then applicable and capable of taking effect" ought to be held on the trusts of the settlement as originally declared without regard to the order of June 29, 1928, made in the matter of *Gooch* v. *Gooch* in His Majesty's Supreme Court in the Colony of Kenya. But this declaration is to be without prejudice to any question whether the said decree is to be treated in this court as a valid decree binding on the persons claiming under the settlement of 1916.

Solicitors: *Merrimans.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

A

MIDDLESEX COUNTY COUNCIL *v.* HALL

[KING'S BENCH DIVISION (Talbot and Humphreys, JJ.), April 10, 29, 1929]

[Reported [1929] 2 K.B. 110; 98 L.J.K.B. 482; 141 L.T. 243; 93 J.P. 188; 45 T.L.R. 474; 73 Sol. Jo. 366; 27 L.G.R. 427]

B

Rent Restriction—Alternative accommodation—Suitability—User of premises for business as well as residence—Accommodation offered suitable for residence, but not for business—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4 (1) (*d*).

Where the availability of suitable alternative accommodation for the tenant is made a condition precedent to recovery of possession by the landlord of a dwelling-house to which the Rent Restrictions Acts apply, the requirements of the Acts are satisfied if the landlord can show that alternative accommodation as required by the Acts which is suitable from the point of view of habitation is available for the tenant. Regard should not be had to the suitability of the accommodation for the purpose of a business carried on by the tenant in the premises of which possession is sought.

C

Wilcock v. *Booth* (1) (1920), 122 L.T. 678, applied.

D

Notes. Section 4 of the Rent and Mortgage Interest Restrictions Act, 1923, was repealed by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which altered the law regarding the provision of alternative accommodation: see now s. 3 (1) (b) of that Act.

As to the provision of alternative accommodation, see 23 HALSBURY'S LAWS (3rd Edn.) 815–818; and for cases see 31 DIGEST (Repl.) 714 et seq. For Rent, &c., Restrictions (Amendment) Act, 1933, see 13 HALSBURY'S STATUTES (2nd Edn.) 1044.

E

Cases referred to:

(1) *Wilcock* v. *Booth* (1920), 89 L.J.K.B. 864; 122 L.T. 678; 84 J.P. 76; 36 T.L.R. 213; 64 Sol. Jo. 292; 18 L.G.R. 221, D.C.; 31 Digest (Repl.) 716, *8011*.

F

(2) *Irvine* v. *Nelson* (1922), 56 I.L.T. 107; 31 Digest (Repl.) 720, **2594*.

(3) *Cameron* v. *Wilson*, 1922 S.L.T. 37.

(4) *Gidden* v. *Mills*, [1925] 2 K.B. 713; 95 L.J.K.B. 1; 134 L.T. 21; 24 L.G.R. 27, D.C.; 31 Digest (Repl.) 649, *7530*.

Appeal from Uxbridge County Court.

G

The plaintiffs, Middlesex County Council, brought an action to recover possession of a dwelling-house of which the defendant Hall was tenant and they were landlords. The dwelling-house had been formed by throwing two small cottages, each of which was within the protection of the Rent Restrictions Acts, into one. The change was effected by one Hunt, who was formerly the owner of the cottages and of a small piece of land on which they stood. The plaintiff council bought the property from Hunt in 1925, and desired to widen the road on which it abutted. The

H

defendant was weekly tenant of house and land from March, 1923, first to Hunt and then to the plaintiffs. He had also had a coffee-stall on part of the land, but subsequently carried on the business on a somewhat extended scale in the dwelling-house. It was not disputed that the house was "reasonably required for the purpose of the execution of the statutory duties and powers of a local authority" within the meaning of s. 4 (1) (e) of the Rent and Mortgage Interest Restrictions

I

Act, 1923. By Rent and Mortgage Interest Restrictions Act, 1923, s. 4 (1) (d):

> "[The court must be satisfied that] alternative accommodation is available which is reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent, character, and proximity to place of work, and which consists either of a dwelling-house to which this Act applies or of premises to be let as a separate dwelling on terms which will afford to the tenant security of tenure reasonably equivalent to the security afforded by this Act in the case of a dwelling-house to which this Act applies."

A The council offered alternative accommodation, which admittedly fulfilled the requirements of the statute in so far as the use of the premises as a dwelling-house was concerned. The county court judge, however, held that he was bound to consider whether the alternative accommodation was suitable also in respect of the business carried on by the tenant in the premises, and he held that it was not. He, therefore, decided that the house remained within the protection of the Acts B and gave judgment for the tenant. The council appealed.

S. H. Smith, for the council, referred to *Wilcock* v. *Booth* (1), *Irvine* v. *Nelson* (2), *Cameron* v. *Wilson* (3), *Gidden* v. *Mills* (4).

The tenant did not appear.

Cur. adv. vult.

C April 29. The judgment of the court was read by

TALBOT, J.—This is an appeal by the plaintiff council from the judgment of a county court, refusing an order for the possession of a dwelling-house of which the defendant is tenant and the plaintiffs are the landlords. The material facts, as they appear to have been found in the county court, are these.

D The dwelling-house in question is a house formed by throwing two small cottages, each of two rooms, into one. It is admitted that these cottages were within the protection of the Rent Restrictions Acts. I may say that we have had a communication from the tenant, and it appears that he challenges that statement of fact about the two cottages being thrown into one house. It will appear presently that that will make no difference in the decision to which we have come. This E change was effected by a Mr. Hunt, who owned the cottages and a small piece of land on part of which they stood. The county council bought the land from him in 1925 in order to widen the road on which it abutted. The defendant was a weekly tenant of the present house and the land, first to Mr. Hunt from March, 1923, and then to the council. He also had a coffee-stall on part of the land, but that has now been removed, and he carries on the business of a tea-shop in the F dwelling-house. The council duly served a notice to quit on the defendant, purporting to act under s. 5 (1) (e) of the Act of 1920 as it now stands by virtue of s. 4 of the Act of 1923. It is not disputed that the house was reasonably required for the purpose of the execution of the council's statutory duties or powers. By s. 5 (1) (e) the order for recovery of possession sought in the action cannot be made unless the court is satisfied "as respects alternative accommodation." To G see what this means it is necessary to look at para. (d), which provides that the court is not to make an order for possession unless it is satisfied

> "that alternative accommodation is available which is reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent, character, and proximity to place of work, and which consists either of a dwelling-house to which this Act applies, or of premises to be let as a separate H dwelling on terms which will afford to the tenant security of tenure reasonably equivalent to the security afforded by this Act in the case of a dwelling-house to which this Act applies."

It was admitted in the court below that the council had offered the tenant alternative accommodation, which fulfilled the requirements of para. (d) so far as the user of the premises as a dwelling-house is concerned; but the county court I judge held that he was entitled and bound to consider also whether the accommodation offered was reasonably suitable for the business which the tenant carried on in part of the house to recover possession of which the action is brought. On consideration of that question he came to the conclusion that it was not suitable. This was not disputed as a fact by the council. Their contention was, both in the county court and before us, that the judge had no right, in dealing with the question of alternative accommodation, to consider the suitability of the premises for the purposes of business. The learned counsel for the plaintiffs relied on *Wilcock* v. *Booth* (1). The point there was exactly the same as in this case. There was

a tenancy of a dwelling-house, a grocer's shop with an off-licence for the sale of beer. Alternative dwelling-house accommodation was offered, but it was not suitable for the business use to which the premises in question had been put, and on this ground the county court judge held that sufficient alternative accommodation had not been offered. It was held by this court, in a considered judgment delivered by BRAY, J., that the question of alternative accommodation was confined to "similar dwelling-house accommodation," and a new trial was ordered so that other questions in the case might be dealt with. This would be an authority decisive of the present appeal, but for the fact that it dealt with the construction of a different statute—namely, the Increase of Rent, &c. (Amendment) Act, 1919. The words of that Act material in that case were these:

> "Unless . . . the court, after considering all the circumstances of the case, including especially the alternative accommodation available for the tenant, considers it reasonable to make such an order. . . ."

—that is to say, an order for possession.

It appears to us that that language is, in relation to this point, more favourable to the tenant than the language of the Act which we have to apply in this case, for on the face of it it is quite unlimited. But the court, having regard to the scope and object of the Act, which protected dwelling-houses only, considered that the words "alternative accommodation available for the tenant" must be confined to accommodation for the purposes of habitation. The protection of the Act of 1920, as it operated when the section which we are considering was introduced into it by the Act of 1923, was in like manner confined to dwelling-houses, and the reasoning of the court in that case seems, therefore, to apply to the present case. It is also instructive to compare the language of the paragraph of the repealed s. 5 of the Act of 1920 with that which has been substituted for it by the Act of 1923. The words of the former Act are:

> "Unless . . . the court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available."

It is, we think, evident that the later Act was intended to limit and define the matters which might be considered in relation to the question of alternative accommodation and also that there is in the paragraph now in force nothing which suggests the consideration of the suitability of the alternative premises for a business carried on by the tenant on the old premises.

The learned judge seems to have decided as he did on a view of a paragraph in s. 12 of the Act of 1920. It occurs in sub-s. (2) of s. 12, in the second of three provisos to that subsection:

> "The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes."

The simple meaning of that proviso appears to be that a dwelling-house is not the less a dwelling-house for the purposes of the Act because part of it is used as a shop or the like. This is merely a statutory enactment of what was already understood and declared to be the law, and that is so stated in the judgment in *Wilcock* v. *Booth* (1). We do not see that this has anything to do with alternative accommodation. We were referred to two cases, one in Ireland and one in Scotland, in which the courts appear to have taken a view similar to that of the learned judge in this case. The Irish case, *Irvine* v. *Nelson* (2), was decided on the original form of s. 5 (1) (d) of the Act of 1920. We have pointed out the important difference between that enactment and that which has now been substituted for it. We certainly are not prepared to hold that *Irvine* v. *Nelson* (2) was wrongly decided upon the words which the court there had to consider. We respectfully say that we do not agree with the reference to s. 12 (2) (ii) in the learned judge's judgment. We have already dealt with this point. The Scottish case, *Cameron* v. *Wilson* (3), was also on the original form of s. 5 (1) of the Act of 1920. On the whole, on the

A statute and on the authority of *Wilcock* v. *Booth* (1), we are of opinion that the learned county court judge was in error in considering the business use of the premises with reference to the question of alternative accommodation.

Another point was taken by the council, which in the circumstances is immaterial, namely, that the change effected by throwing the two cottages into one amounted to the "erection" of a house within s. 12 (9) of the Act of 1920. We do B not think that it would be so called in ordinary speech, and we think also that the distinction between reconstruction and erection which appears in the subsection is very much against the argument. If turning one house into two is "reconstruction" as distinguished from erection, it seems to us that turning two houses into one must be the same. On this point we think the learned judge was right. Moreover, it would be impossible to say that he was bound as a matter of law, on C the facts proved, to hold that what was done amounted to the "erection" of a dwelling-house. The appeal must be allowed and judgment entered for the plaintiffs in the County Court for possession.

Appeal allowed.

Solicitor for council: *C. W. Radcliffe.*

D [*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

E

Re A DEBTOR (No. 76 of 1929)

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Sankey, L.JJ.), April 12, 1929]

[Reported [1929] 2 Ch. 146; 98 L.J.Ch. 334; 141 L.T. 250; F 45 T.L.R. 403; 73 Sol. Jo. 299; [1929] B. & C.R. 48]

Bankruptcy—Act of bankruptcy—Non-compliance with bankruptcy notice—"Final order"—Order before decree absolute directing co-respondent to pay costs to petitioner's solicitors who undertake to lodge the money in court—Petitioning "creditor"—Successful party, not his solicitor—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 1 (1) (*g*), *s.* 4 (1).

G On April 30, 1928, a husband obtained a decree nisi on the ground that the debtor had committed adultery with his wife. On Oct. 24, 1928, an order was made directing that the debtor, as co-respondent in the suit, should pay to H.L. & Co., the solicitors for the petitioner, £67 1s. 9d., the amount of the petitioner's taxed costs, the solicitors undertaking to lodge in court any sums recovered under that order. On Nov. 25, 1928, the decree was made absolute. H The debtor not having paid the £67 1s. 9d., as directed by the order of Oct. 24, on Jan. 2, 1929, a bankruptcy notice was issued at the instance of H.L. & Co., but it was not complied with, and on Jan. 22, 1929, a petition in bankruptcy was presented by H.L. & Co.

Held: the order of Oct. 24 was not a "final order" within s. 1 (1) (g) of the Bankruptcy Act, 1914, since further proceedings would be necessary to get I the money out of court, and, on construction, it did not finally determine the right of the petitioner or anyone else to the sum directed to be paid, and, therefore, the debtor had not committed any act of bankruptcy on which a petition could be founded.

Per LORD HANWORTH, M.R.: The creditor who can present a bankruptcy petition under s. 4 (1) of the Act must be the principal in the matter of the debt—here the petitioner for whose indemnity the order for costs was made—and not an agent, as were his solicitors, who, therefore, were not entitled to present a petition.

Notes. Considered: *Mason* v. *Mason and Cottrell*, [1933] All E.R.Rep. 859. A

As to acts of bankruptcy and who is a "creditor" to present a bankruptcy petition, see 2 HALSBURY'S LAWS (3rd Edn.) 259 et seq.; and for cases see 4 DIGEST 48 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Re Muirhead, Ex parte Muirhead* (1876), 2 Ch. 22; 45 L.J.Bcy. 65; 34 L.T. 303; 24 W.R. 351, C.A.; 4 Digest 124, *1127*. B

(2) *Re Cox-Sinclair, Ex parte Jones*, [1913] W.N. 263; 5 Digest 1033, *8449*.

(3) *Re Binstead, Ex parte Dale*, [1893] 1 Q.B. 199; 62 L.J.Q.B. 207; 68 L.T. 31; 41 W.R. 452; 9 T.L.R. 114; 37 Sol. Jo. 117; 9 Morr. 319; 4 R. 146, C.A.; 4 Digest 92, *830*.

(4) *Re Arkell, Ex parte Arkell* (1889), 61 L.T. 90; 5 T.L.R. 560; 6 Morr. 182, D.C.; 4 Digest 92, *828*. C

(5) *Re Rayner, Ex parte Rayner* (1877), 37 L.T. 38; 25 W.R. 851; 4 Digest 124, *1134*.

(6) *Re A Debtor* (*No. 837 of 1912*), [1912] 3 K.B. 242; 81 L.J.K.B. 1225; 107 L.T. 506; 19 Mans. 317; sub nom. *Re Schenk, Ex parte West Hyde Estate Co., Ltd.*, 56 Sol. Jo. 651, C.A.; 4 Digest 91, *824*.

(7) *Gundry* v. *Sainsbury*, [1910] 1 K.B. 645; 79 L.J.K.B. 713; 102 L.T. 440; 26 T.L.R. 321; 54 Sol. Jo. 327, C.A.; 42 Digest 126, *1207*. D

Appeal from a receiving order made against the debtor by MR. REGISTRAR FRANCKE.

The facts are stated in the judgment of the Master of the Rolls.

W. N. Stable, for the debtor, cited the following cases: *Re Muirhead, Muirhead* v. *Muirhead* (1), *Re Cox-Sinclair, Ex parte Jones* (2), and *Re Binstead, Ex parte Dale* (3). E

C. N. Tindale Davis, for the respondents, cited the following cases: *Re Arkell, Ex parte Arkell* (4), *Re Rayner, Ex parte Rayner* (5), and *Re A Debtor* (*No. 837 of 1912*) (6). He referred to RAYDEN ON DIVORCE (2nd Edn.), p. 379.

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LORD HANWORTH, M.R.—This is an appeal from a receiving order made on Feb. 20 of this year. It appears that on April 30, 1928, a decree nisi was obtained by a husband on the ground that the debtor had committed adultery with his wife. On July 11, 1928, an order was made by the President of the Divorce Division for the payment by the debtor of the petitioner's costs of the divorce proceedings. The order was in this form: G

> "I order that [the debtor] the co-respondent do within seven days from the service of this order pay into court the sum of £67 1s. 9d., being the amount of the petitioner's costs, as taxed and certified by one of the registrars of the Division."

The order was in that form because it was made at a time when the ultimate fate of the petition was undecided. If the decree was not made absolute, the rights of the parties as they appeared on July 11 might never have been brought to fruition. Hence the order that the amount of the costs should be paid into court. On Oct. 24 a further order was made by the President in these terms: H

> "Upon hearing the solicitors for the petitioner, I do order that the order herein dated July 11, 1928, be varied and that [the debtor] the co-respondent do within seven days from the service of this order pay to Messrs. H. L. Lumley & Co., of 35, Piccadilly, W. 1, the solicitors of the petitioner, the sum of £67 1s. 9d., being the amount of the petitioner's taxed costs as taxed and certified by one of the registrars of this Division, the said solicitors undertaking to lodge in court any sums recovered under this order." I

That variation does not add any finality to the terms of the order of July 11, for it still provides that money paid under the order shall find its way into court. The court relies upon the undertaking of the solicitors that they will lodge any sum

A received by them in court. On Nov. 5, 1928, the decree nisi was made absolute. The marriage tie was then broken, the rights of the parties were finally determined, and the debtor, the co-respondent, became definitely liable to pay the £67 1s. 9d.

What was that sum? It was a sum which the debtor had to pay to the petitioner as an indemnity for the costs incurred by the petitioner in the divorce proceedings. The origin of the right to recover costs is clearly shown in *Gundry* v. *Sainsbury* (7), B where it is said that costs are paid by way of indemnity to the successful litigant for the outlay he has had to make in the proceedings. In other words, the costs are paid to reimburse him for what he has paid or will have to pay, and if he, the petitioner, being the dominus litis of the proceedings, had to pay no costs by agreement with the solicitor acting for him, the solicitor could not recover the costs himself from the debtor. The debtor did not make the payment directed by the C order of Oct. 24, and on Jan. 2, 1929, a bankruptcy notice was issued at the instance of Messrs. Lumley & Co., requiring payment to them by the debtor of the sum of £67 1s. 9d. The debtor did not comply with that notice, and a bankruptcy petition was presented on Jan. 22 by Messrs. Lumley & Co. On that petition a receiving order has been made, and from that order this appeal is taken.

Two points are taken in support of the appeal. First, that the order of Oct. 24 D was not a "final" order, justifying the issue of a bankruptcy notice, and, secondly, that these solicitors are not parties to the suit—not the persons who have obtained, or who will obtain, a final order against the debtor. It appears to me that the appeal must succeed.

Under s. 1 (1) (g) of the Bankruptcy Act, 1914, it is provided that a debtor commits an act of bankruptcy if

E

> "a creditor has obtained a final judgment or final order against him for any amount, and . . . has served on him . . . a bankruptcy notice . . . and he does not, within seven days after service of the notice . . . comply with the requirements of the notice. . . ."

There is this proviso to that paragraph:

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> "For the purposes of this paragraph . . . any person who is, for the time being, entitled to enforce a final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order."

It is well known that that subsection is wider than the corresponding sections in previous Acts. It now includes the words "final order" as well as the words "final G judgment." Due significance must be given to the word "final" because, as pointed out by Lord Esher in *Re Binstead, Ex parte Dale* (3) ([1893] 1 Q.B. at p. 203) having regard to the importance of bankruptcy proceedings, it is right that the court should give to the words "final judgment" their strict and proper legal meaning. Lord Esher says: "I think we ought to give to the words 'final judgment' in this subsection their strict and proper meaning." Therefore, although H the present section includes the words "final order," we start with this, that a due importance is to be given to the word "final."

Looking at the order of Oct. 24, which is the basis of the bankruptcy notice, can it be said that it is a "final order" within the meaning of the section? It requires a sum to be paid to the petitioner's solicitors, which they undertake to lodge in court. Why was it to be paid into court? In order that it may be the subject I of a further and future order. Counsel for the petitioner's solicitors pointed out the manner in which the sum could be paid out and handed us the form of an order for payment out, from which it appears that the order is one which must be made by the registrar. It is, therefore, clear that further proceedings will be necessary to get the money out of court, and I think it is also clear that the order of Oct. 24, in its own terms, did not finally determine the right of the petitioner or anyone else, in respect of the sum to be paid. In my opinion, therefore, this is not a final order. Several cases were cited, but I do not think it is necessary to go through them in order to come to a decision upon this point.

In regard to the second point raised—that the petitioning solicitors are not creditors within s. 4 of the Act—it is not, perhaps, material to our decision to consider it very fully, but I think it is also a good point. The principle raised by that second point seems to me to have been the basis of PHILLIMORE, J.'s judgment in *Re Cox-Sinclair, Ex parte Jones* (2), where he points out that the right party has not been put forward as principal to initiate proceedings against the debtor. Also in *Re Muirhead, Ex parte Muirhead* (1) I think that in the judgment of COCKBURN, C.J., there is the same intention to indicate that the person at whose suit proceedings are taken must be the principal, the person in whose interests those proceedings are necessary, and here the petitioner was that person. I think that in this case the petitioning husband was the person who was really the principal, for whose indemnity legal proceedings were necessary. The solicitors were merely acting as part of the machinery, under which the sum enured to the benefit of the petitioner, and were not the principals in the claim against the debtor. I only wish to add that in *Re Arkell* (4), although the case may not altogether be an authority for what it was cited to us for, I think it was decided that a bankruptcy notice ought not to be founded on an order which directed payment to a person not the principal, and, perhaps, not even known to the debtor. I prefer, however, to base my judgment on the first ground—that the order was not a final order, and, therefore, that the bankruptcy notice based upon it was ill-founded. The appeal will be allowed, and the receiving order discharged.

LAWRENCE, L.J.—I agree. In order to constitute a valid bankruptcy notice under s. 1 (1) (g) of the Bankruptcy Act, 1914, it must be grounded on a final judgment or on a final order. The order of Oct. 24 is neither a final judgment nor a final order. By it the debtor was ordered to pay a certain sum representing the petitioner's costs of the divorce proceedings to the petitioner's solicitors on their express undertaking to lodge the sum when received by them in court. The order was made in that form because at that time it was not known whether the petitioner would ultimately become entitled to these costs. It might turn out that any moneys paid by the debtor under the order would ultimately have to be returned to him. The order did not purport to determine finally the rights of the parties to the sum mentioned in it, and was in substance and in form a purely interlocutory order. It was contended before us on behalf of the petitioning solicitors, however, that after the decree nisi had been made absolute the title of the solicitors to the costs became indefeasible, and that thereupon the order ought to be treated as a final order. In my opinion, this contention is fallacious. It is true that, if the order had been complied with, the solicitors would after decree absolute probably have had no difficulty in obtaining an order for payment out to them of the amount paid into court, and that in the present circumstances they would probably have no difficulty in obtaining a final order for payment of the costs either to the petitioner or to themselves, instead of into court. But that fact does not, in my opinion, operate to convert the order of Oct. 24 from an interlocutory into a final order. I agree, therefore, that the receiving order ought to be discharged and the bankruptcy petition dismissed.

SANKEY, L.J.—I agree. I prefer to rest my judgment on the ground that the order of Oct. 24 was not a final order. The order is different from that made in *Ex parte Arkell* (4) in that it contains the concluding words "the said solicitors undertaking to lodge in court any sums recovered under this order" which did not appear in *Re Arkell* (4). It was an interlocutory order, a step in proceedings; it was a necessary step but not a final step. I rest my judgment on the particular words in this particular order which, in my view, prevent it being final.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker*; *H. L. Lumley & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

READING TRUST, LTD. *v.* SPERO

[Court of Appeal (Scrutton, Greer and Slesser, L.JJ.), November 26, 27, December 10, 1929]

B [Reported [1930] 1 K.B. 492; 99 L.J.K.B. 186; 142 L.T. 361; 74 Sol. Jo. 12; 46 T.L.R. 117]

Moneylender—Harsh and unconscionable transaction—Interest over 48 per cent. —Burden of proof—Evidence that transaction harsh and unconscionable—Memorandum—Promissory note—Terms not set out in memorandum—Parol evidence to supplement memorandum—Moneylenders Act, 1927 (17 & 18 C *Geo. 5, c. 21), s. 6 (1), s. 10 (1).*

The effect of s. 10 (1) of the Moneylenders Act, 1927, which provides that where, in proceedings in respect of money lent by a moneylender, it is found that the interest charged exceeds the rate of 48 per cent. per annum the court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive and the transaction harsh and unconscionable, is to shift the burden of proving facts which D condemn or justify the transaction from the borrower to the moneylender, whereas under the Act of 1901 the borrower had to prove the rate of interest excessive and the transaction harsh and unconscionable. Under s. 10 (1) interest below 48 per cent. is not in itself excessive without further evidence adduced by the borrower, and interest over 48 per cent. may not be excessive E if the moneylender proves facts justifying it. To invalidate the transaction the court has to decide on the whole of the circumstances not merely whether the interest is excessive, but whether, in addition, the transaction was harsh and unconscionable. The interest charged may in itself be so excessive as to show that the transaction is harsh and unconscionable.

Where a contract for the loan of money contemplates a promissory note as F security and there is a promissory note in the ordinary form, not contradicting the contract, the fact that the memorandum of the transaction under s. 6 (1) of the Act of 1927 does not set out the terms of the promissory note will not invalidate the contract.

Per Greer, L.J.: Parol evidence was admissible to identify the kind of promissory note referred to in the memorandum. The court can then read G the two documents together as a complete memorandum of the contract of loan.

Notes. Considered: *Collings* v. *Charles Bradbury, Ltd.*, [1936] 3 All E.R. 369. Referred to: *Bennett & Co.* v. *Smith* (1931), 47 T.L.R. 592; *Parkfield Trust, Ltd.* v. *Dent*, [1931] All E.R.Rep. 720; *Temperance Loan Fund, Ltd.* v. *Rose*, [1932] All E.R.Rep. 690; *Dunn Trust, Ltd.* v. *Feetham*, [1935] All E.R.Rep. 280; *Mitchener* v. *Equitable Investment Co., Ltd.*, [1938] 1 All E.R. 303; *Hoare* v. H *Adam Smith (London), Ltd.*, [1938] 4 All E.R. 283; *Tooke* v. *T. W. Bennett & Co., Ltd.*, [1939] 4 All E.R. 200; *Allighan* v. *London and Westminster Loan and Discount Co., Ltd.*, [1940] 3 All E.R. 530.

As to the form of moneylenders' contracts, see 23 Halsbury's Laws (2nd Edn.) 190–192; and as to harsh and unconscionable transactions, see ibid. 201 et seq. For cases see Digest Supps., cases 353a et seq. For Moneylenders Act, 1927, see I 16 Halsbury's Statutes (2nd Edn.) 377.

Cases referred to:

(1) *Samuel* v. *Newbold*, [1906] A.C. 461; 75 L.J.Ch. 705; 95 L.T. 209; 22 T.L.R. 703; 50 Sol. Jo. 650, H.L.; 35 Digest 212, *377*.

(2) *Carringtons, Ltd.* v. *Smith*, [1906] 1 K.B. 79; 75 L.J.K.B. 49; 93 L.T. 779; 54 W.R. 424; 22 T.L.R. 109; 50 Sol. Jo. 171; 35 Digest 215, *409*.

(3) *Gaskell, Ltd.* v. *Askwith* (1929), 45 T.L.R. 439; 73 Sol. Jo. 348, D.C.; affirmed (1929), 45 T.L.R. 566; 73 Sol. Jo. 465; 168 L.T.Jo. 30, C.A.; Digest Supp.

(4) *Long* v. *Millar* (1879), 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 27 W.R. 720, C.A.; 17 Digest (Repl.) 341, *1473.*

(5) *Re A Debtor, Ex parte The Debtor*, [1903] 1 K.B. 705; 72 L.J.K.B. 382; 88 L.T. 401; 51 W.R. 370; 19 T.L.R. 288; 47 Sol. Jo. 334; 10 Mans. 130, C.A.; 35 Digest 212, *376.*

(6) *Rein* v. *Stein*, [1892] 1 Q.B. 753; 61 L.J.Q.B. 401; 66 L.T. 469, C.A.; 12 Digest (Repl.) 513, *3851.*

(7) *The Eider*, [1893] P. 119; 62 L.J.P. 65; 69 L.T. 622; 9 T.L.R. 312; 7 Asp.M.L.C. 354; 1 R. 593, C.A.; 12 Digest (Repl.) 512, *3845.*

(8) *Charles Duval & Co., Ltd.* v. *Gans*, [1904] 2 K.B. 685; 73 L.J.K.B. 907; 91 L.T. 308; 20 T.L.R. 705; 53 W.R. 106; 48 Sol. Jo. 671, C.A.; 12 Digest (Repl.) 514, *3855.*

(9) *Robey* v. *Snaefell Mining Co.* (1887), 20 Q.B.D. 152; 57 L.J.Q.B. 134; 36 W.R. 224; 4 T.L.R. 148, D.C.; 12 Digest (Repl.) 512, *3842.*

Appeal by the defendant from an order of ROWLATT, J., in an action tried by him without a jury.

The plaintiffs, Reading Trust, Ltd., a firm of registered moneylenders, of 84, Jermyn Street, S.W., claimed against the defendant, Alfred Spero, a dealer in antiques and objets d'art, in King Street, St. James's, S.W., (i) as maker of a promissory note dated Jan. 13, 1928, for £200 payable to the plaintiffs or order together with interest thereon at the rate of 60 per cent. per annum payable by monthly instalments of £20 each for thirteen months, the balance to be paid on March 13, 1929; (ii) as maker of a promissory note dated July 5, 1928, repayable three months after date for £100, together with interest thereon, calculated at the rate of 80 per cent. per annum; and (iii) as maker of a promissory note dated Dec. 27, 1928, for £100 for three months together with interest thereon at the rate of 80 per cent. per annum. Default having been made in payment of the amounts due, the plaintiffs claimed payment of such sums together with interest thereon. It was admitted by the defendant that the plaintiffs were registered moneylenders, and that the transactions in question were moneylending transactions and formed part of a series of moneylending transactions that had taken place between the plaintiffs and the defendant, but it was pleaded on his behalf that the plaintiffs did not deliver or send to him within seven days of the making of the alleged promissory notes a note or memorandum in accordance with s. 6 of the Moneylenders Act, 1927, by reason whereof the alleged notes were not and neither of them was enforceable, and that the "memorandum did not contain all the terms of the agreement" and did not state that the money was to be repaid at 84, Jermyn Street as provided by the promissory notes. The defendant also pleaded that the amounts charged for interest, bonus and premiums were excessive, and the said transactions were harsh and unconscionable and were transactions in respect whereof a court of equity would give relief. By counter-claim the defendant alleged that the three loans were the last of a series of loans effected, first with B. Lipton, Ltd., and afterwards with the plaintiffs; that the interest charged on those loans was excessive, and that the transactions were harsh and unconscionable, and that B. Lipton, Ltd., and the plaintiffs had been in partnership. The defendant thereupon claimed to be entitled to re-open the transaction under s. 1 of the Moneylenders Act, 1900, and to have an account taken as between himself and those parties. ROWLATT, J., refused to re-open the transaction on the ground that the interest was excessive or the transactions harsh and unconscionable. He dismissed the counter-claim on the ground that there was no evidence of a partnership between the plaintiffs and B. Lipton, Ltd. Judgment having been given for the plaintiffs, the defendant appealed.

By Moneylenders Act, 1927:

"Section 6 (1): No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no

security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be. (2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act.

Section 10 (1): Where, in any proceedings in respect of any money lent by a moneylender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of 48 per cent. per annum, or the corresponding rate in respect of any other period, the court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding 48 per cent. per annum, is excessive."

Sir Patrick Hastings, K.C., and *Harold Simmons* for the defendant.

T. Eastham, K.C., *R. P. Croom-Johnson, K.C.*, and *H. J. Wallington* for the plaintiffs.

Cur. adv. vult.

Dec. 10. The following judgments were read.

SCRUTTON, L.J.—In a moneylender's action in which ROWLATT, J., has refused to re-open transactions on the ground that the interest was excessive or the transactions harsh and unconscionable, the borrower appeals to this court.

Mr. Spero, the borrower, is a man of about forty, who after the war opened in Bond Street the business of a dealer in antiques. He appears to have had no capital, but purchased a large collection on credit. His prospects of success depended on his being able to hold his stock till a buyer came along who was sufficiently desirous of any article to be ready to pay a high price for it. If his stock was sold at a forced sale, he would make a certain loss. His bank only allowed him a small overdraft. He had no wish to disclose his pecuniary embarrassments to his friends in the trade; he wanted comparatively small sums to carry on his business and meet pressing liabilities. In the circumstances he went to a moneylender, Mr. Lewis, and borrowed sums from him, at a rate of interest of 60 per cent., sometimes plus a share of the profits made on sale. A quarrel arose over one of these transactions, and Spero went to a firm of Liptons, disclosing the circumstances, and borrowed small sums from them to carry on his business, the interest ranging from 80 per cent. to 92 per cent. In the meantime he was repaying his liability to Lewis, amounting originally to £2,900. He did not repay his loans from Liptons punctually, frequently having to renew as instalments fell due. The last loan from Liptons was made in October, 1926. Liptons dissolved as a company in 1927, and the plaintiff firm, the Reading Trust—which the judge has found to be a bonâ fide and separate entity—took over Mr. Spero's obligations, and made their first fresh loan in March, 1927. They made small loans for the purposes of carrying on business up to the end of 1927. Most of them were punctually repaid, though some instalments had to be renewed. There was no security other than promissory notes for any of these loans, no bills of sale, mortgages or pledges of goods. The interest ranged from 80 to 96 per cent. Spero quite understood what he was doing; he did not want to apply to his bank

or friends for help, and he wanted the money to carry on his business and hold his stock till the hoped-for willing purchaser came along. He had now paid off Lewis. A

The Moneylenders Act, 1927, came into force on Jan. 1, 1928, and on Jan. 13 there occurred the first transaction in respect of which the plaintiffs claim a loan of £200 with 60 per cent. interest, repayable in thirteen monthly instalments of £20 and the balance in the fourteenth month. It was a loan to meet business liabilities. On Feb. 27 Spero wanted another £100, which was to be repaid in three months, interest at 80 per cent. He did repay it on June 19, but on June 22 borrowed another £100 for three months at 80 per cent., repayable on Sept. 25, in fact not repaid until Oct 8. In addition to the £100 borrowed on June 22, which may be treated as a renewal of the February loan, Spero borrowed on July 5 another £100, repayable in three months at 80 per cent. This is the second sum claimed for, as it was not repaid in October. Meanwhile he fell into arrears with his instalments on the January loan; the instalment due on Oct. 13 was not paid until Oct. 19; the instalment due on Nov. 13 was not paid until Nov. 27; and the instalment due on Dec. 13 had not been paid when on Dec. 27 he borrowed £100 for three months at 80 per cent., which is the third transaction, and the plaintiffs' writs were issued for £84 18s. on the January transaction, £152 4s. 7d. on July 5 transaction, and £121 0s. 10d. on Dec. 27 transaction. B C D

Before the coming into effect of the Act of 1927, the court, under the Act of 1900, might re-open the moneylending transaction if it was satisfied that the interest or charges were excessive and the transaction harsh and unconscionable, or otherwise such that a court of equity would give relief. The court of equity would set aside, not re-mould, the transaction, but under the Act of 1900 the court might re-mould it, and relieve the borrower of such sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges, as the court, having regard to the risk and all the circumstances, might adjudge to be reasonable. The Act gave no guide in the shape of a maximum rate of interest, but left the court to "weigh each case upon its own merits" and do what was fair: per LORD LOREBURN, L.C., in *Samuel* v. *Newbold* (1) ([1906] A.C. at p. 467). The Act of 1927, by s. 10, provided that, if the rate of interest exceeded 48 per cent., the court should, unless the contrary were proved, presume that the interest was excessive and the transaction harsh and unconscionable. In my opinion, the effect of this provision is this. Whereas before the Act of 1927 the borrower had to prove the rate of interest excessive and the transaction harsh and unconscionable in order to re-open the transaction, after the Act of 1927, if the rate of interest is over 48 per cent., to save the transaction from being re-opened, the moneylender has to prove circumstances which show that the rate is not excessive and the transaction not harsh and unconscionable. In other words, at a point in the scale of interest—namely, the 48 per cent. which Parliament has fixed—the burden of proving facts which condemn or justify the transaction shifts from the borrower to the moneylender. There are these minor results: (i) that interest below 48 per cent. is not in itself, and without more evidence adduced by the borrower, excessive; (ii) that interest over 48 per cent. may not be excessive, if the moneylender proves other facts justifying it. E F G H

In the present case the interest is over 48 per cent., and the moneylender, therefore, has to give evidence to prove the rate of interest not excessive, and the transaction not harsh and unconscionable. He proves (i) that the borrower is a business man of forty, borrowing to provide working capital for a speculative business—speculative in the sense that success may depend on being able to hold an objet d'art till a purchaser who wants it turns up; (ii) that the borrower can give no security, only his personal promise to repay; (iii) that two of the loans were for short terms, when the rate of interest per annum is deceptive. To pay sixpence for the loan of a pound for a week does not sound harsh and unconscionable, but it is at the rate of 130 per cent. per annum. In the last two loans £20 is to be paid for the loan of £100 for three months; it is not paid in advance, but there is a promise to pay it three months hence, with no security; (iv) that there is no evidence of any I

of the circumstances hitherto relied on as proving harshness or unconscionableness —such as misstatements by the moneylender, weakness or lack of understanding by the borrower, or undue pressure.

I have carefully considered the judgment of CHANNELL, J., in a very similar case —*Carringtons, Ltd.* v. *Smith* (2)—and so entirely agree with it that I do not propose to repeat his views in my own words. The plaintiffs have satisfied me that I ought not to find a rate of interest excessive which a man of full understanding and in full possession of the facts was for his own business purposes content to pay, and that there was nothing harsh or unconscionable in the moneylenders' treatment of the borrower. On this point, which involves the merits of the case, I agree with ROWLATT, J., and am against the defendant.

The second point arises on s. 6 of the Act of 1927, and is, as counsel for the defendant earnestly and repeatedly impressed on us, entirely without merits. If, however, it is good in law, he is entitled to raise it. Section 6, for the protection of the borrower, provides that no contract for the repayment of money, or any security for the performance of the contract, shall be enforceable unless a note or memorandum of the contract be signed personally by the borrower before the money was lent, or the security was given, and unless a copy of the contract be sent to the borrower within seven days of the making of the contract. On each of the three loans, a note of the contract was signed before the money was lent, and sent to the borrower within seven days. In each case the note of the contract spoke of the loan being "on the security of a promissory note." It was alleged that the terms of the promissory note differed from those of the contract, and, therefore, the contract and promissory note were unenforceable. If I understood the argument correctly, the two variances were: (i) The note of the contract described the lenders as of 84, Jermyn Street, which would involve a liability of the borrower to find his creditor at 84, Jermyn Street to pay him. The promissory note promised to pay at 84 Jermyn Street, which, by s. 87 (1) of the Bills of Exchange Act, required presentment there. But you cannot present to a man at a named place whose duty it is to come and pay at that place, and who does not come. I am of opinion there is nothing in this point, but I refer to the question of two documents for a loan later. (ii) As to the first loan it was said the note of the contract was for payment of £200 and 60 per cent. interest by consecutive monthly instalments of £20 each, the first payable on Feb. 13 and the balance in the fourteenth month. Such a contract would need thirteen consecutive instalments, that is to say, £260, and a balance to discharge it. The promissory note said so, but it was said that the contract ought to have said "thirteen" and did not. This difference is too trivial to notice. However, in *Gaskell, Ltd.* v. *Askwith* (3) both the trial judge and the Court of Appeal were troubled whether the note or memorandum could be in the two documents, and the present case has raised the question of the relation of the note of the contract to the security. It seems clear in s. 6 that the legislature, while requiring a copy of the contract to be signed, has not required a copy of the security to be sent to the borrower, and it may need consideration whether, if there is a more onerous term in the security than in the contract, the note of the contract may not be incomplete. I am disposed to think that where the contract contemplates a promissory note as security, and there is a promissory note in the ordinary form, not contradicting the contract, the fact that the contract does not set out the terms of the promissory note will not invalidate the contract. It may be otherwise if the security contains an onerous term not in the contract. I reserve, however, any final decision on this question, which does not seem to me to arise in the present case. I think oral evidence may be given to connect the promissory note signed with the memorandum, but s. 6 does not seem to treat the security as part of the memorandum: see per THESIGER, L.J., in *Long* v. *Millar* (4). In my opinion, the appeal should be dismissed with costs.

GREER, L.J.—The plaintiffs, who are moneylenders, claim from the defendant moneys payable under three promissory notes: (i) £84 18s., on a promissory note

for £200, dated Jan. 13, 1928; (ii) £152 4s. 7d., due under a promissory note for £100, dated July 5, 1928; and (iii) £121 0s. 10d., due under a promissory note for £100, dated Dec. 27, 1928. The promissory notes were in all material respects in the same form, except that the first was payable by monthly instalments, the second and third being payable three months after date. Each of the notes was made payable to the Reading Trust, Ltd., or order, at their offices, 84, Jermyn Street, London.

By s. 87 of the Bills of Exchange Act, 1882, presentation at the address named was necessary in order to make the defendant liable on the note, but the defendant does not rely upon this as in itself, apart from the Moneylenders Act, a defence to the action on the notes. Counsel for the defendant admitted in the course of his argument that presentation for payment might be, and in fact had been, waived in the present case. He relied on the section for another purpose, that is to say, he relied on it in support of an argument based on s. 6 of the Moneylenders Act, 1927. His argument was that a presentation for payment was one of the terms of the contract of loan, and that this was not stated in the memorandum signed by the defendant, and, therefore, he was relieved from liability by the terms of the said section of the Moneylenders Act. If this argument is correct, it defeats the whole of the plaintiffs' claim, but the defendant also relied on another contention which, if well founded, would have the effect of reducing the plaintiffs' claim. ROWLATT, J., who tried the case, decided both points in favour of the plaintiffs. Neither point is free from difficulty, but I have come to the conclusion that the decision of ROWLATT, J., was right and ought to be affirmed.

I deal first of all with the point made on s. 6 of the Moneylenders Act. The words of the section draw a clear distinction between a contract by a borrower for the repayment of money lent, and the security or securities which he may give in relation thereto. It requires, first, a note or memorandum of the contract to be made and signed by the borrower, and, secondly, that it should be so signed before the money was lent, or the security was given; it requires in the third place that a copy of the memorandum shall be delivered or sent to the borrower within seven days of the making of the contract, and, fourthly, it requires that the note or memorandum shall contain all the terms of the contract. It was argued for the defendant that one of the terms of the contract of loan was that the promissory note should be presented for payment, that as the memorandum of the contract omitted this term it was not a sufficient memorandum within the section, and that, therefore, the contract was not enforceable. The memorandum in relation to the loan of Jan. 13, 1928, was in the following terms:

> "To Messrs. Reading Trust, Ltd., 84, Jermyn Street, London, S.W.—This is a note or memorandum of contract for a loan on the following terms: The principal sum shall be £200 and shall be advanced on Jan. 13, 1928. The principal sum shall be repaid, together with interest at the rate of 60 per centum per annum, by consecutive monthly instalments of £20 each, the first of such monthly instalments of £20 to be due and payable on Feb. 13, 1928, and the balance on March 13, 1929. In case of default in payment of an instalment or any part thereof the whole of the balance of the said sum of £200 remaining due together with interest at the rate aforesaid to the date of default shall immediately become due and payable, and such balance of principal and interest shall carry interest from the date of such default until payment at the rate of 60 per centum per annum, and I agree the above rate of interest to be a fair rate for the risk taken by you in advancing me the said sum of £200 on the security of a promissory note only. Dated this 13th day of Jan., 1928. This note or memorandum is signed before the principal sum is advanced and before the security stated above is taken. I acknowledge having received a true copy of this memorandum of contract. (Signed) ALFRED SPERO."

A It was proved that it was signed by the defendant before the money was lent, and before the promissory note was signed. The signature of the defendant, in my judgment, admits that the memorandum is a memorandum of the contract between the plaintiffs and the defendant, and it is evidence that the terms of the contract were those which are stated in the memorandum. It is true that the memorandum states that one of the terms of the contract of loan was that it was to be secured B by a promissory note and not otherwise. It does not state what were the terms of the promissory note, but, in my judgment, parol evidence was admissible to identify the kind of promissory note referred to, and it was satisfactorily proved that the form of the promissory note was in existence, though unsigned, at the time the memorandum was signed. Once the form of the promissory note is identified, it can, in my judgment, be treated as part of the memorandum of contract, and the C memorandum can then be read as if it contained the words "on the security of a promissory note in the following form." The words of s. 6 are that, without such a note, no contract of loan shall be enforceable. They are analogous to the words of the Statute of Frauds and the Sale of Goods Act. It has been decided in cases under the Statute of Frauds that parol evidence is admissible to identify a document referred to in the document signed by the party to be charged: see ss. 538–539 D of FRY ON SPECIFIC PERFORMANCE, and p. 276 of BENJAMIN ON SALE (6th Edn.) and the cases there cited. For example, in *Long* v. *Millar* (4) it was held that a receipt for a deposit of £31 on the purchase of three plots of land could be proved by oral evidence to refer to, and incorporate, a written memorandum of the contract of purchase, signed by the purchaser, referring to the deposit, so as to satisfy the Statute of Frauds. Following the same line of reasoning, I think that if a E memorandum of a contract of loan states that the loan is granted on the security of a promissory note, it may be proved by oral evidence that at the time of the loan there was in existence a form of promissory note ready for signature, and that when this evidence is given, the court can read the two documents together as a complete memorandum of the contract of loan. If, for the reasons I have stated, the memorandum is in itself sufficient, this is a complete answer to the argument F put forward on behalf of the defendant based on s. 6, because it cannot be disputed that a copy delivered to the defendant in each case contained a reference to a promissory note which was identified by the evidence, and it is not in dispute that an exact copy of the memorandum was given to him after he signed the memorandum and the promissory note. The same result will be arrived at, if, as I think we may, we construe the words "a promissory note" as meaning a note promising G to pay the Reading Trust, Ltd., at their address each instalment at its due date.

The other contention of the defendant only goes to the amount of the claim on each of the bills. By s. 1 of the Moneylenders Act, 1900, if there is evidence which satisfies the court that the interest charged is excessive and the transaction is harsh and unconscionable the court may re-open the transaction and relieve the person sued from any payment in excess of the sum adjudged by the court to be H fairly due in respect of principal, interest, and charges, and substitute such a sum in respect of such principal, interest and charges as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable. This section is now to be construed in the light of s. 10 of the Moneylenders Act, 1927, whereby it is enacted that if the interest charged is more than 48 per cent. the court shall, unless the contrary be proved, presume that the interest charged is excessive, and that the I transaction is harsh and unconscionable. In the present case the interest on the January loan was at the rate of 60 per cent., and on the other two loans at the rate of 80 per cent. Therefore, until the contrary is proved, the court is required to presume that the interest was excessive, and that the transaction was harsh and unconscionable. But it is still open to the moneylender to show that in all the circumstances of the case the amount charged was not excessive, and the transaction was not harsh and unconscionable. The effect of s. 10 of the Act of 1927 is to shift the onus of proof. Subject to this the question remains the same, and is to be decided on the same considerations as it was before the last-named Act.

In order to invalidate the transaction the court has to decide on the whole of the circumstances; not merely whether the interest was excessive, but whether, in addition to the interest being excessive, the transaction was harsh and unconscionable: see the judgments of the Court of Appeal in *Re A Debtor* (5). As COZENS-HARDY, L.J., says ([1903] 1 K.B. at p. 711):

> "The court must, in my opinion, be satisfied that the rate of interest charged is excessive, or that the other charges for expenses, &c., are excessive, and that in either case the transaction is harsh and unconscionable,"

but he points out that the interest charged may in itself be so excessive as to show that the transaction is harsh and unconscionable. In the present case it was proved that the defendant had for some years, since he started business, been borrowing money from moneylenders in order to carry on his business, that from time to time he was a few days late in his payments, that at certain times he only met the instalments due by fresh borrowing, that he started his business without capital, that he was not in a position to give security except by promissory notes, that he bought stock on credit, that he had an overdraft at the bank, that his business was that of an antique dealer and at times he made large profits when he found customers who took a fancy to the antiques which he had bought, that while the January loan was current he had to borrow further money in February, June, and July, that no deceit was practised on him by the plaintiffs, and that he understood perfectly the obligations he was undertaking. All these matters were, in my judgment, relevant to the question whether the transaction was harsh and unconscionable. The judgment of CHANNELL, J., in *Carringtons, Ltd.* v. *Smith* (2) contains a convincing statement of the considerations that ought to influence the court in coming to a conclusion on the question whether a loan transaction be harsh and unconscionable. Those considerations are applicable at the present day, notwithstanding that in a case where the interest exceeds 48 per cent. the burden of proof has been shifted. The learned judge laid special stress on the fact that the borrower thoroughly understood the transaction, and, knowing all the facts much better than the court could possibly do, had been quite willing to pay the interest asked, as one of the circumstances to be taken into account in deciding whether the transaction was harsh and unconscionable. He also points to the fact that there was no misrepresentation by the moneylenders, and no taking advantage of the ignorance or the necessity of the borrower. All these circumstances were present in the case under appeal.

In my judgment, ROWLATT, J., rightly came to the conclusion that the plaintiffs had discharged the onus put on them of proving that none of the moneylending transactions with which the action before him was concerned were harsh and unconscionable, and the appeal must be dismissed with costs.

SLESSER, L.J.—This action is brought upon a number of promissory notes signed by the defendant on Jan. 13, 1928, July 5, 1928, and Dec. 27, 1928, for the sums of £84 18s., £152 4s. 7d., and £121 0s. 10d., the notes being for £200, £100, and £100 respectively. The defence and counter-claim, so far as it is relevant to this appeal, raises two answers to the claim based upon s. 6 and upon s. 10 of the Moneylenders Act, 1927. It is pleaded by the defendant that the plaintiffs are registered moneylenders, and the transactions—the subject-matter of the action—are moneylending transactions and form part of a series of moneylending transactions that have taken place between the plaintiffs and the defendant. First, as respects s. 6 of the Moneylenders Act, 1927, it is pleaded that the plaintiffs did not deliver or send to the defendant within seven days of the making of the alleged promissory notes a note or memorandum in accordance with s. 6 of the Moneylenders Act, 1927, by reason whereof the defendant says that the alleged promissory notes are not, and neither of them is, enforceable. It is also pleaded that the amounts charged with interest, bonus, and premiums are excessive, and the said transactions are harsh and unconscionable, and are transactions in respect whereof a court of equity would give relief.

A I propose to deal in the first place with the defence which depends upon s. 6 of the Moneylenders Act, 1927. This section imposes a new obligation upon moneylenders with respect to the form of their contracts. From these provisions it appears that no contract for the repayment by a borrower of money lent to him, or of interest on money so lent, or of security given by the borrower, is enforceable unless certain conditions are complied with; the first of which is, that a note or B memorandum in writing of the contract be made and signed personally by the borrower, which note, it is provided by s. 2, must contain all the terms of the contract. Secondly, a copy of the note or memorandum must be delivered or sent to the borrower within seven days of the making of the contract, and, thirdly, the note or memorandum must be signed by the borrower before the money is lent or the security given, as the case may be. It is first necessary in this case to C consider with some care what was the contract—a matter not free from some obscurity. The action is brought upon a promissory note, and the defence, so far as regards s. 6 is pleaded, is that the plaintiffs did not deliver to the defendant within seven days of the said alleged promissory notes a note or memorandum in accordance with the section. The section must be construed strictly, as inaccuracy which has caused no deception and is due merely to a clerical error may render D the contract unenforceable: *Gaskell, Ltd.* v. *Askwith* (3). It appears, from the evidence, that on each date, on the same day, in compliance with s. 6, before the security, the promissory note, was signed, another document called a note or memorandum of contract for a loan was signed by the defendant. In the document of Jan. 13 it is thus stated: "This note or memorandum is signed before the principal sum is advanced and before the security stated above is taken." In E addition, in the note or memorandum of Jan. 13 there appears above the signature of the borrower the following: "I acknowledge having received a true copy of this memorandum of contract," which, if true, would go to satisfy another condition of s. 6. As regards all the later notes or memoranda, it appears from the evidence that between the end of December, 1927, and Jan. 13, 1928, Mr. Lipton, the managing director of the plaintiff company, saw the borrower several times, and F that the agreement arrived at as a result of negotiations was a contract of loan for advances on the security of a promissory note; moreover, the note or memorandum which is signed by the borrower states that the money advanced was on the security of a promissory note. Although slightly differing in language, the subsequent notes or memoranda contain provisions to the like effect and were also stated by the borrower to be memoranda of the respective contracts of loan—the G note is:

> "I have read this note or memorandum, of which I acknowledge I have received a true copy, which is signed before the principal sum is advanced and before the security stated above is given."

The first of such notes of Jan. 13, after setting out substantially similar conditions H of loan and repayment as those contained in the promissory notes, ends with these words:

> "I agree the above rate of interest to be a fair rate for the risk taken by you in advancing me the said sum of £200 on the security of a promissory note only."

The promissory note which is here sued upon contains a provision to pay the I Reading Trust, Ltd., or order at 84, Jermyn Street, London, S.W., and it is argued that, as one of the terms of the contract was that the promissory note should be presented at the office of the lender, the memorandum—which only speaks generally of a "promissory note"—omits an essential item, namely, the place of presentment; that because the reference to the promissory note in the memorandum of the same day does not recite that payment must be made at 84, Jermyn Street, it is not a note or memorandum containing all the terms of the contract within the meaning of s. 6 (2) of the 1927 Act. The only material difference between the note or memorandum, on the one hand, and the promissory note, on the other, is that,

while the note or memorandum says that the "sum of £200 is advanced on the security of a promissory note," it omits to say that the promise to pay was to pay at 84, Jermyn Street, London, which in fact is the place of presentment mentioned in the promissory note itself, and it is said that this is a fundamental omission because, by s. 87 of the Bills of Exchange Act, 1882, where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to make the promisor liable. This argument, however, fails to give sufficient weight to the general rule of law that where no certain place is appointed the debtor is bound to find the creditor and tender him the money: see LEAKE ON CONTRACTS (7th Edn.), p. 640. Primâ facie, when cash is to be paid by one person to another the law means that it is to be paid at the place where the person who is to receive the money carries on business: per KAY, L.J., in *Rein* v. *Stein* (6) ([1892] 1 Q.B. at p. 758); *The Eider* (7) ([1893] P. at p. 131); and, as to companies in particular, MATHEW, L.J., in *Charles Duval & Co.* v. *Gans* (8), said ([1904] 2 K.B. at p. 692):

> "Where no place of payment is specified, it appears to me that, in the absence of anything to the contrary, the intention may be inferred that the payment should be made to the company where its office is situated. A limited company is not for this purpose on the same footing as an ordinary individual, who may be itinerant and at any moment change his residence."

See also STEPHEN, J., in *Robey & Co.* v. *Snaefell Mining Co.* (9) (20 Q.B.D. at p. 154), where he says:

> "Some authority for that is to be found in COKE UPON LITTLETON to the effect that the obligor of a bond must go to the obligee in order to pay it."

The passage referred to by the learned judge appears to be that on p. 210a, s. 340, Third Book, in which it is said, speaking of feoffment in mortgage: "he (the feoffor) is bound to seek the feoffee if he be then in any other place within the realm." In a later passage LORD COKE applies this rule to a man bound to pay at a place certain: "the obligor cannot tender the money at the place when he will, for then the obligee would be bound to perpetual attendance" (p. 211a). If the creditor being abroad prevents payment on the tender being made, the debtor is excused: SHEPPARD'S TOUCHSTONE at p. 378.

In this case it is sufficient to point out that the address of the Reading Trust, Ltd., is mentioned as 84, Jermyn Street, London, in the note or memorandum, and, as a consequence, even if it may be here considered that the note or memorandum in writing of the contract requires that the terms of the promissory note shall be fully stated, I am of opinion that, having regard to the fact that the address of the plaintiff company is stated in the memorandum and to the rule of law that the "debtor is bound to find the creditor if he is within the realm," the words "on the security of a promissory note" mean a note promising to pay the Reading Trust, Ltd., at 84, Jermyn Street, which is to be the place of presentment as fully as if such words had been stated in the note or memorandum. The requirements of the section have, therefore, in my view, here been satisfied, and the defence based upon s. 6 must fail.

I pass to the defence based upon s. 10 of the 1927 Act. This section amends s. 1 of the Act of 1900 by raising a presumption that where the interest charged exceeds 48 per cent. per annum or the corresponding rate in respect of any other period the court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive, and that the transaction is harsh and unconscionable. This section, in my judgment, does no more than shift the burden of proving that the interest charged is not excessive, and that the transaction is not harsh and unconscionable to the lender; and the sole question on this point is whether the lender, in the circumstances of this case, has discharged this burden of proof. The learned judge has not in terms referred to s. 10 of the Act of 1927, but he has found

A "that it is not a case of a man who is in difficulties who cannot escape and advantage is taken of him, and that, therefore, it is harsh and unconscionable. The terms were very stiff and his business was extraordinarily speculative, but he was making large profits . . . this was a true matter of business embarked upon by a gentleman who struck me as being—of course he must be—a man of great intelligence . . . carrying on a high-class business simply finding that B his business is so speculative that he cannot get finance from the banks, but it is so profitable in his skilful hands that he can make profits which can pay 60 or 80 per cent. interest."

This court is loath to disturb the finding of fact on evidence by a judge who has seen the witnesses and observed their demeanour in the box, and, on this finding of fact—for so I treat it—the case appears to me to be one where a judge may C properly find that it has been proved by the lender that the transaction was one which did not call for relief. The policy of the Act was to enable the court to prevent oppression, leaving it in the discretion of the court to weigh each case upon its own merits: per LORD LOREBURN, L.C., in *Samuel* v. *Newbold* (1) ([1906] A.C. at p. 467). In *Carringtons, Ltd.* v. *Smith* (2) CHANNELL, J., mentions as one of the factors which ought to be considered the free and voluntary agreement of a D competent and intelligent borrower to pay the interest asked, and again, speaking of the transactions in that case, he says ([1906] 1 K.B. at p. 93):

"That price (that is, the consideration for the loan) the borrower, without being in any really pressing necessity, immediately agreed to give without any bargaining or remonstrance, merely asking one question and getting a E satisfactory answer."

These conditions have been found to exist by ROWLATT, J., in the present case, and I, therefore, have come to the conclusion that in this case the lender has discharged the onus cast upon him by s. 10 of the 1927 Act to show that the interest charged was not excessive and that the transaction was not harsh and unconscionable. For these reasons, I think that this appeal should be dismissed.

F *Appeal dismissed.*

Solicitors: *Guedalla, Jacobson & Spyer*; *Woolfe & Woolfe.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

Re PATTEN. WESTMINSTER BANK *v.* CARLYON

[CHANCERY DIVISION (Romer, J.), April 17, May 15, 1929]

[Reported [1929] 2 Ch. 276; 98 L.J.Ch. 419; 141 L.T. 295; 45 T.L.R. 504]

B

Settled Land—Tenant for life—Restraint on exercise of powers—Prohibition of leasing house—Provision requiring sale and gift over of proceeds on termination of tenant for life's occupation—Provision of sum for repairs, &c.—Right of tenant for life to surplus—Gift over of sum—Validity—Furniture—Provision for use of furniture during occupation of house—Gift over on termination of occupation—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 106 (1) (*a*), (*b*), (2).

C

By his will the testator directed his trustees to retain £3,000 and apply the interest yearly in payment of the taxes, rates, and repairs of his freehold house, and that his aunt should have the use and occupation of the house and the furniture therein free of cost during her life or for as long as she might require them, but without power to sublet the same, and that on the termination of the aunt's occupation the house was to be sold and the proceeds of sale were to be added to the above-mentioned £3,000 and certain legacies were to be paid from the resulting fund.

D

Held: (i) the only trust declared by the will in respect of the £3,000 was to apply it in payment of the rates, taxes and repairs, and any surplus which remained after discharging that trust was not to go to the testator's aunt; (ii) the direction that the aunt should not have power to let the house was void under s. 106 (1) (a) of the Settled Land Act, 1925, as purporting to forbid her as tenant for life exercising her powers of leasing under the Act; (iii) the provision requiring the house to be sold and the gift over of the proceeds of such sale on the termination of the aunt's occupation was also avoided either under s. 106 (1) (b) as tending to prevent her from exercising a power under the Act or under s. 106 (2) as limiting her estate to continue during non-exercise of her powers under the Act; therefore, if the aunt, in exercise of her powers as tenant for life, should let or sell the house, she would be entitled during her life to receive the rent or the proceeds of sale as the case might be.

E

F

Held, further: (i) the gift over of the £3,000 on the termination of the aunt's occupation of the house tended to induce her, within s. 106 (1) (b), to abstain from exercising her power as tenant for life of leasing under the Act, and so was void in so far as it had that tendency and should be read as to take effect only upon her ceasing to reside in the house for a reason other than the exercise of her powers of leasing as a tenant for life; (ii) the gift over of the furniture primâ facie tended to induce the aunt to abstain from exercising her powers as tenant for life, though it did not necessarily follow that it would, and, therefore, she was entitled to it until she ceased to occupy the house for a reason other than the exercise of her powers under the Act.

G

H

Charity—Benefit to community—Gift to club staff Christmas fund—Gift to fund for training young cricketers.

I

The testator gave certain sums in trust to pay the interest to the staff Christmas funds of two clubs and to the "nursery fund" of a county cricket club, the object of the last-named being to provide for the teaching and coaching of young cricketers who might become cricket professionals.

Held: (i) the fact that the gifts to the clubs might result in their being supplied with good servants was not a matter in which the public were interested, and, therefore, the two trusts were not charitable; (ii) the encouragement of a sport or game was not a charitable object; (iii) both gifts offended against the rule against perpetuities, and both, therefore, were void.

Notes. Followed: *Re Burden, Mitchell* v. *Trustees of St. Luke's Hostel*, [1948] 1 All E.R. 31. Approved: *Re Aberconway's Settlement Trusts, McFaren* v. *Aberconway*, [1953] 2 All E.R. 350. Referred to: *Re Herbert, Herbert* v. *Lord Bicester*, [1946] 1 All E.R. 421.

As to charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; and for cases see 8 DIGEST (Repl.) 312 et seq. As to prohibitions against the exercise of the powers of a tenant for life, see 29 HALSBURY'S LAWS (2nd Edn.) 697 et seq.; and for cases see 40 DIGEST (Repl.) 810 et seq. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Cases referred to:

(1) *Re Boyer's Settled Estates*, [1916] 2 Ch. 404; 85 L.J.Ch. 787; 115 L.T. 473; 60 Sol. Jo. 680; 40 Digest (Repl.) 796, *2772*.

(2) *Re Trenchard (Deceased)*, *Ward* v. *Trenchard* (1900), 16 T.L.R. 525; 40 Digest (Repl.) 800, *2803*.

(3) *Re Simpson, Clarke* v. *Simpson*, [1913] 1 Ch. 277; 82 L.J.Ch. 169; 108 L.T. 317; 57 Sol. Jo. 302; 40 Digest (Repl.) 823, *2997*.

(4) *Re Trenchard, Trenchard* v. *Trenchard*, [1902] 1 Ch. 378; 71 L.J.Ch. 178; 86 L.T. 196; 50 W.R. 266; 46 Sol. Jo. 231; 40 Digest (Repl.) 810, *2896*.

(5) *Re Clifford, Mallam* v. *McFie*, [1912] 1 Ch. 29; 81 L.J.Ch. 220; 106 L.T. 14; 28 T.L.R. 57; 56 Sol. Jo. 91; 8 Digest (Repl.) 356, *353*.

(6) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 338, *198*.

(7) *Re Clarke, Clarke* v. *Clarke*, [1901] 2 Ch. 110; 70 L.J.Ch. 631; 84 L.T. 811; 49 W.R. 628; 17 T.L.R. 479; 45 Sol. Jo. 484; 8 Digest (Repl.) 356, *352*.

(8) *Reeve* v. *A.-G.* (1843), 3 Hare, 191; 1 L.T.O.S. 432; 7 Jur. 1168; 67 E.R. 351; 8 Digest (Repl.) 466, *1671*.

(9) *Loscombe* v. *Wintringham* (1850), 13 Beav. 87; 51 E.R. 34; 8 Digest (Repl.) 417, *1084*.

(10) *Re Nottage, Jones* v. *Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, *370*.

Adjourned Summons.

By his will, made on Nov. 22, 1927, the testator, William Fletcher Moore Patten, directed his trustees as follows:

"I direct my trustees to retain the sum of £3,000 and to apply the interest yearly in payment of the taxes, rates, and repairs of my freehold house, 44, First Avenue, Hove, and I desire that my Aunt Phyllis Patten shall have the use of it and my furniture free of cost for her occupation during her life or so long as she may require them, but without power to sublet the same or any part thereof. On the termination of her occupation the house is to be sold and from the proceeds of the sale added to the above £3,000, £2,000 are to be paid to the Acton Children's Hospital and College for the support of a child, and £1,000 to the Reedham Orphanage for the support of a child. . . . When the house at 44, First Avenue has been sold I wish my nephew George Patten to have my . . . furniture."

The testator also gave the following legacies:

"To the Junior Carlton Club, Pall Mall, S.W., £100 of Funding Loan in trust to pay the interest yearly to the Staff Christmas Fund. To the Union Club, Brighton, £100 of Funding Loan in trust to pay the interest yearly to the Staff Christmas Fund. To the Sussex County Cricket Club £300 of Funding Loan in trust to pay the interest yearly to the Nursery Fund."

The testator died on Feb. 9, 1928.

This summons was taken out by the Westminster Bank, Ltd., as executor and trustee of the will for the determination of inter alia the following questions: (i) Whether, having regard to s. 106 of the Settled Land Act, 1925, the said Phyllis

Patten was entitled during her life or if for any less period then for what period to have (a) the said freehold house, (b) the furniture in the house, (c) the income of the said sum of £3,000; (ii) how and for what period the trustees ought to apply the income of the said sum of £3,000; and in particular (iii) whether during the life of Phyllis Patten or any less period the bank ought from time to time to hold or apply the yearly income thereof not required for the payment of the rates, taxes and repairs of the house as income of the residuary estate, or as income undisposed of by the will; (iv) whether effect ought to be given by the executor to any, and if so, which, of the above-mentioned legacies to the Junior Carlton Club, the Union Club of Brighton, and the Sussex Cricket Club.

Nicholson Combe for the bank.

Morton, K.C., for the tenant for life.

G. D. Johnstone for the trustees of the Acton charity.

J. Leonard Stone for the Reedham Orphanage.

C. R. R. Romer for the residuary legatees.

Hind, Elverston and *J. Beaumont* for the Junior Carlton Club, the Union Club of Brighton and the Sussex County Cricket Club respectively.

Stafford Crossman for the Attorney-General.

Cur. adv. vult.

May 15. **ROMER, J.**, read the following judgment.—Several of the questions still remaining to be decided upon this summons relate to certain dispositions contained in the testator's will which, so far as material for the present purpose, are in these terms:

> "I direct my trustees to retain the sum of £3,000 and to apply the interest yearly in payment of the taxes, rates and repairs of my freehold house, 44, First Avenue, Hove, and I desire that my Aunt Phyllis Patten shall have the use of it and my furniture free of cost for her occupation during her life, or so long as she may require them, but without the power to sublet the same or any part thereof. On the termination of her occupation the house is to be sold and from the proceeds of sale added to the above £3,000, £2,000 are to be paid to the Acton Children's Hospital and College . . . and £1,000 to the Reedham Orphanage. . . . When the house . . . has been sold I wish my nephew George Patten to have my . . . furniture."

It is admitted, and rightly admitted, having regard to the decision in *Re Boyer's Settled Estates* (1), that Mrs. Patten is a person who has the powers of a tenant for life under s. 20 (1) (vi) of the Settled Land Act, 1925, in respect of the house in question. She desires, however, to know what her position will be as to the house, the pictures, and the interest on the £3,000 in the event of her ceasing to reside there. Should she cease to occupy the house for any reason other than the exercise by her of her powers as a tenant for life, there can be no question but that the directions contained in the will to take effect on the termination of her occupation will at once come into operation. She may, however, cease to occupy the house by reason of an exercise by her of her powers of a tenant for life, and in that case it becomes necessary to consider the provisions of s. 106 of the Settled Land Act, 1925. But before doing so, it will be convenient to ascertain what, according to the terms of the will, are the trusts upon which the £3,000 are to be held. It was contended on behalf of Mrs. Patten that during her residence at the house the trusts of the interest accruing on this sum were solely for her benefit, that the payment of the rates, taxes, and repairs was merely one method indicated by the testator of utilising the interest for her benefit, and that she was entitled to be paid such interest so far as it was not exhausted by the particular payments in question. I am unable to take this view. Mrs. Patten would, of course, be benefited by having the rates and taxes and repairs paid for during her residence, but so far as repairs are concerned the persons entitled to the proceeds of sale of the house when sold are also interested in having it kept in a proper state of repair

A until the sale. In my opinion, the only trust declared by the will in respect of the £3,000 is to apply it in payment of the rates, taxes, and repairs, and I cannot find any indication of the testator's intention that any surplus after discharging that trust should go to Mrs. Patten. Should there be any surplus, it would appear to be undisposed of and would fall into residue.

I must now consider the effect of s. 106 upon the provisions of the will to which B I have referred. There is nothing in these provisions purporting or attempting to forbid Mrs. Patten to exercise any power under the Act except the direction that she shall not have power to sublet. That provision obviously falls within s. 106 (1) (a) and is to be deemed void. The provision requiring the house to be sold and the gift over of the proceeds of such sale upon the termination of Mrs. Patten's occupation is also avoided by sub-s. (1) so far as the provision would operate C in the event of her exercising any of her powers as a tenant for life, either because it comes within s. 106 (1) (b) or because her estate or interest may be regarded as limited to continue so long only as she abstains from exercising any of such powers, and must, therefore, by virtue of s. 106 (2) be and take effect as an estate or interest to continue during her life or until she shall cease to occupy for any reason other than the exercise by her of any such powers. If, therefore, Mrs. D Patten, in exercise of such powers, should let or sell the house, she will be entitled to receive during her life the rent or the interest of the proceeds of sale, as the case may be.

The question of what effect s. 106 has upon the £3,000 and the furniture is, however, one of greater difficulty. And first as to this £3,000. In connection with this my attention was called to the decision of Byrne, J., in *Re Trenchard* E (*Deceased*), *Ward* v. *Trenchard* (2), a case decided upon s. 51 of the Settled Land Act, 1882, a section which for the present purpose differed in no material respect from s. 106 (1) and (2) of the present Act. In that case a testator gave to his widow the use of a certain house so long as she should desire to make it her permanent place of residence, his estate to pay all rates, taxes, and outgoings in respect thereof and to keep the house and grounds in tenantable repair. The widow F claimed to be entitled as tenant for life to sell the house and receive the income of the proceeds. It was held that this claim was well founded. But she also claimed in the event of such a sale to receive out of the testator's estate such a further sum in each year during her life as should be equivalent to the rates, taxes, and outgoings of the house. As to this, according to the report, the learned judge said that the point was

G

> "whether the direction contained in the will as to the payment of the rates, taxes, and outgoings, so long as she should desire to make it her permanent place of residence, was such as would deprive the lady of all interest in the portion of the testator's estate properly applicable to such payment in the event of her selling the residence and therefore a prohibition or limitation, void H within the meaning of s. 51 of the Act, as preventing the tenant for life from exercising or as inducing her to abstain from exercising, or as putting her into a position inconsistent with her exercising her powers under the Act, or as tending to bar that operation. He was of opinion that, so far as the direction in the will made it a condition that the benefit of the payments in question was to be dependent upon residence, it was void within s. 51 and that the widow's I interest in such sums continued during her widowhood independently of her residing in the house."

With all respect to the learned judge, I feel great difficulty in understanding this decision. What provision in the will would have prevented her from exercising or would have induced her to abstain from exercising, or put her into a position, inconsistent with her exercising the power of sale? If the answer to this question be that it was the direction to pay the rates, taxes, outgoings, and repairs out of the testator's general estate during her residence then that provision was void in so far as it had that effect. The result of this would be either that the whole

provision was void, which is absurd, or that the confining of this provision to the duration of her residence was void. The provision was not, however, in terms so confined, and, even if it had been, I see much difficulty in treating the section as enlarging the directions contained in the will unless recourse be had to sub-s. (2) and the direction for payment be regarded as creating an estate or interest limited to continue so long as the widow abstained from exercising her power of sale. But supposing that the direction could be treated, by reason of one or other of the provisions contained in the section, as a direction to make the payments during the widow's life, I am unable to find anything in the section that could justify the court in further disregarding the provisions in the testator's will and treating the direction as one to pay the rates, taxes, outgoings, and repairs while the house remained unsold, and an equivalent sum to the widow during the remainder of her life after a sale had taken place and the house had consequently ceased to form part of the testator's estate.

But, notwithstanding these doubts of mine, I might have felt it my duty to follow BYRNE, J.'s decision in the present case were it not for the fact that in *Re Simpson, Clarke* v. *Simpson* (3) SWINFEN EADY, J., took a different view as to the application of the section to a somewhat similar state of facts. In that case the testator made a specific bequest as follows:

> "I give my leasehold dwelling-house known as Fairlawn, situate in Westbourne Road, Edgbaston, aforesaid, in which I now reside, to my executors and trustees in trust to permit my said wife to occupy the same during her life if she shall so long continue my widow, my trustees paying the ground rent and all rates, taxes, and outgoings payable in respect of the said dwelling-house, doing all necessary repairs and observing and performing the covenants contained in the lease under which the same is held out of my general estate, it being my wish that my said wife shall be personally relieved from the payment of the ground rent, rates, taxes, and outgoings, cost of repairs, and the observance and performance of the covenants aforesaid; and I declare that after the decease or second marriage of my said wife (which shall first happen) the said dwelling-house shall fall into and form part of my personal estate."

After the testator's death his widow continued to reside in the house for some years, during which time the trustees paid the ground rent and other outgoings amounting to about £160 a year. She then sold the house as tenant for life, but claimed to be paid out of the general estate the sum of £160 during the joint continuance of the lease and her widowhood. In rejecting that claim SWINFEN EADY, J., expressed himself as follows:

> "The widow . . . says that as she had a right to occupy the house free of ground rent, rates, taxes, and outgoings and cost of repairs amounting in all to £160 a year, which were payable out of the general estate, she ought now to receive an annuity of that amount out of the general estate, which no longer has to pay the actual rent and outgoings. She contends that having regard to s. 51 this extra benefit conferred on her by the will cannot be put an end to by a sale under the statutory power. In my judgment, the provision for payment of rent and outgoings does not fall within s. 51 at all. It is merely an extra benefit conferred on the widow to enable her to reside in the house without the expense of these outgoings. It is true that while she was in occupation she was free from these outgoings, but I am of opinion that the provision conferring this extra benefit on her was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51."

The learned judge then referred to *Re Trenchard (Deceased), Ward* v. *Trenchard* (2), and came to the conclusion that BUCKLEY, J., had taken a different view from that of BYRNE, J., on a subsequent application (*Re Trenchard, Trenchard* v. *Trenchard* (4)) to confirm a compromise in the same matter come to between the widow and the parties interested in remainder. I have carefully read the judgment given

by BUCKLEY, J., on that occasion, and for myself have been unable to discover anything to suggest that BUCKLEY, J., expressed or even indicated by implication that he disagreed with BYRNE, J. The point was not in any way considered by him. But, however that may be, I have the clear expression of SWINFEN EADY, J.'s own view that in a case such as the present the tenant for life is not entitled after a sale to be paid during her life the money that would but for this sale have been expended in outgoings. In the present case the trust is to pay out of the interest from the £3,000 the taxes, rates, and repairs. There is no provision as to how long that trust is to continue except what is to be implied from the gift over of the £3,000 on the termination of Mrs. Patten's occupation, the effect of which I will consider in a moment. But whatever may be the duration of that trust I can find nothing in s. 106 of the Settled Land Act, 1925, that can have the effect of turning it into a trust to pay any part of the interest to Mrs. Patten. It is, however, a trust to apply the income in payment of the outgoings and but for the gift over is a trust that would endure so long as the house remained subject to the trusts of the will. That being so, it appears to me that the gift over of the £3,000 upon the termination of Mrs. Patten's occupancy is a provision that tends to induce her to abstain from exercising her powers of leasing as a tenant for life, and is, therefore, void in so far as it has that tendency. The gift over should, therefore, be read as one to take effect only upon her ceasing to reside for any reason other than the exercise of her powers of leasing as a tenant for life. If she should let the house the trust will, accordingly, continue and she will benefit by obtaining a larger rent. But there can be no necessity for preventing the gift over taking effect upon her selling, for it is not the gift over that tends to induce her not to exercise that power; it is the fact that, upon selling, the trust for payment of the outgoings comes to an end by reason of the nature of that trust, and for the reasons I have given I cannot treat its nature as being altered by any of the provisions of the section.

The furniture, however, stands upon a different footing. According to the will, Mrs. Patten is entitled to the use of the furniture until the termination of her occupation of the house, and on that event happening the furniture is given over. Now, I agree that it does not necessarily follow that this gift over of the furniture tends to induce her to abstain from exercising her powers as tenant for life, but primâ facie it would have such a tendency, and there is no evidence before me to suggest that it would not. Furthermore, her interest in this furniture is in effect one limited to continue so long only as she abstains from exercising her powers as tenant for life and must, therefore, be regarded as one that continues for the period during which it would continue if she were so to abstain. I hold that Mrs. Patten is entitled to the furniture during her life or until she ceases to occupy the house for any reason other than the exercise of those powers.

The only other questions remaining to be decided have reference to three legacies given by the testator in the following terms:

> "To the Junior Carlton Club, Pall Mall, S.W., £100 of Funding Loan in trust to pay the interest yearly to the staff Christmas fund. To the Union Club, Brighton, £100 of Funding Loan in trust to pay the interest yearly to the staff Christmas fund. To the Sussex County Cricket Club £300 of Funding Loan in trust to pay the interest yearly to the Nursery Fund."

It appears that the staff Christmas fund of the Junior Carlton Club is a fund which consists of donations given annually by members of the club which are distributed among the staff of the club in January of each year by the club's secretary. The method of sharing the fund is as follows: Each servant gets one share for each complete six months' service at the club with a limit of twenty shares for any one servant and no difference is made in consequence of more or less responsibility being entailed by the position held by any individual servant. As regards the Brighton Union Club, no staff Christmas fund appears ever to have been constituted, but subscriptions for the staff are given voluntarily by the members

annually, the amount received being distributed among the staff when the list is closed. It further appears that the Sussex County Cricket Club in the year 1908 established a special fund, which has ever since been maintained by voluntary contributions and subscriptions, for the purpose of teaching and coaching young cricketers in the game of cricket so as to enable them to earn their livelihood by becoming cricket professionals, and of furthering the interest of cricket as a national game, such fund being known as the Nursery Fund. All the moneys received for the fund are spent in the payment of a professional cricketer, in teaching and coaching young cricketers in the game of cricket, and in paying the incidental travelling and other expenses incurred in connection with his employment. It is stated that during the past seven years thirty-one boys or thereabouts mainly between the ages of seventeen and twenty-one have by means of the said fund received instruction in the said game and that about twenty-one of these boys are now being employed as professional cricketers by the club or by other clubs and schools in the county of Sussex and other parts of the south of England, and Mr. Godfree, who is a member of the committee of the club, says that the parents of the boys so taught are, he believes, all of the working or the lower middle classes and not well off financially.

As regards all these legacies, it was contended that, notwithstanding the trusts imposed upon the legatees to pay the interest yearly to a particular fund, the legacies ought to be treated as absolute legacies to the several legatees which could be applied by them at once for the purpose of the several funds respectively, and that, therefore, no question of perpetuity arises by reason of the trusts to apply the interest, even if it should be held that the trusts are not charitable. A sufficient answer to this contention is, in my opinion, to be found in the decision of Swinfen Eady, J., in *Re Clifford, Mallam* v. *McFie* (5), where that learned judge had to consider the question whether a legacy to the Oxford Angling and Preservation Society, on condition that the president and committee of the society should invest the sum as capital money and apply the income or dividends for the purpose of re-stocking their waters or as to such other purposes as the president or committee for the time being should resolve upon, was a valid legacy. The learned judge, after deciding that the gift could not be supported as a charitable gift, proceeded to deal with the contention that the bequest was not invalid as a perpetuity, since the society was a voluntary one and the members might dissolve it at any time and divide its funds. As to that contention the learned judge said this:

> "The words of the gift distinctly point to a perpetuity. It is not a gift to a society which the members can immediately divide between them as was the case in *Cocks* v. *Manners* (6)."

After referring to that case he quoted a passage in the judgment of Byrne, J., in *Re Clarke, Clarke* v. *Clarke* (7), where he said:

> "It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the legacy, when paid, be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good."

Swinfen Eady, J., said:

> "It is obvious in this case there is such a trust. The money is given only on condition that the society applies it in a certain way, and that condition makes it invalid as offending against the rule as to perpetuities."

He, accordingly, held that the legacy was bad.

I am unable to distinguish that case from the one before me, and in these circumstances I must consider whether the trusts declared by the testator of the three several legacies are or are not charitable. It was contended that the trusts in favour of the staff Christmas funds of the two clubs are good charitable trusts on the ground that they are trusts for the encouragement of good servants, and I

A was referred to *Reeve* v. *A.-G.* (8) and *Loscombe* v. *Wintringham* (9) as authorities for the proposition that such a trust is charitable. In the former of these cases a testator, after exhorting servants to be obedient unto their own masters, and to please them well in all things, not answering again, and not purloining, but having all good fidelity and denying ungodliness and worldly lusts, and to live soberly, godly and righteously, proceeded as follows:

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> "For such servants, and the like limitation to the principality of Wales, which contains 42,274 female servants, I give £1,000 in new £3 10s. per cent. annuities to the Society for the Encouragement of Female Servants, held at 110, Hatton Garden, or elsewhere, in trust to pay the yearly dividends, £35 in sums of £1 to each such female servant, once only, on their producing a

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> certificate to be entered on the books of the society, signed by the minister and churchwardens of their parish, of their regular attendance at church and by their masters or mistresses of their ten years' quiet and faithful service, at £5 or less per annum, and their never having been married or pregnant."

In point of fact, the society mentioned by the testator declined the trusts of the legacy as not being within the purposes for which it was constituted, and it was

D held that the court would, nevertheless, carry the trust into effect by means of a scheme. I cannot find, however, that the question whether the trust was a charitable one was argued, though undoubtedly it was assumed by Wigram, V.-C., that such was the case. The Vice-Chancellor presumably considered that such a trust was beneficial to the inhabitants of Wales, on the ground that it tended to provide those inhabitants with good servants. In the second of the two cases there

E was a bequest of a legacy "to the governors, guardians and trustees of a society instituted for the increase and encouragement of good servants to the intent and purpose that" the legacy "might be paid to the governors, guardians and trustees of the said society for the increase and encouragement of good servants." No such society could be found, but Lord Langdale, M.R., said he thought there was a sufficient charitable gift. He said:

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> "I cannot at present persuade myself that this is not a charitable and public purpose; and I cannot suppose that the testator had a special intention in favour of this particular society only."

There again the trust was sustained on the ground that it was for the public benefit. In the present case it is by no means apparent that the prospect of sharing in the

G staff Christmas fund would necessarily result in ensuring that the two clubs are supplied with good servants. But whether this be so or not, I cannot think that the public are in any way interested in the question whether the members of the two clubs are well or ill served. In my opinion, these two trusts are not charitable.

As regards the trust for the benefit of the Nursery Fund of the Sussex County Cricket Club it was argued that the trust is one for the "supportation aid and help

H of young tradesmen handicraftsmen and persons decayed" within the meaning of the statute of Elizabeth. In my opinion, a professional cricketer is neither a tradesman, a handicraftsman nor a person decayed, and though, undoubtedly, as a result of the administration of the fund, boys all of the working or lower middle classes and not well off financially may be embarked upon life as professional cricketers, it is, I think, reasonably clear that the object of the fund is the

I encouragement of the game of cricket and nothing else, and it has been held by authorities that are binding upon me that such a bequest is not charitable. In *Re Nottage*, *Jones* v. *Palmer* (10) Lindley, L.J., in holding that a trust to provide a cup to be given annually to the most successful yacht of the season was not charitable, said this:

> "There is great difficulty in drawing the line between gifts which are charitable, in the wide sense in which lawyers use the term, and gifts which are not charitable; but this gift is, in my opinion, decidedly beyond the line. It is a prize for a mere game. The testator himself tells us what was in his mind:

'My object in giving this cup is to encourage the sport of yacht-racing.' Now, I should say that every healthy sport is good for the nation—cricket, football, fencing, yachting or any other healthy exercise and recreation; but if it had been the idea of lawyers that a gift for the encouragement of such exercises is therefore charitable, we should have heard of it before now."

LOPES, L.J., said:

"I am of opinion that a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such sport or game is to some extent beneficial to the public. If we were to hold the gift before us to be charitable we should open a very wide door, for it would then be difficult to say that gifts promoting bicycling, cricket, football, lawn tennis, or any outdoor game, were not charitable, for they promote the health and bodily well-being of the community."

The result is that all the three legacies are invalidly given.

Solicitors: *Montagu's* and *Cox & Cardale*, for *Howard Gates & Ridge*, Hove; *Norton, Rose & Co.*; *Wigan & Co.*, for *Fitzhugh, Woolley, Baines & Woolley*, Brighton; *Sharpe, Pritchard & Co.*; *Hyde, Mahon & Pascall*; *Stones, Morris & Stone*; *Woodcock, Ryland & Parker*; *Treasury Solicitor.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

A. JONES *v.* D. L. JONES

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Hill, J.), October 17, 1929]

[Reported 142 L.T. 167; 94 J.P. 30; 27 L.G.R. 768; 29 Cox. C.C. 30]

Husband and Wife—Summary proceedings—Maintenance order—Non-cohabitation clause in order—No application in summons for non-cohabitation order—Clause struck out—Amount of maintenance—Wage-earners—Inapplicability of standard of one-third of joint income.

On a wife's summons against her husband for a maintenance order on the ground of wilful neglect to maintain her, the justices ordered the husband to pay the wife £1 a week maintenance. The order also contained a non-cohabitation clause, though the wife had not applied for it in her summons. The husband earned £3 a week and the wife, in addition to living rent free as a caretaker of flats, earned 10s. to 15s. a week as a waitress. On appeal by the husband,

Held: (i) the non-cohabitation clause was unwarranted and must be struck out; (ii) the conventional standard of maintenance in the Divorce Court of not more than one-third of the joint income was not applicable to wage-earners, and the amount of maintenance must be reduced.

Notes. Referred to: *Ward* v. *Ward*, [1947] 2 All E.R. 713; *Starkie* v. *Starkie (No. 2)*, [1953] 2 All E.R. 1519.

As to the making of orders in matrimonial cases by magistrates' courts and the procedure therefor, see 12 HALSBURY'S LAWS (3rd Edn.) 487 et seq.; and for cases see 27 DIGEST (Repl.) 705–709, *6729–6762.*

Appeal from an order of the Kingston (Surrey) borough justices.

Mrs. Daisy Louisa Jones, of Melbourne House, Portsmouth Road, Kingston, summoned her husband, Alfred Jones, a labourer, for wilful neglect to provide

reasonable maintenance. They were married on Nov. 15, 1909, at the Edmonton register office, and there was a son aged eighteen years. The wife was a caretaker of the flats where she lived rent free, and also earned 10s. to 15s. a week as a waitress. Since May 7, 1929, her husband had given her no money, and had not provided her with food. The husband said that he had been more than willing to provide maintenance, and wanted her home. There had always been food available since Whit Monday. He had never wilfully neglected to maintain his wife. The husband was earning £3 a week. The justices ordered the husband to pay the wife £1 a week maintenance, and this order contained a non-cohabitation clause. The husband appealed.

C. L. Beddington for the husband.
S. T. T. James for the wife.

LORD MERRIVALE, P.—This is a case in which a man and his wife had been living together in the early part of this year on bad terms, which came to a head about Whitsun. He ceased to make sufficient provision for his wife's sustenance and kept the food for himself. Her evidence was supported by that of the son, and the magistrates made their order. The notice of appeal was inadequate in form in not being directed to the manifest error of a separation order being made when no such application was made in the summons. The appeal was directed to the question of the amount of maintenance ordered, it being claimed that the husband was not in a position to pay £1 a week. On the face of the proceedings the non-cohabitation order was unwarranted. There was nothing to sustain it. It is as though it was made by mistake, but it was not made by mistake, and that part of the order must be cancelled. Matters of the most extreme gravity come within this jurisdiction of magistrates, and, as the whole lives of people in humble circumstances are directed into a different course, it is most important that the correct procedure should be followed. But the magistrates were well warranted in coming to the conclusion of wilful neglect to maintain. The order cannot be dismissed. The conventional standard in the Divorce Court derived from the old jurisdiction of the Ecclesiastical Courts, by which a wife is not likely to get more than one-third of the joint income, is very difficult to apply to a man earning wages and a woman able to earn money. In the usual position of husband and wife in such circumstances the proportion would make the wife substantially better off than the husband, and in some cases, where a man's earnings are precarious, it might leave him with nothing. The fact that the husband has been locked up shows the necessity of extreme care. An order for 10s. a week is as much as is warranted by the facts, and the magistrate's order will be varied accordingly.

HILL, J.—I agree.

Order varied.

Solicitors: *Warren & Warren*, for *Edmund Evans*, Kingston; *Edwin Cobbing & Co.*, Kingston.

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

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MANCHESTER CORPORATION *v.* BUTTLE

[CHANCERY DIVISION (Eve, J.), July 2, 1929]

[Reported [1929] 2 Ch. 390; 98 L.J.Ch. 394; 142 L.T. 14; 94 J.P. 33; 45 T.L.R. 568; 27 L.G.R. 748]

B

Water Supply—Domestic purposes—Supply to dentist's dwelling-house—Part of house used for purposes of trade or business—Right of dentist to have water supplied at domestic rate—Manchester Corporation Waterworks Act, 1847 (10 & 11 *Vict., c. cciii*), *s.* 93—*Manchester Corporation Waterworks and Improvement Act*, 1869 (32 & 33 *Vict., c. cxvii*), *s.* 16.

By the Manchester Corporation Waterworks Act, 1847, s. 93, the corporation, C
at the request of the owner or occupier, had to supply any dwelling-house or part of a dwelling-house within fifty yards of any main or other water pipe with a supply of water for domestic purposes. By the Manchester Corporation Waterworks and Improvement Act, 1869, s. 16, no person was entitled to require, nor was the corporation bound to supply, any dwelling-house with water (otherwise than by meter or by special agreement) where any part of D
such dwelling-house was used for any trade or business purposes. The defendant, who was a dentist, did dentistry work of a mechanical nature and attended patients at his dwelling-house.

Held: the defendant's dwelling-house was used partly for trade or business purposes, and, therefore, the corporation was not bound to supply any water to the house except under a special agreement or by meter under s. 16 of the E
Act of 1869.

Notes. As to supply of water for domestic purposes, see 33 HALSBURY'S LAWS (2nd Edn.) 450–454, paras. 740–744; and for cases see 43 DIGEST 1080–1082, *147–165*.

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Cases referred to:

(1) *Metropolitan Water Board* v. *Avery*, [1914] A.C. 118; 83 L.J.K.B. 178; 109 L.T. 762; 78 J.P. 121; 30 T.L.R. 189; 58 Sol. Jo. 171; 12 L.G.R. 95, H.L.; 43 Digest 1080, *150*.

(2) *Oddenino* v. *Metropolitan Water Board*, [1914] 2 Ch. 734; 84 L.J.Ch. 102; 112 L.T. 115; 79 J.P. 89; 31 T.L.R. 23; 59 Sol. Jo. 129; 13 L.G.R. 33; G
43 Digest 1081, *161*.

(3) *Smith* v. *Anderson* (1880), 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 29 W.R. 21, C.A.; 9 Digest (Repl.) 70, *270*.

Action.

The plaintiffs were the undertakers and owners of the waterworks which supplied H
water in Manchester. The defendant was a dentist practising in more than one place in Manchester, but residing at the particular house, the subject-matter of this action, where he did some dentistry work of a mechanical nature and also attended patients. The plaintiffs brought this action, claiming declarations that the water supplied to the defendant's residence for use in his dentistry work was used for other than domestic purposes and that they were not bound to supply any water to the residence except under a special agreement or by meter. I

By the Manchester Corporation Waterworks Act, 1847, s. 93:

"... the [corporation] shall, at the request of the owner or occupier, furnish to every occupier of a private dwelling-house or part of a dwelling-house within fifty yards of any main or other water pipe of the [corporation] a sufficient supply of water for the domestic use of every such occupier at a rate per centum per annum not exceeding £5 upon the annual rack-rent or value of the premises so supplied with water ..."

By the Manchester Corporation Waterworks Improvement Act, 1869, s. 16:

"No person shall be entitled to require, nor shall the corporation be bound to supply, any dwelling-house with water (otherwise than by meter or by special agreement) where any part of such dwelling-house is used for any trade or business purposes."

Farwell, K.C., and *W. Gorman* for the plaintiffs, the corporation.

Gover, K.C., and *H. Kingdon*, for the defendant, referred to *Metropolitan Water Board* v. *Avery* (1).

EVE, J., stated the facts and continued: The corporation put forward two arguments in support of their case that they are not so bound. The first founded on s. 93 of the Manchester Corporation Waterworks Act, 1847, and the fact that water is used by the defendant in the course of carrying on his profession as a dentist is, in my opinion, disposed of by the judgment of the House of Lords in *Metropolitan Water Board* v. *Avery* (1), the effect of which is stated by SARGANT, J., in his illuminating judgment in *Oddenino* v. *Metropolitan Water Board* (2) ([1914] 2 Ch. at p. 739); and if the corporation had no other argument on which to rely, I should hold that they had failed to establish their right to any of the declarations claimed in this action. But the Act of 1847 was followed by the Manchester Corporation Waterworks and Improvement Act, 1869, an Act in the nature of an omnibus Act, which contains some recitals and a couple of sections dealing with the water supply, and on s. 16 the second and main argument advanced in support of the corporation's case is based. Section 15 is instructive. It indicates, I think, a form of imposition which at one time was not uncommonly practised on the water-supplying authority. Water supplied to a house for domestic purposes was utilised for driving or otherwise in connection with some machinery used for trading purposes, and s. 15 provides for the recovery of penalties from every person so improperly diverting the water. That probably drew attention to the fact that there were in the area of supply numerous premises of a composite nature, used partly for business purposes and partly as residences, and in the year 1869 that state of things was, I doubt not, more prevalent in Manchester and other cities than it is now. The habit of living away from business premises is one which has been developed very largely in the years which have elapsed since 1869. But the corporation in framing these two sections, s. 15 and s. 16, were undoubtedly directing their attention to such composite premises. It was in that class of premises that the abuse which s. 15 was intended to put a stop to was most prevalent and most easily carried out. Section 16 was, accordingly, framed to deal with these composite premises.

At the date when the Act of 1869 was passed, the owner or occupier of a dwelling-house situated within fifty yards of any main or other water pipe of the undertakers could request, and on such request the corporation were bound to supply him with, a sufficient quantity of water for domestic use, and, if the composite premises to which s. 16 is directed included different tenements, those persons who were occupying tenements distinct from that part of the house which was used for business purposes could, under s. 93, obtain a supply of water for domestic purposes at the domestic rate; but where the whole house, or any part of it, was used partly for residential and partly for trade or business purposes, then this section excluded the dwelling-house or such part of it as was used in part for residential and in part for trade or business purposes from any right under s. 93 of the earlier Act, and left the occupier or owner to make such agreement as he could with the corporation for a supply by meter or otherwise. I am told, and so far as I can see it is the fact, that there is no statutory obligation on the corporation to supply by meter or agreement. They are empowered so to do, and, inasmuch as these undertakings are carried on with a view to profit, it is reasonable to assume that the corporation will sell that which they have for sale to any person willing to pay a reasonable price for the same. That, probably, is the explanation of there being no compulsion on the corporation to supply by meter.

The premises occupied by the defendant are used in part as a dwelling-house and in part for business purposes, for I cannot disregard the interpretation imposed in the expression "trade or business" purposes by the Court of Appeal in *Smith* v. *Anderson* (3) and adopted in many subsequent cases. It seems clear they include premises used for professional purposes, and, as it is not disputed that the defendant does use a part of the dwelling-house for professional or business purposes, he is the occupier of a dwelling-house where part of the premises are used for trade or business purposes, and, under this section, is disqualified from insisting that the corporation should supply him with water at the domestic rate.

In these circumstances, the corporation are entitled to the declarations which they claim, and, unless any arrangements have been made in regard to costs, the defendant must pay them.

Solicitors: *Sharpe, Pritchard & Co.*, for *F. E. W. Howell*, Manchester; *Le Brasseur & Oakley.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

GREEN *v.* WEATHERILL AND ANOTHER

[Chancery Division (Maugham, J.), May 1, 2, 10, 1929]

[Reported [1929] 2 Ch. 213; 98 L.J.Ch. 369; 142 L.T. 216; 45 T.L.R. 494]

Trustee—Constructive trustee—Payment by trustee to a stranger of trust money to defeat a judgment—Stranger a constructive trustee—Judgment against trustee as defaulter—Further claim on ground of attempt to defeat judgment —Competency.

The plaintiff obtained judgment in the King's Bench Division against the first defendant, a married woman and a trustee, for payment out of her separate estate of a sum of money in dispute and costs. The first defendant had transferred parts of the money to the second defendant, who was her sister and not a party to the proceedings, although she was aware of them. Execution in respect of the judgment against the first defendant having proved ineffective, the plaintiff commenced the present proceedings in the Chancery Division, claiming that the first defendant had paid the money to the second defendant in order to defeat the judgment in the King's Bench Division, and that the second defendant had received the money as a constructive trustee.

Held: with regard to the first defendant, the plaintiff, having already obtained judgment against her separate estate as a defaulting trustee, could not, on the same facts, obtain another judgment against her in a different form, since the matter was res judicata, but the second defendant had received the money as constructive trustee, and the plaintiff could obtain judgment against her.

Re May (1) (1885), 28 Ch.D. 516; *Badar Bee* v. *Habib Merican Noordin* (2), [1909] A.C. 615; and dicta of Wigram, V.-C., in *Henderson* v. *Henderson* (3) (1843), 3 Hare, at p. 114, applied.

Notes. Considered: *Greenhalgh* v. *Mallard*, [1947] 2 All E.R. 255; *Wright* v. *Bennett*, [1948] 1 All E.R. 227. Referred to: *Marginson* v. *Blackburn Borough Council*, [1938] 2 All E.R 539.

As to constructive trusts, see 33 Halsbury's Laws (2nd Edn.) 138–141, paras. 235–238; and for cases see 43 Digest 704–716, *1440–1554*. As to res judicata, see 15 Halsbury's Laws (3rd Edn.) 184–187, paras. 357–362; and for cases see 21 Digest 198 et seq.

A Cases referred to:

(1) *Re May* (1885), 28 Ch.D. 516; 33 W.R. 917; sub nom. *Re May, Ex parte House*, 54 L.J.Ch. 338; 52 L.T. 78; 1 T.L.R. 220, C.A.; 21 Digest 214, *520.*

(2) *Badar Bee* v. *Habib Merican Noordin*, [1909] A.C. 615; 78 L.J.P.C. 161, P.C.; 21 Digest 168, *253.*

(3) *Henderson* v. *Henderson* (1843), 3 Hare, 100; 1 L.T.O.S. 410; 67 E.R. 313; B 21 Digest 174, *276.*

(4) *Scott* v. *Morley* (1887), 20 Q.B.D. 120; 57 L.J.Q.B. 43; 57 L.T. 919; 52 J.P. 230; 36 W.R. 67; 4 T.L.R. 56; sub nom. *Re Morley, Ex parte Morley, Scott* v. *Morley*, 4 Morr. 286, C.A;. 27 Digest (Repl.) 169, *1242.*

(5) *Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180; 69 L.J.Ch. 187; 81 L.T. 439; 48 W.R. 136; 16 T.L.R. 45; 44 Sol. Jo. 59; 24 Digest (Repl.) C 867, *8615.*

(6) *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176; 43 L.T. 60, H.L.; 43 Digest 657, *904.*

(7) *Hoystead* v. *Taxation Comr.*, [1926] A.C. 155; 94 L.J.P.C. 79; 134 L.T. 354; 42 T.L.R. 207, P.C.; Digest Supp.

(8) *Hunter* v. *Stewart* (1861), 4 De G.F. & J. 168; 31 L.J.Ch. 346; 5 L.T. 471; D 8 Jur.N.S. 317; 10 W.R. 176; 45 E.R. 1148, L.C.; 21 Digest 201, *442.*

(9) *London Syndicate* v. *Lord* (1878), 8 Ch.D. 84; 48 L.J.Ch. 57; 38 L.T. 329; 26 W.R. 427, C.A.; 22 Digest (Repl.) 135, *1191.*

Witness Action.

The following statement of facts is taken from the judgment. The plaintiff was E the executor of the will of Stephen Ellis, an agricultural labourer, who died on Dec. 3, 1925. He claimed a declaration that a sum of £195 5s. 1d. formed part of the estate of the testator, Stephen Ellis, and that the defendant Emily Weatherill was a trustee of that sum on trust to pay it to the plaintiff as representing the estate of the testator. He claimed also in effect to follow £135, part of that sum in the hands of the defendant Sarah Croft; also an account and an order for F payment of any sums found due from the defendants or either of them and costs. The defendants were the two daughters of the testator by his wife Frances Ellis, who died on March 8, 1919. The dispute arose in relation to a sum of £197 16s., which admittedly was standing in the name of Mrs. Ellis at the St. John's Hill, Sevenoaks, savings bank, and was drawn out by her on the day of her death, the main question being whether this sum was hers or her husband's—the testator. G This question had already been in substance litigated in the King's Bench Division before McCardie, J., in an action between the present plaintiff and the first defendant and was decided in favour of the plaintiff; but the second defendant, Mrs. Croft, was not a party to those proceedings, and, accordingly, it was necessary to decide the issues of fact independently of that decision.

The testator was an entirely illiterate man unable even to sign his own name. H Throughout his life till shortly before his death at the age of over eighty he seemed to have been in regular work as an agricultural labourer. His wife, who lived with him, from time to time earned some money as a hop picker, and in kindred ways, and she and her husband sometimes took in lodgers. The savings bank account above referred to was opened on Dec. 17, 1888, with a payment in of the sum of £25. It was opened in the name of the wife, Frances Ellis, a circumstance which I was explained by the plaintiff as arising from the fact that the husband was unable to write. Further sums were paid in between 1888 and 1898, and from time to time there seems to have been some withdrawals of interest. By 1910 the total standing to the account was £202 11s. 11d. In 1915 there was a withdrawal of the sum of £50, and that appeared to have been the only withdrawal of any capital sum. By March 8, 1919, the balance amounted to £197 16s. On that date, Mrs. Ellis being exceedingly ill and about to die, it was arranged that the sum at the savings bank should be withdrawn, and the defendant Mrs. Weatherill and her father went to the post office and received the money in notes. Mrs. Weatherill

undoubtedly was handed the money by her mother and the real question was whether it was so handed to her to keep for her father, or whether, as the defendants in this action asserted, it was handed to Mrs. Weatherill by her mother as the true owner, on the terms that, if the testator needed any money, she was to help him out of the said sum, and, further, that what was left of the said sum at his death was to be divided equally between the defendants. The date of the marriage of Mr. and Mrs. Ellis had not been strictly proved, but Mrs. Ellis was aged eighty-two when she died on March 8, 1919. She must, therefore, have been born in 1837, and, having regard to the age of the defendants, it was apparent that the marriage must have taken place a long time before the passing of the Married Women's Property Act, 1882, and before the passing of the Married Women's Property Act, 1870. Mrs. Ellis having died on March 8, 1919, the sum drawn out from the post office, together with a further sum of £2 4s. given to Mrs. Weatherill by her husband, making the round sum of £200, was placed on deposit account in the name of Mrs. Weatherill with the Bank of Liverpool and Martin's Bank, Ltd., at Bromley, Kent, where Mr. and Mrs. Weatherill were residing. Interest was allowed by the bank at varying rates. On April 12, 1924, the sum of £29 0s. 2d., being the interest up to date, was paid to the testator. On July 25, 1925, a sum of £20, part of the capital of the £200, was drawn out and paid to the testator. Subject to those exceptions, the sum remained intact on deposit at the bank without any withdrawal. The testator died on Dec. 3, 1925, having by his will dated Oct. 16, 1925, appointed the plaintiff to be his executor and trustee. He gave all his furniture and other household effects to Harriet Sophia Weeks, a sister-in-law of the testator, who came to act as his housekeeper on the death of Mrs. Ellis. The rest, residue and remainder of his estate "including the sum of £200, which I handed to my daughter Emily Weatherill for her to invest for me and upon which she has paid during my lifetime certain sums for interest earned on the said capital of £200," he gave unto and to the use of his trustee on trust, first to pay thereout all his just debts, funeral and testamentary expenses, and thereafter to divide the remainder of his residuary estate between his daughters, Sarah Jane Croft and Emily Weatherill, and the said Harriet Sophia Weeks, in equal shares. The will was prepared by the plaintiff, who was the managing clerk to Messrs. Arthur E. Eves and Jones, the plaintiff's solicitors, and was executed by the testator as a marksman. The plaintiff after the funeral went to the house and read and explained the will to the defendants and Mrs. Weeks. The defendants were very angry, and one of them said that their father had "nothing to make a will for." Nothing whatever was said about the deposit account at the bank in the name of Mrs. Weatherill, and the plaintiff had no knowledge of it.

On Dec. 11, 1925, the plaintiff's solicitors wrote to Mrs. Weatherill enclosing a copy of the will and asking with regard to the sum of £200 deposited by the deceased that she would render an account showing the interest due to the estate, and forward the amount due for principal and interest. The reply by Mr. W. G. Weller, then acting as solicitor for Mrs. Weatherill, was that the deceased did not at any time deposit with her the sum of £200 as alleged, or any other sum and that, therefore, no account could be given. Ultimately, after further correspondence, the plaintiff, by a specially endorsed writ issued in the King's Bench Division on Oct. 6, 1926, claimed as executor of the testator for money had and received by the defendant Mrs. Weatherill to the use of the deceased the sum of £200, and this was stated in the particulars to be the amount entrusted to the defendant by the deceased on or about March 6, 1919. By the defence, the defendant pleaded that she did on or about April 12, 1924, give to the testator a sum of £29 which was the interest from a sum of £198 which had been the property of her mother and was given to the defendant by her mother in the month of March, 1919, and, further, that on or about July 25, 1925, the defendant gave to the testator a sum of £20 out of the said sum of £198. The defendant wholly denied that the sum of £200 or any part thereof was deposited with her by the testator. At the trial before MAUGHAM, J., the managing clerk for Mrs. Weatherill's

then solicitor, Mr. Weller, was called on behalf of the defendants, and he stated during cross-examination that Mrs. Weatherill informed him that the sum of £198 was the property of her mother and had been given to her by the defendant as an absolute gift without any conditions, and this view was reflected in the defence. The case in the King's Bench Division came before McCardie, J., for trial and the defendant and Mrs. Croft and other witnesses were called. The evidence given seemed to have been substantially the same as the evidence given before Maugham, J. The learned judge did not attach credit to the statements of Mrs. Weatherill and Mrs. Croft and decided in favour of the plaintiff. The formal judgment was for £198 with costs, such sum and costs to be payable out of the separate estate of the defendant, as directed in the associate's certificate, and there followed the words usual in judgments against married women in the *Scott* v. *Morley* (4) form. It was not till December, 1927, that Messrs. Kinch and Richardson, who had been appointed to be solicitors for the defendant, as the result of a change, disclosed to the plaintiff the fact that the defendant had, or had had, a banking deposit receipt in respect of the sum of £200 referred to in the pleadings. This document ought obviously to have been included in the affidavit of documents made by the defendant. The copy banking account was thereupon obtained by the plaintiff, and from that account it emerged that, on May 24, 1927, the balance standing to that account was drawn out by the defendant, the pleadings having been closed in the previous month and the case having been set down for trial.

At the hearing before McCardie, J., and also before Maugham, J., Mrs. Weatherill deposed that she had paid out of the sum withdrawn from Martin's Bank the sum of £135 to her sister, Mrs. Croft, who knew all about the proceedings, in settlement of "her share in the sum" handed to Mrs. Weatherill by her mother as alleged, and a debt of £31 10s. stated, truthfully or otherwise, to have been owing to Mrs. Croft since the year 1907. She appeared to have used the balance by paying a sum to her then solicitor on account of costs, and also paying £5 to her husband and two sums of £5 to her married daughters. An execution levied in respect of the judgment so recovered in the King's Bench Division had thus been wholly unproductive. Nor could such a judgment be enforced by process of attachment, since the married woman was a trustee and the sum was due in respect of a breach of trust: see *Scott* v. *Morley* (4). There was no doubt that the King's Bench judgment was necessarily in the *Scott* v. *Morley* (4) form—see the view expressed by Stirling, J., in *Re Turnbull, Turnbull* v. *Nicholas* (5). The plaintiff, having failed to recover as the result of that action, commenced the present proceedings on April 25, 1928, making Mrs. Croft a defendant in addition to Mrs. Weatherill; and he pleaded that the defendant Mrs. Weatherill, in order to defraud the just claim of the plaintiff to the sum in question, and in order to defeat the plaintiff's right to take the same in execution of any judgment that he might recover in the said action, withdrew all that remained of the said capital sum and paid the sum of £135 to the defendant Mrs. Croft, and that Mrs. Croft, at the time when she received the said sum of £135, knew or had notice of all the facts referred to in the statement of claim. Maugham, J., did not think it was necessary for him in the circumstances to analyse the evidence in any detail, for he had come to the same conclusion as that at which McCardie, J., arrived on the facts of the case, and he accepted the evidence given on behalf of the plaintiff. He did not think it was established that Mrs. Ellis ever had any independent savings of her own, still less that she ever intended to make a gift of them on the terms now set up by the defendants; and he was fortified in that opinion by the circumstance that Mrs. Weatherill attempted at an earlier stage to set up that the sum in question had been given to her absolutely and by the fact that, although her father died on Dec. 3, 1925, she made no attempt to deal with the money in any way or to pay over one-half the fund to her sister Mrs. Croft until the King's Bench action was ripe for hearing. His conclusion was that the sum deposited in Martin's Bank at the date of the testator's death formed part of his estate.

Ronald Smith, for the plaintiff, referred to *National Bolivian Navigation Co.* v. *Wilson* (6).

A. C. Edgar, for the defendants, referred to *Hoystead* v. *Taxation Comr.* (7), *Hunter* v. *Stewart* (8), 13 HALSBURY'S LAWS (1st Edn.), para. 334, and *Scott* v. *Morley* (4).

Cur. adv. vult.

May 10. **MAUGHAM, J.**, stated the facts and continued: It now becomes necessary to consider the defences of the two defendants separately. The main defence of the defendant Mrs. Weatherill, having regard to my findings of facts, is the judgment in the King's Bench action for £198 and costs. It is contended on behalf of the plaintiff that, notwithstanding that unsatisfied judgment, he is entitled to institute the present proceedings in the Chancery Division and therein to obtain an order for the payment into court of the amount proved to have reached the hands of the defendant Mrs. Weatherill as a trustee. The advantage to the plaintiff of an order in that form would be that such an order can be enforced by attachment: *Re Turnbull, Turnbull* v. *Nicholas* (5). The position of a married woman who happens to be a defaulting trustee is, in the light of the authorities, a somewhat curious one. If an order is made of which the object is to compel her to make good a loss occasioned by her breach of trust, the proper form of the order is that laid down in *Scott* v. *Morley* (4): see the judgment of STIRLING, J., in *Re Turnbull, Turnbull* v. *Nicholas* (5). If, however, the proceedings take such a form that no breach of trust has been proved, but it is established that the defendant has in her hands moneys or property subject to the trust, and the object of the order is to get that property for greater security transferred into court, an order in the form of *Scott* v. *Morley* (4) is inappropriate (see the words of STIRLING, J.), and an order for attachment may then be made. It will be observed that moneys forming part of the trust do not in truth form part of the separate estate of the defendant trustee; and it would seem that the plaintiff in such a case must make up his mind whether he desires to allege and prove that the defendant has committed a breach of trust and is, therefore, liable to the extent of her separate estate in respect of it, or whether he desires to treat her as a trustee possessed of trust moneys which it is desired to place in safe custody.

In my opinion, it must be admitted that the cause of action in the two cases is, strictly speaking, not the same. On the other hand, the plea of res judicata is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation: see *Re May* (1), *Badar Bee* v. *Habib Merican Noordin* (2). In the latter case, it may be observed that LORD MACNAGHTEN in delivering the judgment cites from the DIGEST and relies on the maxim "Exceptio rei judicatae obstat quotiens eadem questio inter easdem personas revocatur." In the leading case of *Henderson* v. *Henderson* (3) there is to be found the following statement of law by WIGRAM, V.-C. (3 Hare at p. 114):

> "I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

This passage has recently been approved by the Privy Council in *Hoystead* v. *Taxation Comr.* (7).

I cannot doubt that the present claim against the defendant Mrs. Weatherill is one which properly belonged to the subject of litigation raised in the King's Bench action and that the plaintiff, having recovered judgment against her by establishing that she was paid the sum of £197 as a trustee and had misapplied it, is not now entitled by establishing practically the same facts to obtain judgment in a different form. The action against the defendant Mrs. Weatherill, therefore, fails.

As against the defendant Mary Croft, the position is very different. She was not a party to the previous proceedings, and it has been noticed that the payment to her of the sum of £135 was not made till after the pleadings in that action were closed. In the present action, she is sued as a constructive trustee of the sum so paid to her with full knowledge of the action and of the nature of the claim which was being made as to the sum deposited by her sister with Martin's Bank. In my opinion, those facts having been established, she must be taken to be a trustee. It is not alleged in the action that she has committed any breach of trust, and counsel for the plaintiff would be entitled on the pleadings as they stand to ask for an account of the sum received by her with notice of the plaintiff's claim. It is not disputed that the sum paid to the defendant Mrs. Croft is the sum of £135, and an account against her is, therefore, unnecessary. This, therefore, is a case where the court has ascertained to its satisfaction that the sum of £135 is in the hands of the defendant Mrs. Croft as a constructive trustee, and I can see no reason why the court should not order payment by the said defendant of that amount into court: see *London Syndicate* v. *Lord* (9).

There remains the question of costs. [His Lordship ordered that the plaintiff should pay the defendant Mrs. Weatherill's costs, but that these should be set off against the sum recovered from that defendant by the King's Bench judgment, and that the defendant Mrs. Croft should pay the plaintiff's costs as against her and pay £135 into court.]

Solicitors: *Arthur E. Eves & Jones*; *Kinch & Richardson.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re GRAHAM. GRAHAM *v.* GRAHAM

[CHANCERY DIVISION (Eve, J.), March 6, 13, 1929]

[Reported [1929] 2 Ch. 127; 98 L.J.Ch. 291; 141 L.T. 197]

Will—Necessary implication—Gift to husband subject to life gifts to parents with gift over to husband's children if he should predecease parents—Death of husband after parents in testatrix's lifetime—Failure through lapse.

By her will, the testatrix, after reciting that her parents and her husband were still alive and that she had no issue, but that there were seven children by her husband's first wife living, devised her residuary real and personal estate to her parents for life and on the death of either to the survivor and then to her husband, but, if he should have predeceased her parents, then to her husband's children, whether by herself or his first wife. The testatrix died in 1928, having been predeceased by her parents and, later, by her husband. She left no issue of her own, but was survived by six children of her husband's first marriage.

Held: there was no implication, express or implied, in the will of a gift over to the children on the failure of the gift to her husband by lapse, and, therefore, the testatrix died intestate as to her residuary estate.

Jones v. *Westcomb* (1) (1711), Prec. Ch. 316, not applied.

Notes. Distinguished: *Re Bowen, Treasury Solicitor* v. *Bowen*, [1948] 2 All E.R. 979. Approved: *Re Bailey, Barrett* v. *Hyder*, [1951] 1 All E.R. 391.

As to the effect of lapsed devises, see 34 HALSBURY'S LAWS (2nd Edn.) 146–148, paras. 191–194; and for cases see 44 DIGEST 492 et seq.

Cases referred to:

(1) *Jones* v. *Westcomb* (1711), Prec. Ch. 316; Gilb. Ch. 74; 1 Eq. Cas. Abr. 245; 24 E.R. 149; 44 Digest 1175, *10165*.

(2) *Avelyn* v. *Ward* (1750), 1 Ves. Sen. 420; 27 E.R. 1117, L.C.; 44 Digest 1179, *10201*.

(3) *Murray* v. *Jones*, *Fawcett* v. *Jones* (1813), 2 Ves. & B. 313; 35 E.R. 338; 44 Digest 1180, *10203*.

(4) *Maddison* v. *Chapman* (1858), 4 K. & J. 709; 70 E.R. 294; affirmed (1859), 3 De G. & J. 536, L.C. & L.JJ.; 44 Digest 1173, *10150*.

(5) *Davies* v. *Davies* (1882), 47 L.T. 40; 30 W.R. 918; 44 Digest 1159, *10037*.

(6) *Re Shuckburgh's Settlement*, *Robertson* v. *Shuckburgh*, [1901] 2 Ch. 794; 71 L.J.Ch. 32; 85 L.T. 406; 50 W.R. 133; 46 Sol. Jo. 13; 37 Digest 447, *510*.

(7) *Brookman* v. *Smith* (1872), L.R. 7 Exch. 271; 41 L.J.Ex. 114; 26 L.T. 974; 20 W.R. 906, Ex. Ch.; 44 Digest 1176, *10177*.

(8) *Doo* v. *Brabant* (1792), 4 Term Rep. 706; 3 Bro.C.C. 393; 100 E.R. 1256; 44 Digest 1176, *10175*.

(9) *Wing* v. *Angrave* (1860), 8 H.L.Cas. 183; 30 L.J.Ch. 65, H.L.; 44 Digest 1172, *10149*.

(10) *Calthorpe* v. *Gough* (1789), 4 Term Rep. 707, n; 3 Bro.C.C. 395, n; 100 E.R. 1257; 44 Digest 492, *3117*.

(11) *Humberstone* v. *Stanton* (1813), 1 Ves. & B. 385; 35 E.R. 150; 44 Digest 1180, *10205*.

(12) *Re Tredwell*, *Jeffray* v. *Tredwell*, [1891] 2 Ch. 640; 65 L.T. 399; sub nom. *Re Tredwell*, *Jaffray* v. *Tredwell*, 60 L.J.Ch. 657, C.A.; 44 Digest 1175, *10162*.

(13) *Re Edwards*, *Jones* v. *Jones*, [1906] 1 Ch. 570; 75 L.J.Ch. 321; 94 L.T. 593; 54 W.R. 446; 50 Sol. Jo. 324, C.A.; 44 Digest 1140, *9860*.

(14) *Tarbuck* v. *Tarbuck* (1835), 4 L.J.Ch. 129; 44 Digest 1139, *9849*.

Originating Summons.

The testatrix, by her will made in India on April 27, 1904, appointed an executor and trustee, and after reciting that her parents and husband were alive, her husband, having seven children by his first wife, then living, whom she named, devised and bequeathed her real and personal estate to her trustee on trust for conversion and investment of the residue and to pay the income thereof to her parents during their joint lives and to the survivor of them during his or her life, and subject thereto in trust for her husband if living after their deaths. Should he, however, have predeceased both her parents, the trust fund was to be held in trust for such of her husband's children, whether by herself or by his first wife, living at her death, and such of his grandchildren then living and being children of any deceased child as should attain the age of twenty-one years or marry. The testatrix died in 1928, having survived her parents and husband. Her husband survived both parents, and died in 1926. She left no issue, but six of her husband's children named in the will were then living. This summons was taken out by the trustee asking whether, in the events which had happened, the husband's children living at her death were entitled to the residuary estate, or whether the same was undisposed of.

A. J. Belsham for the plaintiff.

R. Turnbull, for the children, referred to *Jones* v. *Westcomb* (1), *Avelyn* v. *Ward* (2), *Murray* v. *Jones* (3), *Maddison* v. *Chapman* (4), *Davies* v. *Davies* (5), *Re Shuckburgh's Settlement* (6), and JARMAN (6th Edn.), p. 2195.

L. F. Potts, for the next-of-kin, referred to *Jones* v. *Westcomb* (1), *Brookman* v.

Smith (7), *Doo* v. *Brabant* (8), *Wing* v. *Angrave* (9), *Calthorpe* v. *Gough* (10), *Humberstone* v. *Stanton* (11), *Re Tredwell* (12), and *Re Edwards* (13).

Cur. adv. vult.

March 13. **EVE, J.**—By her will dated April 27, 1904, after appointing her father, Caleb Kennelly, to be her executor and trustee, and stating that, at the date of her said will, she had no children, but that both her parents and her husband, James Graham, were alive and that her husband had, by his former marriage, seven children, Ada Alice, Frank, Herbert, Harry, Hilda, Fred and Rennil, then living, the testatrix devised, appointed and bequeathed her residuary real and personal estate to her said trustee, on trust for conversion as therein mentioned, and after payment thereout of her funeral and testamentary expenses, on trust to invest the clear residue and to pay the income thereof to her parents during their joint lives, and, on the death of either, to the survivor, and thereafter the will continued as follows:

> "That after the death of my father, his executor or administrator shall pay the whole of the income of my trust fund to my mother, should she be living at his death, but in case she happen to have predeceased my father, my father's executor or administrator shall hold the trust fund in trust for my husband, Mr. James Graham, who will be absolutely entitled to the whole of the trust fund. Should he, however, have predeceased both my parents the trust fund shall be held in trust for such of my husband's children, whether by me or by his first wife living at my death, and such of his grandchildren living at my death and being children of any then deceased child of my husband entitled under this my will as being male attain the age of twenty-one years or being female attain that age or marry in equal shares per stirpes."

The mother of the testatrix died in 1909, her father in 1916, and her husband in 1926. She herself died in 1928. Had the husband survived the testatrix, he would have taken an indefeasible interest; the failure of the prior gift—the gift to him—is due to lapse only.

The six of the husband's seven children who survived the testatrix claim that the executory gift takes effect, although the event that has happened is the exact opposite of that on which the substituted gift is dependent, and in support of their claim they rely on the line of authorities, of which *Jones* v. *Westcomb* (1) is the leading case. But have these authorities, which proceed on the doctrine that the event, on which the gift over was to come into operation, was an event implied, if not expressly indicated, by the language of the will, any application to a case like the present, where the failure of the prior gift is due to lapse by the death of the donee in the lifetime of the testatrix? I think not. The husband had satisfied the condition of the gift in the lifetime of the testatrix, and she cannot be supposed to have contemplated the failure of the gift to him by lapse. She presumed, as every testatrix does, that the persons who were to take under her will would survive her. The case falls within the decisions of *Calthorpe* v. *Gough* (10), *Doo* v. *Brabant* (8), *Tarbuck* v. *Tarbuck* (14), *Brookman* v. *Smith* (7), and *Humberstone* v. *Stanton* (11), and the testatrix died intestate as to her residuary estate. The costs of all parties, taxed as between solicitor and client, will be paid thereout.

Solicitors: *Lemprière & Hunter*, for *R. Hudson*, Accrington; *Gamlen, Bowerman & Forward.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

PRINSEP *v.* PRINSEP

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), November 1, 4, 1929]

[Reported [1930] P. 35; 99 L.J.P. 35; 142 L.T. 172; 46 T.L.R. 29] B

Variation of Settlement—Power of court—Provision for injured spouse and children of dissolved marriage—No variation not necessary for that object—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.

Under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925 [now s. 25 of the Matrimonial Causes Act, 1950], the court ought only to interfere and vary ante-nuptial or post-nuptial settlements made on the parties whose marriage has become the subject of a decree for divorce or for nullity of marriage so far as is necessary to make proper provision for the injured spouse and the child or children of the marriage. When that has been effected the trusts of the settlements should stand except that the beneficial interests under them of the wife and children should be extinguished. The court is not free to make such provision as is thought suitable in the general circumstances of the case. C D

Order of HILL, J., [1929] P. 225, varied.

Notes. Considered: *Newson* v. *Newson*, [1934] All E.R.Rep. 523; *Best* v. *Best*, [1955] 2 All E.R. 839. Referred to: *Alston* v. *Alston*, [1929] P. 311; *Smith* v. *Smith*, [1945] 1 All E.R. 584. E

As to variation of settlements, see 12 HALSBURY'S LAWS (3rd Edn.) 451 et seq.; and for cases see 27 DIGEST (Repl.) 641 et seq. For Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Appeal from an order made on a petition by the wife for variation of settlements, reported [1929] P. 225. F

The parties were married on Aug. 8, 1912, and there was one child of the marriage, born on May 26, 1913. A decree nisi of divorce granted to the wife was made absolute on April 23, 1928. On May 12, 1928, the wife presented a petition for variation of (i) an ante-nuptial settlement dated Aug. 7, 1912; and (ii) a settlement dated Aug. 25, 1920. In both cases the settlor was the husband's mother, and the combined effect of the settlements was to create a trust of capital funds G amounting to about £108,000, producing an annual income of £6,300. The funds under the ante-nuptial settlement totalled about £21,500, and no question arose as to the power of the court to vary this settlement in favour of the wife and the child. By a deed dated Sept. 1, 1917, the respondent's mother covenanted to pay the respondent during the joint lives of herself (the mother) and the respondent £2,000 a year. By the 1920 settlement this annuity was revoked, and securities to H the value of more than £80,000, yielding an annual income of £5,100 a year, were settled for the use of the husband, the wife, and their issue, or any future wife or children, during the husband's lifetime, in the absolute discretion of the trustees. Further, the settlement provided that after the death of the husband the capital and income of the trust fund should be held in trust, subject to any appointment of a life or less interest which might be made by him to any wife who survived I him, for (i) his issue by any marriage; (ii) the husband's brothers and the issue of any such brother as the husband should by deed or will appoint and, in default of and subject to such appointment, then as the wife should by will or deed, executed after the husband's death, appoint, provided that the powers so made exercisable by the wife should only be capable of being exercised by her while any issue of the husband should be in existence. Subject to trusts in which the trustees were given a wide discretion, it was provided that this trust fund should be held in contingent remainder for the husband's two brothers and their issue. By a deed of separation,

dated Feb. 23, 1926, the husband covenanted to pay the trustees £2,000 a year in trust for the wife as her separate estate for her life, and if she did not re-marry. The wife brought nothing into settlement. As to the contingent interest of the husband's brothers the settlement gave the trustees absolute power on the husband's re-marriage to get rid of their interests. After the decree absolute for divorce had been granted on the wife's petition the husband married again. HILL, J., ordered a re-settlement of £45,000 for the benefit of the wife and her child, and as to the balance of £62,400 that £40,000 should be re-settled on trusts for the husband and any wife or issue other than the wife and her child upon certain trusts, and the remaining £22,400 should be released to the husband free of the original trusts. The trustees appealed.

Gavin T. Simonds, K.C., and *Victor Russell* for the trustees.
Sir Thomas Hughes, K.C., *Colquhoun Dill*, and *C. L. Beddington* for the husband.

LORD HANWORTH, M.R.—This is an appeal from a judgment of HILL, J., in part confirming and in part varying the order which had been made by the registrar under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, varying certain settlements which had been made on the occasion of the marriage, and subsequently, of these spouses who were divorced.

The marriage took place between the two spouses on Aug. 8, 1912. On the previous day an ante-nuptial settlement had been executed. The marriage took place, and there was one child, a daughter, who was born on May 26, 1913. On Aug. 25, 1920, a post-nuptial settlement was made. On Aug. 14, 1927, the decree nisi was made, and on April 23, 1928, that decree was made absolute, and the marriage between these two spouses was dissolved. In accordance with s. 192 an application was made to deal with the settled property, for the mother of the husband, Mrs. Ball-Greene, was a lady of large means, and she had made the settlement of Aug. 7, 1912. The wife did not bring any money at all into the settlement. At that time Mrs. Ball-Greene brought in a sum of £21,000 to the settlement fund, and she provided a protected life interest to her son, and thereafter discretionary trusts. That settlement followed a comparatively common form, but there was also contained in it a covenant on the part of Mrs. Ball-Greene to pay £1,000 a year to the trustees for the benefit of the husband, and after his death to pay a sum of £500 a year to the wife and the issue of the marriage. I need not refer to that settlement more except to call attention to the fact that the sum which was brought into settlement by the mother was the sum of £21,000. The settlement of Aug. 25, 1920, dealt with much larger funds. The total sum that was dealt with under that settlement was over £80,000. Again, I need not refer in detail to its terms [set out supra], except to say that it was a post-nuptial settlement made in favour of the husband and contained provisions under which he took as what was called the principal beneficiary the protected interests. But there was a power on the part of the trustees, if they should so determine, after the principal beneficiary had reached the age of thirty-five years, to hand over the funds to him. If they did not do that, they were interests created in favour of the wife and the issue. Finally, there was an interest, if there should be no appointment made by the principal beneficiary, to the brothers of the principal beneficiary—other sons of Mrs. Ball-Greene. When the marriage was dissolved, the wife having brought no money into settlement and the husband being amply provided for, it was not unnatural that the application should be made under s. 192, which provides:

> "The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise

the powers conferred by this subsection notwithstanding that there are no children of the marriage."

I agree with counsel for the husband that, broadly speaking, the purpose of that section is to readjust the settlements as between the parties in order that, the marriage being dissolved, provision may be made for the innocent party, and, indeed, that their relations inter se may be re-organised as the court may think right.

In the present case upon that application being made the matter went in due course before the registrar. Shortly put, he reported that a new settlement should be created, giving the wife a life annuity of £2,000 and the child one of £500 during the joint lives of the wife and child, and after the death of the wife giving the child an annuity of £1,000 for life, the husband covenanting to make up any deficiency of income to meet the annuity of £500, and after the death of the husband and the wife to make up for the child a provision of £2,500 per annum, and after the completion of this new settlement the husband should take the residue of the trust premises absolutely free from the original trusts with all consequential directions as to the settlements and the costs. I have pointed out that both in the original settlement and in the post-nuptial settlement there was a protected life interest given to the husband, but, more than that, the second settlement of 1920 was obviously conceived in the spirit of protecting the husband from himself, and it contained various clauses giving a wide discretion to the trustees. It will be observed that the report of the registrar provides for a new settlement, and that the husband should take the residue of the trust premises after provision had been made for his late wife and child absolutely free from the original trusts of the settlement. On appeal, that was brought before the learned judge, and he varied the order and made a provision whereby there should be a re-settlement of £40,000 and a sum of £20,000 should be handed over to the husband absolutely. The figures run, I think, in this way: Adding the two settlements together, the £20,000 and the £80,000, there is a sum of more than £100,000 that is dealt with under the two settlements. The new provision made for the late wife and the daughter took up something like £40,000, and, as HILL, J., states the figures, there remains as a balance of the two settlements a sum of £62,000 or £63,000, which was over and above that demanded as necessary for the new provision made for the wife and her daughter. HILL, J., came to the conclusion that it would be wise in his view, and that the proper course would be to release part only of the balance of this £62,000 or £63,000 and to re-settle the rest in such a way as the trustees may approve so as to carry out the intentions of the original settlement, but upon the basis that the wife and her child have no longer any interest therein, and he says in his judgment that there should be new trustees—that is to say, that the Public Trustee should be appointed. Then he says:

"The only question as to which I think there is any difficulty is as to whether in the new settlement we should carry out the suggestion of para. 4 (c) of the suggested heads of settlement that 'If any child of Mr. Prinsep does not live to attain a vested interest then in trust for Mr. Prinsep absolutely,' or whether we should endeavour to embody again the provisions as to the possible interests of the brothers or the trustees of the brothers. I said on the previous occasion that I thought their interest was so very remote that it ought not to affect the way in which I dealt with the fund in the interests of the petitioner and her child, and really I think the same applies to the present proposals; it is so remote, and I think it will only complicate the matter, and it would be much better to have it on the simpler grounds which are suggested. Now, as to that, we can strike out the suggested trustees and insert 'The Public Trustee.' "

It is the provision that in default of appointment by the principal beneficiary there was an interest created in favour of the brothers which HILL, J., sets aside as negligible on the ground that it is so remote. I am far from saying that in

no circumstances could such a course be adopted, but HILL, J., has, I think, himself stated the true principle under which s. 192 is to be used, that is, that primâ facie settlements ought not to be interfered with further than is necessary for that purpose, the purpose being to make proper provision for the injured spouse and the children of the marriage. My difficulty is to see, accepting that view of the purpose of the statute, how it is right to adopt the course which HILL, J., has done—to re-settle the balance of £63,000 on trusts which are quite different from those which were contained in the 1920 settlement; to release the principal beneficiary from the terms of those trusts; and as to £20,000, part of this balance, to hand it over to the principal beneficiary absolutely free from the terms of the original trust under which it is settled. If one is to interfere no more than is necessary for the purpose of the interest to be taken by the late wife and daughter, it seems impossible to accept the view that this further provision should be made under which the husband is to be freed from what may be called the discretions—possibly a happier word would be the fetters—of the trust of 1920. It has been argued before us that the matter was a matter of agreement, but I do not so read HILL, J.'s judgment. I have looked at his notebook, and I think it is plain that on the last occasion when the matter was before him certain provisions were made with regard to the figures. It is true he records that the appointment of the public trustee was agreed on, but it is also clear from his note that counsel for the trustees protested against the interference with the existing settlement and HILL, J., said: "Quite apart from any question of agreement I say £40,000 ought to be re-settled and the balance to be paid over to Mr. Prinsep." That is his determination. I have indicated that, in my view, so to deal with the £60,000 is to go far further than is necessary for the purpose of making provision for the late wife and the daughter. It was argued before him that with regard to the interests of the brothers they could only come in at all if (i) there were no children who attained the age of twenty-one or being daughters, married, and (ii) the husband does not exercise his general power of appointment. It is true that the interests of the brothers was remote, but the interests existed and the discretion of the original trustees existed and we have to determine whether or not it is open to a judge, quite apart from the necessary intervention in the settlements which is required to make provision for the wife and the daughter, to feel himself free from the terms of the settlement and to make such provision as he thinks ought to be done in what might be called the general circumstances of the case. It appears to me that there is no authority under s. 192 to go so far. HILL, J., has definitely said that, so far as provision is made for the wife and the daughter in the registrar's report, it is a proper variation and that, in considering and coming to that conclusion, he pays no regard to the consent of Mr. Prinsep. I do not think that the consent of the parties in any way binds or fetters the court. HILL, J., felt that, and he made the order on his own motion and under the powers the statutes give him, but, in my judgment, he has exceeded those powers for he has neglected to follow his own rule that he laid down that settlements ought not to be interfered with further than is necessary for the purpose before the court, which was to make provision for the benefit of the children of, or the parties to, the marriage. For these reasons it appears to me that the order of HILL, J., cannot stand, and that the right order will be that the provision made for the late wife and the daughter is to stand and that with regard to the remainder, the balance—that is the £63,000—the settlement of 1920 must be affirmed, but with such necessary variations as the creation of the interests in favour of the late wife and daughter make essential. The appeal, therefore, will be allowed.

LAWRENCE, L.J.—I agree. In his first judgment delivered on March 26, 1929, HILL, J., has correctly stated the principle on which the court ought to act in making orders to vary settlements under s. 192 of the Act of 1925, namely, that primâ facie settlements ought not to be interfered with further than is necessary for the purpose of making proper provision for the injured spouse and children.

In making his final order on July 1, 1929, however, the learned judge has, in my opinion, drastically departed from that principle. The short effect of that order was to provide for the injured spouse and the child of the marriage by taking out of the 1912 settlement the bulk of the trust funds comprised therein and further by taking out of the 1920 settlement trust funds to the value of nearly £25,000. No question arises as to the propriety of that variation, and, if the matter had stopped there, there would have been no cause to complain. But the order then went on to direct that the whole of the remaining trust funds should be taken out of the trusts of the settlements. With regard to the balance of the trust funds under the 1912 settlement, I think the learned judge rightly exercised his discretion in ordering that to be paid out to the husband. He was the ultimate beneficiary under that settlement and the other beneficiaries had been adequately provided for by the fresh settlement directed to be made in favour of the injured spouse and her child. As regards the balance of the trust funds under the 1920 settlement, however, I think that there was in the circumstances no justification for dealing with it in the manner directed by the learned judge. The fund remaining under that settlement amounted to about £62,000 and the learned judge dealt with that fund by directing part of it (namely, a sum of not less than £40,000) to be settled on trusts substantially different from the trusts of the 1920 settlement and the rest of it (amounting to upwards of £20,000) to be paid out to the husband.

The only reasons that I can discover from the learned judge's judgment for adopting that course were (i) that under the trusts of the 1920 settlement there was, in cl. 8, a power to the trustees notwithstanding any of the trusts thereby declared to pay to the husband at his request any sum not exceeding in the whole £20,000, and the learned judge seems to have considered that in those circumstances it would not be unfair to order a sum of approximately £20,000 to be paid to the husband free from the trusts of the settlement. (ii) As regards the £40,000 the learned judge seems to have considered that the power conferred by the settlement on the trustees to make a new settlement on the husband in the case of a subsequent marriage justified an order directing a new settlement to be executed as the husband had married again. In my opinion, neither of those reasons affords a sufficient justification for disturbing the trusts of the 1920 settlement more than is necessary for the purpose of making a provision for the injured spouse and her child. On principle there is no reason why, on varying a settlement under s. 192, any further variation should be made than such a variation as necessarily or reasonably flows from the provision which is being made for the wife and child. In the circumstances of the present case and having regard to the principle I have stated I am of opinion that the only variations which ought to be made as regards the funds remaining subject to the trusts of the 1920 settlement are variations which would have the effect of extinguishing the beneficial interests therein of the wife and the child. As regards the wife, she has an interest in the income of the trust fund under cl. 3 of the settlement and she also has a power under cl. 4 in default of appointment by the husband to appoint the capital and the income of the fund as thereby provided. As regards both those interests I am of opinion that it follows from the provision made for her by the fresh settlement that they ought to be extinguished as if she were dead. As regards the child, she is a beneficiary under the discretionary power conferred by cl. 3 as to the income and under cl. 4 she is interested in the capital of the fund both as an object of the special powers of appointment and in default of appointment. As regards the child's interest in the income, I think that should be extinguished. As regards her interest in the capital, I think that her interest in default of appointment should be extinguished, but not her interest as an object of the special powers of appointment. It may well happen that her father will have no issue by his present or by any future marriage and that he may for that or any other reason desire to appoint to his existing child notwithstanding what has happened. There is only one other matter which, in my opinion, follows upon the order which has been made for the provision of the wife and child: namely, that the estate of Mrs.

A Ball-Greene ought to be released from the covenant as to the £1,000 a year and the £500 a year contained in the settlement of 1912.

Subject to the variations I have indicated the proper course is to leave the 1920 settlement undisturbed as regards the balance of the trust funds. In the result, I have come to the conclusion that the learned judge was wrong in principle in putting an entire end to the 1920 settlement and thus displacing it to a far greater B extent than was necessary for the purpose of exercising the powers contained in s. 192. I, therefore, agree that the appeal should be allowed.

RUSSELL, L.J.—I am of the same opinion. The learned judge, by his order made on March 26, directed that there should be transferred to new trustees substantially the greater part of the 1912 settlement funds and also in addition to that C a sum of £24,000 or £25,000 out of the 1920 settlement funds, and he directed a settlement of those funds in the hands of the new trustees upon trusts which I need not state in detail, but they were for the benefit of the wife and child of the first marriage with an ultimate trust in the event of the child not taking, for Mr. Prinsep. That was considered by the judge to be the proper provision to be made for the benefit of the first wife and the daughter, Jane Prinsep. He made that D provision quite independently of any consent by Mr. Prinsep, and as I read his judgment, he would have made it in the teeth of opposition by Mr. Prinsep. That was a perfectly proper order to make, in my opinion, and, if that had been the whole of the order, provision would, no doubt, then have been made for extinguishing the interests of the child and the first wife under the ante-nuptial settlement. But in view of the order which was in fact made, there was no necessity for that E provision, because the order in fact provided for the handing over of the balance of all the funds to Mr. Prinsep. That part of the order which was made on July 1 was this: having taken out a portion of the funds of the 1920 settlement for the purpose of making provision for the first wife and the child, the learned judge then took a further £40,000 out of that settlement and directed it to be transferred to the Public Trustee to be held upon certain trusts indicated, and as to the balance F which amounted in round figures to some £23,000, he directed that that should be paid out and out to Mr. Prinsep.

Let me indicate in a few words what the effect of that order is. That part of the order confers no benefit upon the first wife or the child. It operates solely for the benefit of Mr. Prinsep, and it operates for his benefit at the expense of third parties. It operates to cut out altogether the interests of the Frederick G settlement beneficiaries and those of the Nicholas settlement beneficiaries under cl. 3 (1) of the 1920 settlement. It cuts out their interests as objects of the discretionary trusts of income, and that cutting out applies both as to the £40,000 and as to the balance of £23,000. It applies to the whole £63,000. Such a proceeding is, no doubt, justifiable for the purpose of providing means of support for the first wife and child; but, in my opinion, it is quite unjustifiable except for that H purpose. Secondly, that order operates to cut out altogether the interests of the same people under the ultimate trusts under cl. 9. That, again, applies both as to the whole £40,000 and as to the balance of £23,000. Thirdly, it operates to cut out the interests of all Mr. Prinsep's unborn children and issue in regard to the balance of £23,000 handed over to him. There is no necessity for making any such order. There can be no doubt that if the balance of £63,000 is allowed to I remain subject to the trusts of the 1920 settlement, there is ample provision for the maintenance and support both of Mr. Prinsep himself and of any future wife or children of his. There is that large sum left remaining which, under the trusts of the 1920 settlement, is available for their support and maintenance. The learned judge in his judgment, having stated perfectly correctly, in my opinion, the principle on which the court proceeds, and ought to proceed, in these cases, himself without justification entirely departs from it—the principle which he states correctly in the following words, "Primâ facie settlements ought not to be interfered with further than is necessary for that purpose," the purpose being to make proper

provision for the injured spouse and the children of the marriage. It seems to me that, if the learned judge had acted strictly in accordance with that principle, what he ought to have done was, having made proper provision for the injured spouse and the child out of the funds of the first settlement and out of a portion of the funds of the 1920 settlement, to leave undisturbed in the possession of the trustees of the 1920 settlement the whole balance then remaining of the 1920 settlement funds, and that is the order which I think this court ought to make.

Appeal allowed.

Solicitors: *Radcliffes & Hood, St. Barbe, Sladen & Wing*; *Theodore, Goddard & Co.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

NEWSHOLME BROS. *v.* ROAD TRANSPORT AND GENERAL INSURANCE CO., LTD.

[Court of Appeal (Scrutton, Greer and Russell, L.JJ.), June 13, 14, 17, July 1, 1929]

[Reported [1929] 2 K.B. 356; 98 L.J.K.B. 751; 141 L.T. 570; 45 T.L.R. 573; 73 Sol. Jo. 465; 34 Com. Cas. 330]

Insurance—Agent—No authority to fill in proposal form—In so doing agent of proposer—Untrue statements in proposal form—Notice to agent of untruth—Acceptance of premium—Liability of insurers.

A proposal form was handed by the agent of an insurance company to a partner in the plaintiff firm who was minded to insure a motor omnibus, the property of the partnership, against damage by accident and third-party risks. In answer to three of the questions set out in the proposal form the partner gave the correct answers orally to the agent, but the agent wrote those answers on the form incorrectly, either because he had misunderstood or forgotten what the partner had told him or intentionally to earn a commission which otherwise he might not receive. The partner then signed the form, which contained a warranty that the answers were true and a statement that the warranty was promissory and should be the basis of the contract between insurers and assured. The company issued a policy and accepted a premium. An accident having occurred, the plaintiffs claimed to be indemnified under their policy, but the company repudiated the claim on the ground that the written proposal contained untrue statements.

Held: the agent was not authorised by the company to fill in the proposal form and in doing so must be regarded as the agent of the proposer, and knowledge of the agent that the answers to certain questions in the form were not true was not notice to the company; the written contract alone could be looked at to ascertain the terms of the agreement between the parties; and, therefore, the company was not liable to meet the plaintiffs' claim.

Per Greer, L.J.: The acceptance of the premium cannot be regarded as an agreement to vary the contract by inserting in it a promise to indemnify the assured if the statements contained in the proposal form are untrue, nor can the company be said to be estopped by the receipt of the premium from relying on the contract under which the premium was paid.

Notes. Considered: *Dunn* v. *Ocean Accident and Guarantee Corpn., Ltd.* (1933), 50 T.L.R. 32; *Evans* v. *Employers' Mutual Insurance Association, Ltd.*, [1935]

All E.R.Rep. 659. Referred to: *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293.

As to the effect of a proposal and the knowledge of agents, see 22 HALSBURY'S LAWS (3rd Edn.) 197–205; and for cases see 29 DIGEST 54 et seq.

Cases referred to:

(1) *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q.B. 534; 61 L.J.Q.B. 792; 57 J.P. 116; 8 T.L.R. 566; 36 Sol. Jo. 502, C.A.; 29 Digest 60, *200*.

(2) *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516; 71 L.J.K.B. 79; 18 T.L.R. 119; 49 Sol. Jo. 105; sub nom. *Re Biggar and Rock Life Assurance Co.*, 85 L.T. 636; 29 Digest 54, *170*.

(3) *Levy* v. *Scottish Employers' Insurance Co.* (1901), 17 T.L.R. 229, D.C.; 29 Digest 57, *184*.

(4) *New York Life Insurance Co.* v. *Fletcher* (1886), 117 U.S. 519.

(5) *M'Millan* v. *Accident Insurance Co., Ltd.*, 1907 S.C. 484; 44 Sc.L.R. 334; 14 S.L.T. 710; 29 Digest 59, *191 ii*.

(6) *Life and Health Assurance Association, Ltd.* v. *Yule* (1904), 6 F. (Ct. of Sess.) 437; 41 Sc.L.R. 316; 12 S.L.T. 690; 29 Digest 55, *d*.

(7) *Taylor* v. *Yorkshire Insurance Co.*, [1913] 2 I.R. 1; 29 Digest 60, *200 xviii*.

(8) *Manchester Trust* v. *Furness*, [1895] 2 Q.B. 539; 73 L.T. 110; 44 W.R. 178; 8 Asp.M.L.C. 57; 1 Com. Cas. 39; 14 R. 739; sub nom. *Manchester Trust, Ltd.* v. *Turner, Withy & Co.*, Ltd., 64 L.J.Q.B. 766; 11 T.L.R. 530, C.A.; 20 Digest 319, *659*.

(9) *Blackburn, Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531; 57 L.J.Q.B. 114; 57 L.T. 730; 36 W.R. 449; 3 T.L.R. 837; 6 Asp.M.L.C. 216, H.L.; 29 Digest 174, *1308*.

(10) *J. C. Houghton & Co.* v. *Nothard, Lowe and Wills, Ltd.*, [1928] A.C. 1; 97 L.J.K.B. 76; 138 L.T. 210; 44 T.L.R. 76, H.L.; 9 Digest (Repl.) 691, *4558*.

(11) *Re Hampshire Land Co., Ltd.*, [1896] 2 Ch. 743; 75 L.T. 181; 45 W.R. 136; 12 T.L.R. 517; 40 Sol. Jo. 654; 3 Mans. 269; sub nom. *Re Hamshire Land Co., Ltd., Ex parte Portsea Island Building Society*, 65 L.J.Ch. 860; 9 Digest (Repl.) 691, *4557*.

(12) *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; 2 Nev. & M.K.B. 28; 2 L.J.K.B. 127; 110 E.R. 713; 17 Digest (Repl.) 313, *1201*.

(13) *Wing* v. *Harvey* (1854), 5 De G.M. & G. 265; 2 Eq. Rep. 533; 23 L.J.Ch. 511; 23 L.T.O.S. 120; 18 Jur. 394; 2 W.R. 370; 43 E.R. 872, L.JJ.; 29 Digest 56, *177*.

(14) *Ayrey* v. *British Legal and United Provident Assurance Co.*, [1918] 1 K.B. 136; 87 L.J.K.B. 513; 118 L.T. 255; 34 T.L.R. 111; 29 Digest 61, *203*.

Appeal from an order of ROWLATT, J., on a Special Case stated by an arbitrator under s. 7 of the Arbitration Act, 1889 [see now Arbitration Act, 1950, s. 21].

By a policy of insurance, dated Feb. 25, 1927, the defendants, the Road Transport and General Insurance Co., Ltd., insured the plaintiffs, Newsholme Bros., who were proprietors of a motor omnibus, against damage to the omnibus and third-party risks. On Aug. 3, 1927, damage was caused to the motor omnibus by fire and several of the passengers were injured, and the plaintiffs claimed to be indemnified under their policy in respect of the damage, claims and costs. The insurance company having refused to pay upon the ground that the proposal form and the declaration upon which the policy of insurance was issued and which were by express terms incorporated in the policy, contained incorrect statements, and that information had been withheld which it was material for the company to know, the matter went to arbitration. There it appeared that the agent of the company who had dealt with the plaintiffs' insurance was one Willey, and that the proposal form was signed by A. Newsholme, a partner in the plaintiff firm, but the written answers had been filled in by Willey. The form contained the usual warranty that

the answers to the questions were true, and that they formed the basis of the contract. A

The arbitrator made his award in the form of a declaration of liability subject to a Case Stated. He found that the answers set out on the form were not true or correct, but that Willey was told the true facts, and that the insurers had through him full knowledge of the true facts, and were, therefore, liable under the policy. The question for the opinion of the court was whether the arbitrator had come to B a right determination in point of law. ROWLATT, J., held that in filling up the form Willey was the agent of Newsholme, and that the written contract could not be varied by the oral statements of Newsholme to Willey, and, therefore, the company had a good defence to the claim. The plaintiffs appealed.

J. Willoughby Jardine, K.C., and *J. Neal* for the plaintiffs.
Schiller, K.C., and *Paley Scott* for the insurers. C

Cur. adv. vult.

July 1. The following judgments were read.

SCRUTTON, L.J.—This appeal from ROWLATT, J., raises the kind of troublesome question which inevitably arises from the course of business of accident and life insurance companies, as contrasted with that of marine insurance companies. D The contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk. The marine underwriter sits still and asks no questions; a proposal for insurance is brought to him by a broker, to whom he pays commission, but who is the agent of the assured. The assured and his broker must disclose everything they know material to the E risk. The knowledge of the broker is not the knowledge of the underwriter, and the broker is bound to communicate it to the underwriter. I deal hereafter with his duty to his own principal. The practice of life and accident insurers is different; they employ an agent to canvass and procure proposals for them. In general, he cannot make contracts binding them, but only submits proposals for their consideration. Unlike the marine underwriter, they do ask questions; they give their F agent a proposal form containing a number of questions on matters which they think material, and he is expected to submit that proposal form with the answers of the proposed assured filled in and signed by the assured. The proposal form contains a promise, a warranty, that the truth of the proposer's answers shall be the basis of the contract, and is signed by the proposer. It is inevitable in such a course of business that the agent employed to get proposals will sometimes fill in G or assist in filling in the answers on the form, and, if they are inaccurate, that the proposer, though he has signed the promise that those answers are true, alleges that the fault is that of the agent of the insurance company who filled in the answers, and claims, not that he can rescind the contract, but that he can rely on it without being prejudiced by the inaccuracy of the answers he has signed as true. There then comes a conflict, which is visible in the authorities cited to us, between H the desire to hold the insurer, who employs an agent to bring him business, liable for anything that agent does in procuring business, and, on the other hand, the contention that a man who signs a promise that certain written statements are true and the basis of his contract, which statements, if he read them before signing, he would know to be untrue, cannot claim to vary his contract by omitting that promise and mis-statement. The insurance companies also run the risk of the I contention that matters they do not ask questions about are not material, for, if they were, they would ask questions about them.

The facts in the present case appear in an award stated by an arbitrator in the form of a Special Case, as supplemented by further information given by the arbitrator as the result of a reference back to him by the court. Newsholme Bros. are motor-bus proprietors; Mr. Willey is an agent of the insurance company. On Jan. 18, 1927, Mr. A. Newsholme, a partner in the firm, signed a proposal for an insurance of a motor omnibus. The proposal form contained a warranty:

A "We hereby warrant that the answers stated above are true, that we have withheld no information which might influence the acceptance of this proposal, and that the warranty hereby given shall be held to be promissory, and shall be the basis of the contract between us and the company. We agree to accept a policy in the current form now issued by the company to cover risks of the nature insured, and subject to the terms, conditions and exceptions, contained B in such current form of policy whereof we shall be deemed to have notice, and we agree to pay the premium thereon."

The form also contained fourteen questions to be answered, and answers were included in the form signed by A. Newsholme. The arbitrator finds that the answers to questions 7, 8 and 14 "were not true or correct, and thereby information was withheld from the insurance company which might have influenced the accep- C tance of the proposal." That finding is in the terms of the warranty.

The questions and answers were as follows:

"(7) Have you previously been insured for motor risks? If so, give name of company." Answer: "Atlas." "(8) Have any insurers at any time in respect of any motor vehicle: (a) declined your proposal, or cancelled or not invited renewal of your policy?" Answer: "No." "(b) required increased premium D or special conditions on renewal, or required you to carry the first amount of each loss?" Answer: "No." "(14) State hereunder particulars of all claims made or accidents which have occurred in connection with any motor vehicles owned by you, or under your control, during the past two years, whether insured or not."

E Then a schedule is filled in stating certain accidents. The arbitrator does not find what the true answers would have been; the case must proceed on the basis that these answers were untrue in material respects. The arbitrator finds that the answers were in the handwriting of Willey, the insurance agent, and that Newsholme apparently left the matter entirely in the hands of Willey. He finds that Willey was told the true facts by Newsholme, and that the reason for his not writing down F the true facts did not appear. It must be either: (i) that he unintentionally wrote untruths, because (a) he did not understand Newsholme's communication to him, or (b) forgot what he was told, or (c) did not understand the questions asked; or (ii) that he intentionally wrote down untrue facts to earn his commission. Whichever alternative is the truth, Willey was writing the answers as the amanuensis of Newsholme, whose answers they were to be; and after Willey had written the G answers, Newsholme signed the proposal, and must be taken to have promised the truth of what he signed. I do not understand how in receiving the information as to the answers and in writing those answers Willey can be taken to be anything else than the agent of the person whose answers they are to be, and he must be taken to have written them and promised they were true. I can understand a contention that Newsholme was induced to sign by the representation of Willey H that these answers were what the insurance company required, though such a contention would be difficult to sustain in view of Newsholme's knowledge that the answers were untrue; but the result of such a contention, if sustained, would be rescission of the contract, not its enforcement with the omission of the untrue answers.

The arbitrator's view appears to rest on waiver of the untruth by acceptance of I the premium, with knowledge of the untruth, the knowledge of Willey being the knowledge of the insurance company. This requires a consideration of the position of Willey, as to which the original Case contained para. 12:

"The facts as to the position of the said J. Willey are as follows: He was appointed an agent by writing under the hand of the agency manager of the insurance company, and was supplied by the insurance company with proposal forms. His duties were to procure persons to take out insurance policies with the insurance company and to obtain from them duly filled in and signed proposal forms. He was authorised by the insurance company to receive

premiums on their behalf. He was not authorised to give a cover note or enter into any policy of insurance. I do not find that the insurance company authorised Willey to fill in the proposal forms, or that they were aware that he had in fact done so."

When the Case was first before this court, we thought it unsatisfactory that, if there was a written appointment which had not been before the arbitrator, we should not know what it was. We did not understand what the arbitrator meant by the statement that Willey's duty was to procure proposal forms "duly" filled in, and we did not quite understand whether the last sentence of para. 12 was a positive or only a negative finding. We, accordingly, sent the Case back to the arbitrator asking him to answer the questions of the court. The relevant extract from the judgment of this court is as follows:

"The matter will go back to the arbitrator with a request on the part of the court, that if he is able, consonant with his other judicial duties, to answer the questions of the court, he will kindly do so. The matters on which the court wants information are: What was the writing, if any—or rather, not 'if any,' because he says that there was writing—what was the writing under which Willey was appointed: if it appears from the writing, the application and the answer, that he was appointed upon the usual terms and conditions, what were the usual terms and conditions so far as relevant to the matters in dispute in the case: and to ask him to expand a little what he meant by the word 'duly' filled in, and to state a little more precisely the exact nature of his finding in the last sentence of para. 12, whether it is merely a negative finding saying: 'I do not find anything' or whether it is in any sense, and what sense, a positive finding. Then the matter will come back to this court when the arbitrator has dealt with the matter."

I regret to say that, in my opinion, this court has not obtained that assistance from the arbitrator for which we asked and for which, should we in the future ask him in his capacity as county court judge, we shall be entitled to require. He has, apparently, declined to report in writing the answers to the questions we asked, but refers us to forty-nine pages of shorthand notes for the information we want. As to the "written appointment," he forwards us the application and appointment, which is "as agent on the usual terms and conditions." We had seen this document at the first hearing, but it was disputed whether it was really the "appointment." As we had seen it, we asked the arbitrator, if he found this was the appointment, to tell us what the usual terms and conditions were relevant to the matter in dispute, namely, the duty of the agent as to filling up the proposal form. This the arbitrator has declined to do, for reasons which, as far as I can understand them, are quite insufficient, but we are left with a statement that the arbitrator does not find that Willey had authority from the company to fill in the proposal forms, but that his duty was to obtain duly filled in and signed proposal forms. Asked to explain what he means by "duly" he gives an explanation that he meant that the agent must, as far as he can, see that the answers were sound and correct, but he is not to investigate them; the answers must be regular, as far as the agent knows. As a matter of law, I do not understand this; the proposal is the proposal of the assured, the responsibility of declaring it true is his; how can it be the duty of the company, through their directors or agents, to the assured, to see that the assured makes correct statements of fact, when he promises them they are true, especially when the arbitrator declines to find that the agent had authority from the company to fill in the form, or what the usual conditions of his appointment in this matter were. On the Case as originally stated, without the subsequent explanations, Rowlatt, J., took the view that Willey was the agent of Newsholme in filling up the proposal, and that Newsholme promised in writing that what Willey wrote and Newsholme signed was to be the basis of the contract, and that in these circumstances the contract could not be varied by oral statements from Newsholme to Willey. He, therefore, decided that the arbitrator came to a wrong decision in

law when he held that the knowledge of Willey was the knowledge of the company. Newsholme Bros. appealed.

The difficulty on the authorities arises from the alleged conflict between the decisions of the English Court of Appeal in *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.* (1) and the decisions of WRIGHT, J., in *Biggar* v. *Rock Life Assurance Co.* (2) and of WILLS and PHILLIMORE, JJ., in *Levy* v. *Scottish Employers' Insurance Co.* (3). It is more important that this conflict should be determined because: (i) WRIGHT, J., acted on and followed a decision of the Supreme Court of the United States in *New York Life Insurance Co.* v. *Fletcher* (4), the reasoning in which is not easy to reconcile with *Bawden's Case* (1); (ii) the Scottish courts in *M'Millan* v. *Accident Insurance Co., Ltd.* (5) and *Life and Health Assurance Association, Ltd.* v. *Yule* (6) have declined to follow *Bawden's Case* (1) and have expressed their preference for *Biggar's Case* (2) and *Fletcher's Case* (4); (iii) the Irish courts by the mouth of PALLES, C.B., have expressed a similar preference in *Taylor* v. *Yorkshire Insurance Co.* (7). *Bawden's Case* (1), to quote the present Lord Chancellor [LORD SANKEY], who, as a lord justice, was present at the first hearing of the present case, is, therefore, a very "distinguished" case.

The facts in *Bawden's Case* (1) were as follows. Bawden was an illiterate man, almost unable to read or write, but able to write his name. He had only one eye. Quin was a local agent of the insurance company. No evidence was given as to the extent of his authority, but the court "gathered from what he did" that he had no authority to make contracts, but that he had authority to negotiate and settle the form of the assured's proposal for insurance, and he was supplied with forms for that purpose. LORD ESHER, M.R., used the phrase "negotiate and settle the terms of the proposal"; LINDLEY, L.J.: "He was the person deputed by the company to receive the proposal and to put it into shape"; KAY, L.J.: "It was his duty to get the form of proposal filled up and signed by the proposer, and to see that this was done correctly." It is not clear on what evidence the learned lords justices came to this finding. The proposal form contained a number of questions, the answers to which were filled in by Quin at the dictation of Bawden, and these answers were all correct. It also contained a printed declaration, the material words of which were:

> "I . . . have no physical infirmity, nor are there any circumstances that render me peculiarly liable to accidents. . . . I agree that the statements contained in this proposal shall form the basis of the contract between me and the company."

It also contained a marginal note against this clause: "If not strictly applicable, particulars of any deviation must be given at back." No particulars as to his one-eyed condition were given at back by either Quin or the assured, but Bawden signed his name to the proposal, and Quin forwarded it to the company who accepted it. Quin knew at the time he did so that Bawden had only one eye. The policy was renewed from time to time, and Bawden met with an accident which destroyed the sight of the remaining eye. The court held that Quin's knowledge was the knowledge of the company, who must, therefore, be taken to have contracted with a man who, to their knowledge, was a one-eyed man. The policy insured £500

> "if the direct effect of [the injury by accident] shall, within three calendar months of the occurrence of such injury, occasion permanent total disablement,"

e.g., "irrecoverable loss of sight in both eyes"; and £250 if it caused complete and irrecoverable loss of sight in one eye. The court gave the plaintiff £500, though it is difficult to see how the accident within three months caused loss of sight in both eyes; the loss of sight in one eye had been caused long before the accident. The court held that the knowledge of the agent was the knowledge of the company, and

that the company, therefore, could not rely on the declaration of the assured that he had no physical infirmity and that this was the basis of the contract. It will be noted that the agent made no inaccuracy in filling up the proposal, unless it was that he did not enter particulars of deviation on the back. KAY, L.J., says that it was his duty to the company to do this, but the other two judges do not mention the point. KAY, L.J., is also the only judge who says that it was Quin's duty to see that the proposal was filled up "correctly"; LINDLEY, L.J., uses the phrase "put it into shape," and LORD ESHER says "negotiate and settle." I find considerable difficulty in seeing how a person who fills up the proposal can be the agent of the person to whom the proposal is made. A man cannot contract with himself. A. makes a proposal to B. by signing it, and communicating it to B. If A. gets someone—C.—to fill up the form for him before he signs it, it seems to me that C. in doing so must be the agent of A. who has to make the proposal, not of B. who has to consider whether he will accept it. If C. is also the agent of B. to procure proposals, and induces A. to make a proposal by representing that a certain form of proposal contains the particulars that B. wants to know, when it does not, the remedy seems to be to rescind the written contract procured by misrepresentation, not to alter the written contract and claim the benefit of it as altered.

This is the line of criticism contained in the Scottish and Irish cases. In *M'Millan's Case* (5) LORD SALVESEN doubts the inference that Quin had authority to negotiate and settle the proposal, but said that, if he had, there was a contract in writing under the signature of the proposer. He cites the view of the Lord Justice Clerk in *Yule's Case* (6), where *Biggar's Case* (2) was followed, who says:

> "I hold that in filling up the paper for the defender at his request he was acting for him. Further, I hold that if the defender did not choose to see that there were no mis-statements in the proposal before he signed it he must be held responsible for it as being his."

In *M'Millan's Case* (5) the Lord Justice Clerk says (1907 S.C. at p. 491):

> "The case of *Bawden* (1) presents more difficulty. This court is of course not bound by it. I may be permitted to say that I do not follow the reasoning contained in the judgment. But it is unnecessary, as I think, to say more than that it is inconsistent with the decision of this court in *Yule* (6), a later decision. I agree with the Lord Ordinary in thinking that the court in the case of *Bawden* (1) failed sufficiently to consider that they were dealing with a written proposal as the basis of a contract. LORD ESHER says that 'the proposal must be construed as having been negotiated and settled by the agent with a one-eyed man. In that sense the knowledge of the agent was the knowledge of the company.' This seems to me to be erroneous. The knowledge of the company was the knowledge of the directors, who were the only persons who could 'settle' the contracts, and they had nothing before them but the proposal, the answers in which they dealt with as being true. There was therefore no knowledge by the company that the insured had only one eye. It would, I think, be most unjust to hold that an insurance policy was valid because a servant of the insurance company knew a fact which was contrary to a statement in the proposal signed by the person seeking the insurance, although it was certain that the policy would never have been granted if the insured had seen to it that the questions put to him were answered truthfully for the information of those who alone could grant a valid policy."

In the Irish case—*Taylor* v. *Yorkshire Insurance Co.* (7)—the point hardly arose, as the knowledge of the agent, which contradicted the answers which he filled in, and which the proposer signed, was not derived from the course of his agency for the defendant company, but from his previous agency for another company; but PALLES, C.B., says ([1913] 2 I.R. at p. 16):

"In *Bawden's Case* (1) the plaintiff was an illiterate man, and, to the knowledge of the defendants' agent, was almost unable to read or write, although he could write his name. He had but one eye. Quin, the company's agent, saw this when the plaintiff applied to him to be insured. The form of the proposal was a complicated one, and contained a note: 'If not strictly applicable, particulars of any deviation must be given at back'; which may well be taken to have been a direction, not to the proposer, but to the agent. LORD ESHER, M.R., rested his judgment on the imputation to the company of the knowledge acquired by their agent during the negotiations for the policy, that the proposer had but one eye. LINDLEY and KAY, L.JJ., however, in addition to relying on this imputation of notice, held that a duty lay upon Quin, in reference to the filling up of the proposal, LINDLEY, L.J., stating it was his duty 'to put it into shape' and KAY, L.J., that it was his duty to see that it was filled up correctly, and to have written at its back that the proposer had but one eye—a fact which rendered the form not strictly applicable. Thus, one lord justice expressly and certainly, and the other probably, bases the duty which it is alleged makes the company's agent an agent of the proposer to fill up the answers, on the special circumstances of that particular case. This is the view taken of it by WILLS and PHILLIMORE, JJ., in *Levy* v. *Scottish Employers' Insurance Co.* (3). Agreeing, as I do, with them, I hold not only that, as a general rule, no such duty devolves upon an insurance company's agent, but that the expressions relied on do not indicate an opinion that it does. On the contrary, I hold with WRIGHT, J., that although 'he may have been an agent to put the answers in form,' the agent of an insurance company cannot be treated as their agent to invent the answers to the questions in the proposal form; and that, if he is allowed by the proposer to invent the answers, and to send them as the answers of the proposer, the agent is, to that extent, the agent, not of the insurance company, but of the proposer. In arriving at this conclusion, I have not overlooked the fact that both in *Biggar* v. *Rock Life Assurance Co.* (2) and *Levy's Case* (3) there was a provision in the proposal that verbal statements to the agent should not be imputed to the company; but, in relation to this question of authority, as distinct from that of imputations of notice, this is immaterial. I have read, with pleasure and advantage, the judgment of FIELD, J., in delivering the unanimous opinion of the Supreme Court of the United States, in *New York Life Insurance Co.* v. *Fletcher* (4), relied on by WRIGHT, J., which well repays perusal."

In *Fletcher's Case* (4) in the Supreme Court of the United States, the agent, given correct information by the assured, filled up the answers untruly, and the proposer signed the proposal without reading it. The Supreme Court held that the assured might have cancelled the policy as obtained by false representations, but could not, having signed it without reading it, sue on it and escape the consequences of its containing false statements. The policy signed contained a provision that only statements in writing were material to affect the rights of the company. The court did not allow the fact that the company's agent filled in the form or heard the true oral statements of the assured to affect the rights of the company.

This reasoning was approved and applied by WRIGHT, J., in *Biggar's Case* (2). In that case the agent of the company filled in answers, false to his knowledge, to the questions in the proposal form, and the assured signed the form without reading it and without knowledge of the untrue answers. It contained an agreement that the above statements should form the basis of the contract, and the provision that the knowledge of the local agent should not be notice to the company in spite of any acceptance of premium by them. The premium was paid to the agent and received by the company. WRIGHT, J., held that the agent in filling up the form was the agent of the proposer, and the proposer, having signed the agreement that the truth of the statements in the form was the basis of the contract, could not recover against the company if they were untrue. He adopted the reasoning of the

Supreme Court in *Fletcher's Case* (4). He does not expressly state why he does not follow *Bawden's Case* (1), but I think it is that, as the agent was acting both in fraud of the company and of the proposer, his knowledge could not be imputed to his employers.

In *Levy's Case* (3) the agent inserted incorrect answers in the proposal form. The proposer signed the usual clause that the truth of the statement was the basis of the contract, which also contained a clause that verbal statements to the agent were not binding on the company. The agent said that the proposer would be insured right away. The court held that the agent had no authority to make a verbal contract to differ from the terms of the written document, and declined to follow *Bawden's Case* (1), also relying on the memorandum in that case as to endorsement of variation on the back of the proposal. These cases and *Bawden's Case* (1) have been in a number of reported cases before judges of first instance, discussed and followed, sometimes on the lines of *Bawden's Case* (1), sometimes on the lines of *Biggar's Case* (2).

In my view, the important question for the decision of the present case is whether the knowledge of the agent acquired in filling up the proposal for the assured is to be taken as the knowledge of the company. If the person having authority to bind the company by making a contract in fact knows of the untruth of the statements and yet takes the premium, the question may be different. Even then I see great difficulty in avoiding the effect of the writing signed by the proposer that the truth of the statements is the basis of the contract. But where the person contracting for the company has no actual knowledge, but only constructive notice, the difficulties of the proposer are greater. In commercial matters, the doctrine of constructive notice is not favoured: see the explanation by LINDLEY, L.J., in *Manchester Trust* v. *Furness* (8). In *Blackburn, Low & Co.* v. *Vigors* (9) a broker employed to effect an insurance heard of a fact affecting the risk, and did not tell his principal. That broker did not effect that insurance, but, later, the principal did effect an insurance on that risk. On a loss occurring, the underwriters alleged that the knowledge of the first broker was the knowledge of the principal, and as the principal had not disclosed the fact he must be taken to have known the insurance was void. The House of Lords held that this contention was erroneous: that while it was true that, if the first broker had effected a policy, he would have been bound to disclose his actual knowledge to the underwriters, he was not so bound to disclose his knowledge to his principal that his principal, though it was not disclosed, must be taken to know it. Another objection to this imputation of constructive knowledge may be found in the recent decision of the House of Lords in *J. C. Houghton & Co.* v. *Nothard, Lowe and Wills, Ltd.* (10), where VISCOUNT SUMNER points out that where knowledge is to be imputed to an artificial person, in the first place it must be the knowledge of the directors who deal with the company's rights, and, in the second place, the knowledge of a person who acquires it in a breach of duty, and is guilty of a breach of duty in respect to it, and is not to be imputed to a company to whom, from the hypothesis, he would be very unlikely to disclose it in fact. He cites *Re Hampshire Land Co. Ltd.* (11), where VAUGHAN WILLIAMS, L.J., declines to hold that the agent's "knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company."

I find it difficult to reconcile these principles, laid down in the highest tribunal, with the decision in *Bawden's Case* (1). The decision of the Court of Appeal on fact is not binding on any other court, except as between the same parties. When the decision is that from certain facts certain legal consequences follow, the decision is, I think, binding on the Court of Appeal in any case raising substantially similar facts. In *Bawden's Case* (1) the agent did not fill up any answer incorrectly. He did not put on the back of the proposal any statement that the assured was a one-eyed man; one member of the court held that by reason of the note on the form, it was his duty to do this. There is no such note here. The court had no evidence as to the actual authority, but found what it was from what the agent did. The

assured who signed the declaration was an illiterate man who could hardly read. In the present case the arbitrator produces the actual authority, but will not find that Willey had authority from the company to fill up the form and will not find what the usual terms and conditions are. The inaccuracy relied on is on the form as filled up for the proposer by Willey, and not on the form as signed by the proposer, Willey taking no part in the inaccuracy except that he knows of it by his own observation, apart from statements made to him by the proposer to enable him to complete the proposer's form for the proposer. It appears to me that the facts in this present case are not substantially similar with those in *Bawden's Case* (1) so as to make the conclusions of law drawn from them in the latter case binding on this court, even if those conclusions are not inconsistent with the two decisions in the House of Lords to which I have referred. In my view, the decision in *Bawden's Case* (1) is not applicable to a case where the agent himself, at the request of the proposer, fills up the answers in purported conformity with information supplied by the proposer. If the answers are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed. In my view, the judgment of ROWLATT, J., was right and the appeal must be dismissed with costs.

GREER, L.J.—I am of the same opinion. I think the judgment of ROWLATT, J., was right on the ground that upon the facts stated by the arbitrator in the Special Case, and afterwards when the award was remitted to him for a further report, Newsholme Bros. had not established any right to indemnity under the policy on which they made their claim in the arbitration. It is a little difficult to discover from the shorthand note exactly what the arbitrator decided on the questions submitted to him by this court, but I think it must be taken that he found as a fact that the agent Joshua Willey, referred to in the case, was appointed agent on the terms of his application marked "J.A.G." and dated April 26, 1925, which was accepted by the insurance company by their letter of May 5, 1925, marked "E.J.A.G." He was, accordingly, appointed an agent of the company upon the usual terms and conditions at the remuneration mentioned in the document "E.J.A.G.," but the arbitrator has not found, in fact he has declined to find, what were the usual terms and conditions referred to in the agent's said written application of April 26, 1925. It is, therefore, clear that the plaintiffs did not prove before the arbitrator what the terms and conditions of Mr. Willey's appointment were, and that all that was proved was that he was appointed an agent to obtain business for the company in consideration of the commission mentioned in the document "E.J.A.G." In para. 12 of the award the arbitrator says that the facts as to the position of the said J. Willey are:

> "He was appointed an agent by writing under the hand of the agency manager of the insurance company and was supplied by the insurance company with proposal forms. His duties were to procure persons to take out insurance policies with the insurance company and to obtain from them duly filled in and signed proposal forms. He was authorised by the insurance company to receive premiums on their behalf. He was not authorised to give a cover note or enter into a policy of insurance. I do not find that the insurance company authorised Willey to fill in the proposal form, or that they were aware that he had in fact done so."

It is difficult to understand how, in the absence of any evidence as to what the usual terms and conditions were, the arbitrator was able to enumerate his duties, as stated in para. 12, and I think, in order to decide this case on the information now before the court, para. 12 must be read as if it stated that Mr. Willey was appointed agent on the usual terms and conditions, but that no evidence was given as to what those terms and conditions were. No doubt, he was the agent of the company to obtain signed proposal forms and send them on to the company. Possibly he was authorised to receive premiums on behalf of the company. The arbitrator finds that he was not authorised to give a cover note or enter into any policy of insurance. It is clear there was no express authority proved which would entitle him to give a cover note or enter into a policy of insurance, and in the absence of such authority it seems beyond question that an agent to procure signed proposal forms is not authorised to give cover notes or enter into any policy of insurance. The learned arbitrator decided, apparently without any evidence, that it was Mr. Willey's duty to obtain from proposing insurers forms truthfully, that is, correctly, filled in. He found that the proposal form signed by Mr. A. Newsholme for the plaintiffs contained in answer to questions 7, 8 and 14, statements that were not in fact true, but that true information on those points had been given to Mr. Willey.

The way in which the policy came into existence is as follows. Mr. Willey, on the instruction of the plaintiffs, filled in the answers to the questions on the proposal form. He inserted incorrect answers, though he had been told what the true facts were. Whether he inserted the incorrect answers because he misunderstood what he was told, or had forgotten it, or did it fraudulently, knowing that the statements were untrue, does not appear and is not found by the arbitrator. Mr. Newsholme signed for his firm the application form. By the act of signing he authenticated the statements contained in the form, asserted to the insurance company that they were true, and signed the clause just above his signature whereby he, on behalf of his firm, warranted that the answers were true and that the warranty thereby given should be held to be promissory and should be the basis of the contract between the plaintiffs and the company, and he agreed on their behalf to accept a policy in the current form issued by the company to cover risks of the nature insured and subject to the terms, conditions and exceptions contained in such current form of policy, whereof they should be deemed to have notice, and he agreed to pay the premium thereon. Until that proposal form was accepted by the company, there was no contract between the parties. The company issued their usual form of policy, which contained the following recital:

> "Whereas the insured, designated in the schedule hereto, carrying on the business referred to in the said schedule and no other for the purposes of this insurance, has made or caused to be made to the Road Transport and General Insurance Co., Ltd. (hereinafter called the company), a written proposal and declaration containing certain particulars and statements, which the insured warrants are correct, and it is hereby agreed that such warranty which is to be deemed to be of a promissory nature and effect shall be the basis of this contract and considered as incorporated herein."

It also contained condition No. 7, which is in these terms:

> "The due observance and fulfilment of the terms, provisions, conditions, and endorsements of this policy by the insured, in so far as they relate to anything to be done or complied with by him, and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy."

After the issue of the policy it is quite clear that the only contract between the plaintiffs and the company was the contract contained in the policy, and the only promises binding on the company were those which were contained in the policy. By the policy the company undertook to indemnify the plaintiffs against certain accidents if the statements made in the proposal form which they had signed were

A true; they made no promise to indemnify the plaintiffs if those statements were not true.

It seems to me that the view of the arbitrator based on the statements made to Mr. Willey is contrary to a fundamental and well-recognised rule with regard to contracts in writing. Once a contract is reduced into writing, the writing alone can be looked at as containing the terms of the contract. Anything said during the B negotiations ceases to have any legal validity. The contract, and the contract alone, can be looked at in order to determine the rights of the parties. This rule is conveniently stated in SALMOND AND WINFIELD'S PRINCIPLES OF THE LAW OF CONTRACTS (1927) at pp. 103, 104:

> "Such being the nature of a written contract, I proceed to the consideration of a fundamental legal principle which applies to all such contracts, and dis- C tinguishes them from all others. This principle may be thus formulated: In the case of a contract in writing, the written instrument is exclusive and conclusive evidence of the terms of the contract. It is exclusive evidence, and therefore no other and substituted evidence is admissible as to what these terms are. . . . A written contract is what the written instrument says it is: nothing more, nothing less, and nothing different."

D The paragraph concludes by this citation from DENMAN, C.J., in *Goss* v. *Lord Nugent* (12):

> "If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of E preparation, so as to add to or subtract from, or in any manner to vary or qualify, the written contract."

In the present case, therefore, it does not seem to matter whether the verbal statements which are relied upon are made to a person in the position of Mr. Willey, or are made to the directors of the company. In either case they could not affect the contract which is wholly contained in the policy of insurance with its incor- F porated proposal form. It was argued on behalf of the plaintiffs that by receipt of the premiums through their agent Willey, the company have waived their right to say that they have not promised indemnity to the plaintiffs. I fail to understand the force of this argument. Only one premium had been paid in the present case, and that premium was paid in consideration of the promise of indemnity contained in the policy. I do not see how its payment can affect the right of the insurance G company to say: "As things stand, we never promised to indemnify the assured." The acceptance of the premium cannot, in my judgment, be regarded as an agreement to vary the contract by inserting in it a promise to indemnify if the statements contained in the proposal form are untrue, nor can the insurance company, in my judgment, be said to be estopped by the receipt of the premium from relying upon the contract under which the premium was paid. If it had not been for the H decision of the Court of Appeal in *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.* (1) the plaintiffs' case would have been unarguable. The present case is, in my judgment, distinguishable on its facts from *Bawden's Case* (1), and is indistinguishable, so far as its material facts are concerned, from *Biggar* v. *Rock Life Assurance Co.* (2). In my judgment, *Biggar's Case* (2) and the cases which have followed it—*Levy* v. *Scottish Employers' Insurance Co.* (3) and the two I Scottish cases referred to by my Lord—were rightly decided. They are in agreement with the judgment of the Supreme Court of the United States in *New York Life Insurance Co.* v. *Fletcher* (4), and I think we ought to follow them, notwithstanding the decision of the Court of Appeal in *Bawden's Case* (1). It is not easy to reconcile all that is said in *Bawden's Case* (1) with the decision in *Biggar's Case* (2), but it is to be observed that in *Bawden's Case* (1) no attempt was made to use any part of the conversation between the plaintiff and the agent for the purpose of altering in any way the written contract. I think *Bawden's Case* (1) is an application of the rule that in construing any written instrument the court is

entitled to take into account the surrounding circumstances, and the surrounding circumstances may be such as to enable the court to put a special meaning on the words used in the contract. If, for example, a contract is made on a market in which a dozen means thirteen, then the court can construe the word "dozen" as meaning thirteen. In *Bawden's Case* (1) it could not be disputed that the agent had authority to interview the proposing candidates for insurance, and when he took the plaintiff's signature to the proposal form, he knew, and, therefore, the company who had deputed him to see the plaintiff can be deemed to have known, that they were making their contract with a one-eyed man. That being so, the court seems to have considered itself in that case justified in putting on the words of the contract a meaning which was not their literal meaning, but which the court considered was their reasonable interpretation as applied to a "one-eyed man." LORD ESHER says ([1892] 2 Q.B. at p. 539): "The proposal must be construed as having been negotiated and settled by the agent with a one-eyed man," and (ibid. at p. 540):

> "Quin, being the agent of the company to negotiate and settle the terms of the proposal, did so with a one-eyed man. The company accepted the proposal, knowing through their agent that it was made by a one-eyed man, and they issued to him a policy, which is binding upon them, as made with a one-eyed man, that they would pay him £500 if he by accident totally lost his sight, i.e., the sight of the only eye he had,"

and LINDLEY, L.J., says (ibid. at p. 540): "The policy must, in my opinion, be treated as if it contained a recital that the assured was a one-eyed man." I think that case must be deemed to have been decided on the ground that the policy was interpreted as one effected with a one-eyed man, and that the agent, having authority to see the proposer and get a proposal form from him, the company are fixed with notice of what the agent saw at the interview. The case has been considered, and sometimes distinguished, and sometimes followed in cases before courts of first instance, but, in my judgment, it does not apply to the facts of the present case. As I have indicated, I do not think it matters whether the directors are taken to have notice of what was said during the negotiations with Mr. Willey, the agent, but I also take the view that notice to the agent whose duty was to obtain a signed proposal form and send it to the company, was not notice to the company of anything inconsistent with the signed proposal form, and that in filling up the form, whether he mistook the instructions of the insured, or whether he intentionally filled in something different from what he was told, he was not acting as the agent of the company, but as the agent of the insured.

Of the numerous cases cited in the course of the argument of the plaintiffs' counsel, only two beyond those I have already mentioned call for notice: *Wing* v. *Harvey* (13), a decision of the Court of Appeal in Chancery, and *Ayrey* v. *British Legal and United Provident Assurance Co.* (14). Both these cases are distinguishable from the present case. In *Wing* v. *Harvey* (13) the action was brought by the assignee of a policy against the defendant trustee of the Norwich Union Society. The policy contained the following condition:

> "If the party upon whose life the insurance is granted shall go beyond the limits of Europe, without the licence of the directors, this policy shall become void: the insurance intended to be hereby effected shall cease, and the money paid to the society become forfeited to its use."

After the assured had gone to live in Canada, the assignee, on paying the premium to the agent, informed him that the assured had gone to Canada, and was then told that notwithstanding that fact, the policy would be perfectly good if the premiums were regularly paid. Thereafter the premiums were paid on the faith of the policy continuing valid and effectual notwithstanding the assured's departure for Canada. It will be seen here that no question could arise of varying the terms of the policy by words used in the course of the negotiations. The case is only an authority for the proposition that, if an event has happened after the issue of the

policy which would make the policy void, and the company with notice of the event which voids the policy renews the contract by receiving the premium to cover a further period of insurance, it will be deemed to have effected the insurance on the term that the conditions will not be insisted on. It will be noticed that both KNIGHT BRUCE and TURNER, L.JJ., who decided the case thought there was sufficient evidence to justify them in coming to the conclusion that the directors had received from the agent notice of the fact that the assured had gone to live in Canada. They further held that, even if the agent did not so inform the directors, the directors were bound by the receipt of the premium by their agent with knowledge of the forfeiture. In any case, this decision has no application, except to a case where the alleged forfeiture arises out of facts happening after the issue of the policy.

In *Ayrey's Case* (14) the plaintiff was the executrix of a man named Mackenzie, who was a fisherman. In Mackenzie's signed proposal form his occupation was stated as that of a fisherman. He was also a member of the Royal Naval Reserve Service, but this was not stated in the proposal form. He, however, communicated the fact verbally to the agent of the defendant company when the proposal form was signed. The agent referred the matter to one of the district superintendents, who was their district manager for the locality in question, and the latter saw the plaintiff and told her that the insurance money would be paid, although Mackenzie had gone mine-sweeping. The question in the case was whether there had been concealment of a material fact. The proposal form contained a clause providing that if any information which ought to have been made known to the insurance company with reference to the insurance were withheld, the policy would become absolutely void. It was held by the Divisional Court, consisting of LAWRENCE and ATKIN, JJ., that the plaintiff was entitled to recover. LAWRENCE, J., put his judgment on the ground that notice to the district manager was notice to the company, it being his duty to supervise the company's subordinate agents, and to be the means of communication between them and the head office, and on the ground that the receipt of the premiums by the district manager with full knowledge of the facts was a waiver by the company of the objection that there had been a concealment of a material fact. ATKIN, J., stated in his judgment that he was not satisfied that there had been any concealment, but that, even if there had, the position had been set right by verbal communication to the district manager, who received the information as the authorised agent of the company, before any premium was paid, and that, having accepted the premium through their authorised agent, they could not then void the policy on the ground of concealment of a fact of which through their agent they had been informed. The case, in my view, only decides that where there is oral communication of the material facts to an agent of the insurance company authorised to receive it, there is no concealment. It does not seem to me to have any bearing on the point we have to decide in the present case. I agree that this appeal should be dismissed with costs.

RUSSELL, L.J.—I agree that this appeal fails. I have had the advantage of reading both the judgments which have been delivered by my Lords. I find myself in agreement with them, and am unable to add anything useful to them. In those circumstances I have not prepared any independent judgment.

Appeal dismissed.

Solicitors: *A. H. Freeman*, for *Hyman Stone*, Sheffield; *Joynson-Hicks & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

ROSS *v.* WATERFIELD

[CHANCERY DIVISION (Luxmoore, J.), July 19, 22, 23, 24, 25, November 14, 1929]

[Reported [1930] 1 Ch. 377; 99 L.J.Ch. 67; 142 L.T. 189; 46 T.L.R. 61]

B

Conflict of Laws—Succession—Immovables—Movables—Renvoi—Law of the domicil—Whole law of country of domicil—Lex situs.

By English law the succession to movable property, wherever situate, is governed by the law of the domicil of the deceased, which means the whole law of the country of the domicil including the rules of private international law administered by its tribunals. An English court, therefore, is solely concerned to inquire what the courts of the country of domicil would decide in the particular case. Accordingly, where it appeared from the evidence that the courts of the domicil, which was Italy, would have applied the law of the nationality of the deceased, which was English, **held,** that English law would be applied in determining the effect of the will of the testatrix to the exclusion of the right of her son to a legitima portio to which an Italian national would have been entitled under Italian municipal law.

C

D

English law has never suggested that the law of the domicil has anything to do with the succession to immovable property. It has always recognised that the lex situs governs the succession to immovables, and the lex situs must necessarily be the law of the country where the property is situate as it would be expounded by the courts of that country. "Lex situs" must be construed in the way the courts of the country where the immovables are situate would themselves determine. Therefore, in the case of the immovables of an English national domiciled in Italy the succession would be determined according to Italian law, which, on the evidence, would be in the same way as the English courts would determine it if the property belonged to an Englishman and was situate in England.

E

F

Notes. Considered: *Re Askew, Marjoribanks* v. *Askew*, [1930] All E.R.Rep. 174; *Re O'Keefe, Poingdestre* v. *Sherman*, [1940] 1 All E.R. 216. Referred to: *Jaber Elias Kotia* v. *Katr Bint Jiryes Nahas*, [1941] 3 All E.R. 20; *Re Duke of Wellington, Glentanar* v. *Wellington*, [1947] 2 All E.R. 854.

As to succession to property, see 7 HALSBURY'S LAWS (3rd Edn.) 50 et seq.; and for cases see 11 DIGEST (Repl.) 389 et seq.

G

Cases referred to:

(1) *Re Annesley, Davidson* v. *Annesley*, [1926] Ch. 692; 95 L.J.Ch. 404; 135 L.T. 508; 42 T.L.R. 584; 11 Digest (Repl.) 360, *285.*

(2) *Re Johnson, Roberts* v. *A.-G.*, [1903] 1 Ch. 821; 72 L.J.Ch. 682; 88 L.T. 161; 51 W.R. 444; 19 T.L.R. 309; 11 Digest (Repl.) 359, *283.*

H

(3) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, *22.*

(4) *Bremer* v. *Freeman* (1857), 10 Moo.P.C.C. 306; 29 L.T.O.S. 251; 5 W.R. 618; 14 E.R. 508, P.C.; 11 Digest (Repl.) 336, *85.*

(5) *Hamilton* v. *Dallas* (1875), 1 Ch.D. 257; 45 L.J.Ch. 15; 33 L.T. 495; 24 W.R. 264; 11 Digest (Repl.) 333, *68.*

(6) *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431; 57 L.J.P.C. 88; 59 L.T. 106; 4 T.L.R. 407, P.C.; 11 Digest (Repl.) 344, *138.*

I

(7) *Casdagli* v. *Casdagli*, [1919] A.C. 145; 88 L.J.P. 49; 120 L.T. 52; 35 T.L.R. 30; 63 Sol. Jo. 39, H.L.; 11 Digest (Repl.) 344, *139.*

(8) *A.-G. for Alberta* v. *Cook*, [1926] A.C. 444; 95 L.J.P.C. 102; 134 L.T. 717; 42 T.L.R. 317, P.C.; 11 Digest (Repl.) 472, *1030.*

(9) *R.* v. *North Petherton* (1826), 5 B. & C. 508; 8 Dow. & Ry.K.B. 325; 4 Dow. & Ry.M.C. 79; 2 Bott. 6th Edn. 796; 4 L.J.O.S.K.B. 213; 108 E.R. 189; 22 Digest (Repl.) 328, *3466.*

(10) *Collier* v. *Rivaz* (1841), 2 Curt. 855; 163 E.R. 608; 11 Digest (Repl.) 412, *664*.
(11) *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch.D. 600; 57 L.J.Ch. 135; 57 L.T. 674; 36 W.R. 163; 3 T.L.R. 798; 11 Digest (Repl.) 396, *518*.
(12) *Maltass* v. *Maltass* (1844), 1 Rob. Eccl. 67; 3 Notes on Cases, 257; 8 Jur. 860; 163 E.R. 967; 11 Digest (Repl.) 343, *136*.
(13) *Frere* v. *Frere* (1847), 5 Notes on Cases, 593; 11 Digest (Repl.) 412, *665*.
(14) *In the Goods of Bianchi* (1862), 3 Sw. & Tr. 16; 1 New Rep. 108; 8 L.T. 171; 11 W.R. 240; 164 E.R. 1177; 11 Digest (Repl.) 353, *220*.
(15) *In the Goods of Lacroix* (1877), 2 P.D. 94; 46 L.J.P. 40; sub nom. *In the Goods of De La Croix*, 41 J.P. 664; 11 Digest (Repl.) 402, *578*.
(16) *Enohin* v. *Wylie* (1862), 10 H.L.Cas. 1; 31 L.J.Ch. 402; 2 L.T. 263; 8 Jur.N.S. 897; 10 W.R. 467; 11 E.R. 924, H.L.; 11 Digest (Repl.) 394, *508*.
(17) *Ewing* v. *Orr-Ewing* (1885), 10 App. Cas. 453; 53 L.T. 826, H.L.; 11 Digest (Repl.) 374, *391*.
(18) *Doglioni* v. *Crispin* (1866), L.R. 1 H.L. 301; 35 L.J.P. & M. 129; 15 L.T. 44, H.L.; 11 Digest (Repl.) 396, *516*.
(19) *Re Tallmadge, Re Chadwick's Will* (1919), 181 N.Y. Supp. (215 N.Y. State Repr.) 336; 36 L.Q.R. 9; 43 L.Q.R. 22; sub nom. *Matter of Chandler*, 109 Misc. (N.Y.) 696.

Action for a declaration.

The plaintiff, Alexander Gordon Ross, sought a declaration that he was entitled, notwithstanding the testamentary dispositions made by his mother, Mrs. Janet Anne Ross, to one moiety of her movable and immovable property situate in Italy, and to one moiety of her movable property situate elsewhere than in Italy. There was an alternative claim to one-third of the same property. The plaintiff was the only child of Henry James Ross and Janet Anne Ross, his wife. He was born in the year 1862. His father, Henry James Ross, was born on March 9, 1820, in the island of Malta, the legitimate son of his parents, and consequently was of British nationality, his domicil of origin being Maltese. Henry James Ross resided with his parents in Malta until the year 1837. In that year he became an officer in the British consular service, and in 1839, having left that service, entered a cotton business at Alexandria in Egypt and went to reside there. In 1860 he came to England on a visit, and while in England married, at Ventnor, in the Isle of Wight, Janet Anne Duff Gordon. It was admitted for the purposes of this action that her parents were British subjects, and that their domicil of origin was English, and, consequently, that her domicil of origin was also English. Janet Anne Duff Gordon was, at the date of her marriage to Henry James Ross, an infant. The usual proceedings to enable her to make a binding settlement on her marriage were instituted under the Infants' Settlement Act, 1856, and a settlement was in fact executed under an order made in those proceedings. At the date of the marriage, it was admitted for the purposes of this action, Henry James Ross was domiciled in Egypt and had his residence in Alexandria. After the marriage was solemnised, Janet Anne Ross accompanied her husband to Egypt, and lived with him in Alexandria. In 1862 the plaintiff was born. He was the only child of the marriage of his parents. In 1866 Henry James Ross and Janet Anne Ross left Alexandria and set up their home in Turin. In 1868 they again moved, and this time went to Florence, where they lived together until the death of Henry James Ross in 1902. In 1888 Henry James Ross purchased a mansion and estate in Florence known as Poggio Gherardi, and he and his wife lived there from the date of the purchase down to 1902. The domicil of Henry James Ross and his wife at this date was Italian. Henry James Ross, by his will, left all his property, including the mansion and estate in Florence, to his wife Janet Anne Ross. In due course she entered into possession of the property, and during her lifetime no claim of any kind was made by the plaintiff to any interest in any part of that property. Janet Anne Ross resided at Poggio Gherardi until her death on Aug. 23, 1927, at the age of eighty-five.

Her testamentary dispositions were contained in four documents—a will in the English language with two codicils in the same language, and a will in the Italian language. The English will, which was dated July 6, 1910, began in the following terms:

"I, Janet Anne Ross . . . for the purpose of disposing of all my property which at the time of my death shall be actually in England and of all other my property wheresoever except any property real or personal locally situate in Italy which may belong to me at my death it being my intention to dispose of such my property in Italy by a separate testamentary disposition already made or hereafter to be made by me. . . ."

She appointed her niece, Caroline Lucy Isabel Waterfield [a defendant], to be sole executrix of her will. There followed bequests to servants, and a residuary devise and bequest in these terms:

"I devise and bequeath all the residue of my property (except property whether real or personal which shall be locally situate in Italy as aforesaid) to my niece, Caroline Lucy Isabel Waterfield, if living at my death for her own absolute use and benefit. But if she shall predecease me then I devise and bequeath the same to my son Alexander Gordon Ross."

On July 22, 1921, Janet Anne Ross executed the first codicil to her will. By it she gave certain legacies to her servants and others, and in all other respects she confirmed her will. On May 1, 1924, she executed a further codicil to her will making thereby an alteration in the award of the legacy bequeathed to one of her servants, but otherwise leaving her will unaltered except so far as provided by her first codicil. On May 23, 1924, she made a will in the Italian language. The agreed translation was in these terms:

"I, the undersigned Janet Anne Ross, born Duff Gordon residing in the aforenamed locality [Poggio Gherardi] do by this my last will and testament appoint as heir to the whole of the property which I may possess in Italy at my death movables as well as immovables and in particular the villa and estate of Poggio Gherardi together with all the appurtenances and outbuildings forming part thereof my grand-nephew Aymand Victor Arthur Waterfield [defendant to the present proceedings] and if he should predecease me I appoint in his place his brother Ottiwell Henry Gordon Waterfield. Moreover I leave the usufruct of the said property for the term of her natural life to my niece, Caroline Lucy Isabel Waterfield, the mother of my said heirs, and I also leave to her my jewellery, lace and wearing apparel."

The English will with its two codicils was duly proved by Caroline Lucy Isabel Waterfield on May 16, 1928, and no question was raised as to the validity of the English will and the two codicils or any of them, nor was any question raised as to the validity of the Italian will, it being admitted that for the purposes of this action it conformed with the requirements of Italian law and was executed by Janet Anne Ross in such manner as was required by such law. The testatrix left considerable property both in England and in Italy, the bulk of her property in Italy being the mansion and estate Poggio Gherardi. Neither by her English testamentary dispositions, nor by her Italian will, did she leave anything to her son, the plaintiff, for the defendant, Mrs. Waterfield, and her two sons both survived the testatrix. Her domicil at the date of her death was Italian.

The plaintiff claimed that, notwithstanding the testamentary dispositions of his mother, Janet Anne Ross, he became entitled on her death as her only child to one-half of her immovable property situate in Italy, and to one-half of her movable property, whether situate in Italy or elsewhere, on the ground that such one-half constituted his legitima portio under Italian law.

Sir Gerald Hurst, K.C., and *J. N. Gray*, for the plaintiff, referred to *Re Annesley, Davidson* v. *Annesley* (1), *Re Johnson, Roberts* v. *A.-G.* (2), *Udny* v. *Udny* (3),

Bremer v. *Freeman* (4), *Hamilton* v. *Dallas* (5), *Abd-ul-Messih* v. *Farra* (6), *Casdagli* v. *Casdagli* (7), *A.-G. for Alberta* v. *Cook* (8), *R.* v. *North Petherton* (9).

Cohen, *K.C.*, and *W. Hunt*, for the defendants, referred to BENTWICH ON DOMICIL AND SUCCESSION (1911), p. 167; WESTLAKE ON PRIVATE INTERNATIONAL LAW (7th Edn.), pp. 29, 35, 121; *Collier* v. *Rivaz* (10); *Re Trufort*, *Trafford* v. *Blanc* (11).

Cur. adv. vult.

Nov. 14. **LUXMOORE, J.,** read a judgment in which he stated the facts and continued: I will deal first with the movable property. Both the plaintiff's and defendants' counsel agree that by English law the succession to movable property, wherever situate, is governed by the law of the domicil, in this case the law of Italy. In Italy, as in most of the European countries, the law refuses to recognise domicil as governing succession and other personal rights, and accepts the law of the nationality as the governing law. The material sections of the Italian Code are arts. 6, 8 and 9 of the preliminary title. These articles so far as material to the present case provide as follows—I am reading from the agreed translation:

> "Article 6. The status and capacity of persons and the family relations are regulated by the law of the nation to which they belong. Article 8. Succession, either under an intestacy or under a will, whether as regards the order of succession or the measure of the rights of succession, or the intrinsic validity of the testamentary dispositions, is regulated by the national law of the person whose estate is in question, and this whatever may be the nature of the property or the country in which it is situate. Article 9. The substance and effect of . . . testamentary dispositions are deemed to be governed by the national law of the . . . testator."

The parties are agreed that "the law of the domicil governs the succession to the movable property." The dispute which arises between them, and which I have to determine, is what is meant by "the law of the domicil." Does the phrase, so far as the English law is concerned, mean only that part of the domiciliary law which is applicable to nationals of the country of domicil—sometimes called "the municipal law," or "the internal law"—or does it mean the whole law of the country of domicil including the rules of private international law administered by its tribunals? If the former contention is correct, then the English court in deciding such a case as the present is concerned to inquire, not what the courts of the country of domicil would in fact decide in the particular case, but what the courts of the domicil would decide if the propositus instead of being domiciled in the foreign country was also a national of that country. Whereas, if the latter view is the correct one, the English court is solely concerned to inquire what the courts of the country of domicil would in fact decide in the particular case. In my opinion, the latter is the correct view, as laid down by the English decisions, and there is no decision that has been quoted to me in argument or that I have been able to discover which supports the former view, though there is a dictum in the most recent case dealing with the question, which expresses approval of that view. I refer to the dictum of RUSSELL, J., in *Re Annesley* (1). I will deal with this case and the dictum in it later.

The argument against the view that the law of the country of domicil means the whole of the law of that country, including its rules of private international law, is based on a claim that if this be the meaning of the expression "the law of domicil," then, logically, the meaning of the expression "law of the nationality" must also mean the whole of that law, including its rules of private international law; and it is said that, if such is the true rule, the English court, in effect, has to say—I am putting the argument in the concrete form applicable to the case before me—"the Italian law provides that the law of the nationality is to be the governing law, that is, the English law, on the basis that the domicil of origin is English, but as the English law considers the law of the domicil to be the governing law, there is a further reference back from it to the Italian law as the domiciliary

law, the logical result being an endless oscillation backwards and forwards from one law to the other, the English court sending the case back according to the English doctrine of domicil to the Italian court, and the Italian court sending it back again to the English court, according to the Italian doctrine of nationality, and so on ad infinitum, the result being the establishment of what has been called by some of the text-writers "a circulus inextricabilis." The circle can only be cut if and when one or other of the opposing systems of law, to use once more a phrase adopted by the text-writers, "accepts the renvoi." Is this argument well founded? Indeed, does it arise at all? It does not in fact arise if the true view of the English court is that by the phrase "the law of the country of domicil" is meant that law which the courts of the country of domicil apply to the decision of the case to which the rule refers. If this is the correct view, the English courts in such a case "accept the renvoi."

Let me illustrate what I mean by a reference to the present case. It is admitted on both sides that the English court must adhere to the rule that, Janet Anne Ross having died domiciled in Italy, the distribution of her movable property must be governed by the "law of Italy." On the proposition with which I am dealing this means the law which the Italian courts would hold to be applicable to the case of Janet Anne Ross. Janet Anne Ross being a British subject with an English domicil of origin, if because of her nationality the Italian courts hold that her movable property ought to be distributed in accordance with English internal law as applicable to English nationals domiciled in England, the English courts will distribute such property, in exactly the same way as if Janet Anne Ross was, in fact, at her death domiciled in England. If, on the other hand, the Italian courts should hold that her movable property should be distributed in accordance with the internal law of Italy applicable to Italian nationals, then the English courts will distribute Janet Anne Ross's movable property in accordance with Italian internal law. In other words, the English court will endeavour to ascertain what the Italian courts would, in fact, decide with regard to such part of Janet Anne Ross's movable property as might come under the actual control of the Italian courts.

My attention has been called in the course of the argument of this case to a number of authorities, and I have also considered a number of other decisions. In my view, the general trend of the authorities establishes that the English courts have generally, if not invariably, meant by "the law of the country of domicil" the whole law of that country as administered by the courts of that country, and with the exception of the dictum already referred to there is no case to the contrary. The earliest case in the books is *Collier* v. *Rivaz* (10). One Ryan, a British subject, died domiciled in Belgium. He left certain testamentary papers executed in accordance with the formalities required by English law, but not in accordance with those required by Belgian local law. It was proved by the necessary expert evidence that the Belgian courts if called on to decide the question of validity would uphold the testamentary documents, on the ground that they were valid according to the testator's national law, and Sir Herbert Jenner in his judgment said this (2 Curt. at p. 858):

> "The question, however, remains to be determined whether these codicils which are opposed are executed in such a form as would entitle them to the sanction of the court which has to pronounce on the validity of testamentary dispositions in Belgium, in the circumstances under which they have been executed. Because it does not follow that, Mr. Ryan being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the law of Belgium requires from its own native-born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence; that is, foreigners who come to reside under certain

A circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects and the subject of another country; and the court, sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case."

B The whole basis of his decision is that the court sitting in this country to determine the question must consider itself sitting in Belgium, that is, the court is only concerned to see what view the Belgian court would take of the English law; and it was never suggested that it was the duty of the English court to consider what its own view of the English law ought to be. The result in *Collier* v. *Rivaz* (10) could not have been arrived at if the English court had refused to take into account C the rules of private international law applied by and recognised in the Belgian courts, and had merely applied the ordinary local law of Belgium applicable to Belgian nationals.

In *Maltass* v. *Maltass* (12) the question arose as to the validity of a will made by a British subject resident in Turkey. The will was in the form required by English internal law. The question of what was the testator's domicil at his death D was debated, but the court did not think it necessary to decide the question, and DR. LUSHINGTON, sitting for SIR HERBERT JENNER, said (1 Rob. Eccl. at p. 72):

"But this inquiry (that is, the inquiry as to domicil) will become unnecessary if it should turn out that, with respect to this individual succession, the law of Great Britain and of Turkey is the same; for when we speak of the law of E domicil as applied to the law of succession, we mean, not the general law, but the law which the country of domicil applies to the particular case under consideration. Such law may be totally different as applied to a natural-born subject of the country, as exemplified in the case of *Collier* v. *Rivaz* (10). There the testator died domiciled in Belgium; but, by the Belgian law, the succession in that case was not to be governed by the law of Belgium, applic- F able to natural-born subjects, but the law of that country, applicable to an English-born subject dying domiciled in Belgium."

I refer to this case for the dictum I have just read, for the actual decision turns on the applicability of certain treaties existing between the United Kingdom and Turkey, and there is no decision relating to any question of renvoi.

In *Frere* v. *Frere* (13) the Prerogative Court of Canterbury declined to declare G void the will of the Right Honourable J. Hookham Frere, who at the date of his death was domiciled in Malta, such will having been made in England in English form, and not in accordance with the requirements of the local Maltese law. The basis of the decision was that the evidence before the court was that the Maltese courts would not deem a will made outside Malta to be void if it complied with the formal requirements of the locus actus.

H In *Bremer* v. *Freeman* (4) a British subject died domiciled de facto in France. She had made a will in France in English form; the will dealt with movables, the bulk of which were situate in England. The testatrix had not obtained from the French government an authorisation to acquire a French domicil. SIR JOHN DODSON admitted the will to probate on the ground that, though the testatrix had her domicil de facto in France, yet that it was necessary in order to establish a I domicil in France such as would affect her succession and the mode of making her will that her domicil should be by authorisation of the French government. The judge, SIR JOHN DODSON, expressly said he was following *Collier* v. *Rivaz* (10). The decision was reversed in the Privy Council. The judgment was delivered by LORD WENSLEYDALE, and he said in the course of his judgment that there were two questions before the court; the first related to domicil and the second was: Has it been established that by the municipal law of the domicil at the time of death the will propounded was valid? On the first question it was held that the testatrix was domiciled de facto in France, although there had been no authorisation by the

French government, and, consequently, the second question was whether, in the case of a person domiciled de facto in France, the use of the English form was sanctioned by the municipal law of France. The keystone of the judgment of LORD WENSLEYDALE is that, the testatrix having died domiciled de facto in France, the validity of her will is to be determined by French law. The judgment deals with two alternative interpretations of art. 13 of the Code Napoleon, on which the first question arose. The two interpretations dealt with were: First, that the French law refuses civil rights, including the right of testamentary disposition, to one who is domiciled, but has not an authorisation. On this point LORD WENSLEYDALE said two cases must be considered: (a) Suppose the refusal applies to goods wherever situate. In this case the testatrix loses, by the French law of her domicil, power to make a will altogether, and the will propounded is invalid; and (b) suppose this refusal applies only to goods situate in France. Still, the will to have any effect, must be in the form and with the solemnisation of the domicil according to the general rule, otherwise it cannot be admitted to proof. The second interpretation dealt with was: Does art. 13 of the Code Napoleon mean that French law insists that no domicil for any purpose whatever can be obtained without authorisation? LORD WENSLEYDALE came to the following conclusion, after considering French cases and the opinions of French writers. He says this (10 Moo.P.C.C. at p. 373):

> "On the whole, then, on a review of all this evidence of the law of France, their Lordships are clearly of opinion, that it is not established, that for the purpose of having a domicil which would regulate the succession, any authorisation of the Emperor was necessary; that a legal domicil for this purpose was clearly proved, and that consequently, if the testatrix had a power to make a will at all, the will in this form was invalid."

The decision involves the acceptance of the fact that the French law had rules of succession for a foreigner who was domiciled in France without authorisation, and dealt with the case as it concluded the French courts would have decided the matter. I have referred to this case at length because it is claimed by counsel on behalf of the plaintiff that it supports his argument that the English court ought to decide the question as to what is meant by the law of the country of domicil as limited to the local law of that country applicable to its own nationals resident there. In my view, for the reasons stated in my consideration of the case, this case does not support that argument, but is, in fact, opposed to it, for the basis of the decision is the finding of the court as to the law which the French courts would have held to be applicable.

Hamilton v. *Dallas* (5) was also relied on by the plaintiff. In my view, its effect is, for all practical purposes, the same as the decision in *Bremer* v. *Freeman* (4). The question was as to the succession upon an intestacy of an Englishman domiciled in France de facto and without the official authorisation required by the Code. BACON, V.-C., held that the deceased was, in the circumstances of that case, capable by French law of acquiring a domicil for civil purposes in France, and that his succession was governed by the French law. In that case, as in *Bremer* v. *Freeman* (4), no question of renvoi arose. The court acted on the rule that the whole law of the foreign country, in the particular case France, was to be considered when a question of succession was referred to that law, and pronounced judgment on the footing of the conclusion to which the court held the French law would, in fact, have arrived.

In *In the Goods of Bianchi* (14) the question again related to succession. The testator was born at Genoa, which then formed part of the kingdom of Sardinia. He went to Brazil early in life, and after having acquired a fortune, he decided to leave Brazil and return permanently to Genoa. He died on his way home without having made any testamentary disposition of his property. Some of his children resided in Brazil and others in Genoa. Among other property he possessed movable property in England. In 1859 the Probate Court in England made a grant of administration to the representative of a person who had been appointed by the

A Brazilian court as the guardian. Discussions arose between the Brazilian and Sardinian governments with regard to the testator's domicil at the date of his death, and in the result the Brazilian government withdrew all claims to administration and guardianship. In 1862 an application was made to the Court of Probate in this country to rescind the former grant in favour of the representative of the Brazilian guardian, and to make a new grant in favour of the Sardinian consul at B Bahia. SIR CHARLES CRESSWELL refused to pay any regard to the arrangement between the two governments and ultimately rescinded the grant on the ground that as the testator had partially abandoned his acquired domicil in Brazil the domicil of origin revived, and the court, therefore, had to deal with the case according to the Sardinian law.

In *In the Goods of Lacroix* (15) SIR JOHN HANNEN granted probate to the will of C an Englishman presumably domiciled in France. The will was made in France in English form, and not in a form allowed by the internal French law. The grant was made ex parte and on evidence by affidavit that by French law the will of a British subject made in France would be valid if it was in the form required by the law of England to give validity to wills executed by Englishmen in England. The basis of this decision is the interpretation by the court of the provision in D LORD KINGSDOWN'S Act [Wills Act, 1861, s. 1], that a will is valid in England if "made according to the forms required . . . by the law of the place where the same was made," as referring to "the law which the courts of the locus actus would deem applicable in the given case."

In *Re Trufort* (11) the question arose with regard to the succession to the property of a Swiss national who had died domiciled in France. The plaintiff E instituted proceedings in the Swiss court claiming that he was the legitimate son of the propositus and to be entitled, notwithstanding his testamentary dispositions, to the bulk of his estate. The Swiss courts decided in the plaintiff's favour. Proceedings were started in England for the enforcement of the Swiss judgment and for a declaration that the estate of the propositus ought to be administered according to the law of France. STIRLING, J., declared that he was bound by the decisions F of the Swiss courts. After quoting from such well-known cases as *Enohin* v. *Wylie* (16), *Ewing* v. *Orr-Ewing* (17), and *Doglioni* v. *Crispin* (18), STIRLING, J., said this (36 Ch.D. 611):

> "The rule to be extracted from these cases appears to be this, that although the parties claiming to be entitled to the estate of a deceased person may not G be bound to resort to the tribunals of the country in which the deceased was domiciled, and although the courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such case may be bound to ascertain as best they can who, according to the law of the domicil, are entitled to that estate, yet where the title has been adjudicated upon by the courts of the domicil, such adjudication is binding upon, and must H be followed by, the courts of this country. It is contended that this rule applies to the present case. It is, indeed, admitted that the domicil of the testator was French, but according to the law of France (as stated by the defendant's own witnesses) the right to his succession depends on his nationality. That nationality it is said was Swiss, and by virtue of the treaty between France and Switzerland in 1869 the right of succession falls to be I determined by the tribunals of Zurich, who have decided in favour of the plaintiff. It is obvious that this argument cannot prevail unless the testator's nationality was Swiss, and this is a point which at the trial was made the subject of considerable argument and which demands close examination."

The learned judge drew certain conclusions from the evidence, and held that the plaintiff's father—the testator—was at the time of his death a Swiss, and not a British subject. He then continued:

> "The testator's nationality then being Swiss at the time of his death it follows that the Zurich tribunals are those which according to the law of the testator's

domicil have jurisdiction to decide on the right of succession to his estate, and in fact they have at the instance of the defendant been recognised as such by the court of St. Julien. This being so, I have an advantage similar to that which the court had in *Doglioni* v. *Crispin* (18), that the claim of the party litigating in this court has been actually raised and decided in the courts which according to the law of the testator's domicil were the proper and competent tribunals to decide on their rights. Those tribunals have decided that the plaintiff is entitled to nine-tenths of the testator's personal estate, of which the funds which form the subject-matter of the present action are part, and in accordance with the principle laid down in *Doglioni* v. *Crispin* (18) I consider that I am bound by their decision."

In *Abd-ul-Messih* v. *Farra* (6) the question to be determined was with regard to the succession to the movable property of a testator, a member of the Chaldean Catholic community, having a Turkish domicil of origin, but who had at the date of his death acquired a permanent residence in Cairo and the status of a protected British subject. It was held in the Privy Council that the testator died domiciled in the dominions of the Porte, and that a consular court at Constantinople, being bound by a particular Order in Council to follow the same principles which would have been observed by an English court of probate, was right in holding that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey be followed in considering the power of testacy of the deceased and in distributing his effects. So far as the actual decision is concerned, no question of renvoi arose, but LORD WATSON, who delivered the judgment of the Privy Council, indicated how the case would have been dealt with if it had been a case of renvoi. The relevant passage is where LORD WATSON says this (13 App. Cas. at p. 443):

"The next alternative presented by the appellant's counsel was this, that her husband had de facto, or at all events according to Ottoman law, lost his Turkish nationality, and had become a subject of the Queen. That change in his political status was said to be attended with one or other of these consequences, namely, either that his civil status became that of a domiciled Englishman, or, assuming his domicil to have been in Bagdad, that a Turkish tribunal would, in administering his estate, defer to the law of England, as the law of his nationality. . . . If it be assumed that, in consequence of his having placed himself under foreign protection, the Porte resigned the deceased, both civilly and politically, to the law of the protecting power, that would merely give him the same rights as if his nationality had been English, and the territorial law of his domicil would still be applicable to his capacity to make a will, and to the distribution of his estate."

I refer to this case because it was relied on by the plaintiff's counsel as supporting his argument. In my view, for the reason I have stated, I am of opinion that this reliance is not well founded. The dictum is purely neutral, because the phrase "the territorial law of his domicil" is, I think, used in an ambiguous sense, and not in the narrower sense of the law of the country of domicil applicable to the nationals of such country.

Re Johnson (2) is the first case in which the word "renvoi" appears to have been used. The facts are shortly as follows. In 1894 a British subject—one Mary Elizabeth Johnson—whose domicil of origin was Maltese, died intestate and domiciled in Baden. She was not naturalised there, and the evidence in the case established that by the law of Baden the succession to her property was governed by the law of her nationality. She left movable property in England and Baden. FARWELL, J., directed the movables in England to be distributed according to Maltese law. The decision was based on two alternative grounds: First, that it is impossible according to English law for a person to acquire a domicil of choice in a foreign country unless that person has also acquired a domicil there according to the law of the foreign country; therefore, in the particular case, as the law of

Baden refused to recognise domicil as having any legal effect on the status of Mary Elizabeth Johnson, the succession to her movable property must be determined according to the law of her domicil of origin, that is, Maltese law. This view of the English law as to domicil is not consistent with other decisions, and RUSSELL, J., refused to follow it in *Re Annesley* (1). The second group of the decision is based on the assumption that Mary Elizabeth Johnson was at her death domiciled in Baden, and that the law of Baden governed the succession to her movable property. It was found by the certificate which was binding on the parties in the case that, according to the law of Baden, the legal succession to that part of her property which she had not disposed of by her will was governed by the law of the country of which she was a subject at the time of her death. The learned judge says this ([1903] 1 Ch. at p. 830): "It is not for me to say how the Baden courts would interpret their rule of distributing according to nationality." I think that means that the interpretation of the Baden law is a matter for the Baden court; and he goes on later to say:

> "It was urged in argument that the finding in the certificate is that, according to the law of Baden, movables are to be distributed according to the nationality of the propositus. I have already given my reasons for holding that the Baden courts would have really refused jurisdiction; but, even if this were not so, I should arrive at the same conclusion in a different way. When it is said that the Baden courts regard the nationality of the propositus, I apprehend that this means that they distribute according to the law of the nation to which the propositus belongs, or in other words, of which he is a subject."

On this second ground the decision is in accordance with the view expressed in the other cases I have already referred to, namely, that the law of the country of domicil is the law as it would be decided by the courts of that country in reference to the facts of the particular case to be considered.

The latest reported case dealing with the question is *Re Annesley* (1), to which I have already referred. There RUSSELL, J., after fully discussing the decision in *Re Johnson* (2), refused to follow it, so far as the question of domicil was concerned, and held that the deceased in the case before him had acquired a domicil de facto in France by long-continued residence, coupled with the intention of indefinite residence, and overruled objections based on a clause in the deceased's will which declared she had never intended to abandon her English domicil, and had never applied under art. 13 of the Civil Code or otherwise to fix her domicil in France, or for naturalisation. In addition to this, the learned judge, after examining the evidence as to French law, concluded that the proper view was that the French law would accept renvoi from the English law, and apply the local law of France to the deceased's testamentary dispositions, and following this he decided that the deceased only had power to dispose by such testamentary dispositions of one-third of her English personal property, and her French movable property. I should state that the will, and a codicil to it, were both made in English form, and were valid under the Wills Act, 1861. So far the actual decision as to the law applicable is in accord with the other authorities to which I have referred, for the learned judge held in fact that the law applicable was the law as it would have been determined by the French courts. In other words, the learned judge placed himself in the position of the French court in considering and determining the question. He said this ([1926] 1 Ch. at p. 708):

> "After careful consideration of the evidence of the experts called before me, I have come to the conclusion that I ought to accept the view that according to French law, the French courts, in administering the movable property of a deceased foreigner who, according to the law of his country, is domiciled in France, and whose property must, according to that law, be applied in accordance with the law of the country in which he was domiciled, will apply French municipal law, and that even though the deceased had not complied with art. 13 of the Code."

He, however, expressed his personal opinion that the doctrine of the renvoi should be entirely avoided. He said this: A

> "Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of renvoi need be encountered at all. When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the propositus, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicil while the law of the country of domicil in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogates Court of New York." B C D

He refers to *Re Tallmadge* (19). With all respect to the learned judge, I do not think his expression of opinion—no matter how convenient such a course might be (and as to that I express no personal view)—is not in fact in accord with the cases to which I have referred, while his actual decision, so far as the renvoi doctrine is concerned, in fact accords with them.

I would like to refer to the dictum of SCRUTTON, L.J., in *Casdagli* v. *Casdagli* (7), where he says ([1918] P. at pp. 89, 111): E

> "Hence it has been argued that if the country of allegiance looks to or sends back the decision to the law of the domicil, and the country of domicil looks to or sends back (renvoyer) the decision to the law of nationality, there is an inextricable circle in 'the doctrine of the renvoi' and no result is reached. I do not see that this difficulty is insoluble. If the country of nationality applies the law which the country of domicil would apply to such a case arising in its courts, it may well apply its own law to the subject-matter of dispute, being that which the country of domicil would apply, but not that part of it which would remit the matter to the law of domicil, which part would have spent its operation in the first remittance. The knot may be cut in another way, not so logical, if the country of domicil says: 'We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects.' " F G

This dictum, in effect, I think, approves of the decision of such matters in accordance with the law as interpreted and administered by the courts of the country of domicil. H

I have, I think, now dealt with all the relevant cases. In addition to them my attention has been called to a number of articles by international jurists. There is an acute conflict between the various authors on the question, and so far as the English writers are concerned, they seem to be fairly equally divided. I should also add that in the course of the argument my attention was called to the report of the American case, *Re Tallmadge*, *Re Chadwick's Will* (19), referred to by RUSSELL, J., in his judgment in *Re Annesley* (1). The decision is that of the Surrogates Court of New York County. The judge of that court goes through most of the authorities to which I have referred, and comes to a conclusion opposite to that at which I have arrived. For the reasons I have endeavoured to express in this judgment, I think such decision is not in accord with the English authorities. In my opinion, the present case must be decided in accordance with the law of Italy, as such law would be expounded in the Italian courts. If the Italian court had in fact dealt with the matter, there would be no necessity to inquire into the I

law, and it would be my duty simply to follow the decision. Since there is no decision by the Italian court, I am bound to ascertain how the Italian court would decide the case from the evidence of those competent to instruct me. I am glad to say that the Italian lawyers who have been called on both sides are unanimous in this conclusion, that if the case fell to be decided in the Italian courts, it would be held that the testamentary dispositions of Mrs. Janet Anne Ross were valid, and provide for the total disposition of her property in Italy, and that in no circumstances would the Italian court recognise any right on the part of the plaintiff to any part of such property as legitima portio, as it would have done had Mrs. Janet Anne Ross been an Italian national. Dr. Guiseppe Pallicia, who gave evidence on behalf of the plaintiff, said that if the present case fell to be decided in Italy, there is no doubt but that the Italian court would apply the English law applicable to Mrs. Janet Anne Ross as a British subject, without any reference to the fact that she was domiciled in Italy, and the most he would say in favour of the plaintiff's claim was that, if the court in England decided in his favour, that is, held he was entitled, notwithstanding his mother's testamentary dispositions, to the legitima portio he would have been entitled to if she were in fact an Italian national, then the Italian courts would recognise that decision and enforce it, unless it were against public policy, and though his answer to the question whether such a decision would be against public policy is a little ambiguous, I think he really expressed the view that the sounder opinion is that the answer would be in the affirmative. On the other hand, both Dr. Dingli and Dr. Ferdinando Bosi are unanimous in the view that the Italian courts would determine the case on the footing that the English law applicable is that part of the law which would be applicable to an English national domiciled in England, and that if the English court decided the case in any other manner, the Italian court would refuse to follow such decision and dispose of the case as if it came before the Italian court untrammelled by any English decisions. I accept their evidence on the Italian law.

This disposes of the case so far as the movables in Italy are concerned. The position as to the immovable property in Italy seems to me to stand on a different basis. It is true that the law of Italy provides, by arts. 8 and 9 of the Code—which I have already read—that the succession to movable and immovable property is governed by the law of the nationality of the deceased owner, yet the English law has never suggested that the law of the domicil has anything to do with the succession to immovables. On the contrary, it has always recognised that the lex situs governs the succession to immovables, and the lex situs must necessarily be the law of the country where the property is situate, as it would be expounded by the courts of that country; and domicil cannot in any circumstances have any bearing on the case. But to some extent the theory of the renvoi may apply, for the law of England refers the question of succession to immovables to the lex situs —in this case the law of Italy—and the lex situs—the Italian law—refers the case to the law of the nationality, and this might mean the law of the nationality including the rule relating to the lex situs, and once again the "circulus inextricabilis" would be constituted. But in my view the lex situs must, for the reasons I have already stated with regard to the meaning to be placed on the phrase "law of domicil," be construed in the way the courts of the country where the immovables are situate would themselves determine. On this basis the expert evidence is clear that the Italian courts would decide the succession to the immovable property in the same manner as the English court would determine it if such immovable property belonged to an Englishman and was situate in England.

In the result, the plaintiff has failed to substantiate either of his claims in this action, and I therefore dismiss it with costs.

Solicitors: *Holloway, Blount & Duke*; *Stephenson, Harwood & Tatham.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

MACLEAN *v.* WORKERS UNION

[CHANCERY DIVISION (Maugham, J.), January 11, 14, 15, 16, February 18, 1929]

[Reported [1929] 1 Ch. 602; 98 L.J.Ch. 293; 141 L.T. 83; 45 T.L.R. 256; 73 Sol. Jo. 190]

B

Trade Union—Expulsion—Legality—Expulsion in compliance with rules and in good faith—Tribunal appearing to act as prosecutors as well as judges—Bias.

A domestic tribunal is bound to act honestly and in good faith. Where the tribunal is the result of rules adopted by the members of a body, e.g., a trade union, the rights of a member who comes before the tribunal depends simply on the contract, express or implied, between him and the union which is to be found in the C
rules. A member who is expelled in accordance with the rules—however unfair or unjust the rules may be, e.g., if they provide that a member may be expelled without being called on to explain his conduct, or however unfair and unjust the action of the expelling tribunal may be—has no legal right of redress provided that the tribunal acts in good faith. If the rules postulate an inquiry, the accused must be given a reasonable opportunity of being heard and putting forward his D
defence. If there is anything in the nature of a lis between the accused and a member of the tribunal, the latter should not sit, but in many cases the tribunal is entrusted with the duty of appearing to act as prosecutors as well as judges, e.g., where the alleged misconduct of a member is brought to the notice of the council or body which also acts as a tribunal to consider such a matter and possesses power to expel the member if the charges against him are found to be true E
the council's duty is to call on the member to appear and explain his conduct, and then to adjudicate on the matter.

Notes. A member of a trade union who has been wrongfully expelled can claim damages against the union: *Bonsor* v. *Musicians' Union*, [1955] 3 All E.R. 518, overruling *Kelly* v. *National Society of Operative Printers' Assistants* (1915), 84 L.J.K.B. 2236. F

Applied: *Lamberton* v. *Thorpe* (1929), 45 T.L.R. 420; *Stuart* v. *Haughley Parochial Church Council*, [1935] All E.R.Rep. 890. Considered: *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175. Referred to: *Chapman* v. *Ellesmere*, [1932] All E.R. Rep. 221; *Lumiansky* v. *Myddleton* (1934), 78 Sol. Jo. 223; *Wells* v. *Myddelton* (1935), 78 Sol. Jo. 270; *Russell* v. *Duke of Norfolk*, [1949] 1 All E.R. 109; *White* v. *Kuzych*, [1951] 2 All E.R. 435; *Abbott* v. *Sullivan*, [1952] 1 All E.R. 226; *Barnard* v. *National* G
Dock Labour Board, [1952] 2 All E.R. 424.

As to the expulsion of members of a trade union, see 32 HALSBURY'S LAWS (2nd Edn.) 489; and for cases see 43 DIGEST 98–101.

Cases referred to:

(1) *Law* v. *Chartered Institute of Patent Agents*, [1919] 2 Ch. 276; 88 L.J.Ch. 319; 121 L.T. 50; 35 T.L.R. 385; 63 Sol. Jo. 447; 36 R.P.C. 163; 8 Digest (Repl.) H
657, *42*.

(2) *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238; 68 L.T. 472; 9 T.L.R. 90; 2 R. 207, C.A.; 2 Digest (Repl.) 499, *477*.

(3) *Ives and Barker* v. *Willans*, [1894] 2 Ch. 478; 63 L.J.Ch. 521; 70 L.T. 674; 42 W.R. 483; 10 T.L.R. 439; 38 Sol. Jo. 417; 7 R. 243, C.A.; 2 Digest (Repl.) 494, *439*. I

(4) *Thompson* v. *British Medical Association* (*N.S.W. Branch*), [1924] A.C. 764; 93 L.J.P.C. 203; 131 L.T. 162; 40 T.L.R. 506; 68 Sol. Jo. 518, P.C.; 43 Digest 112, *1173*.

(5) *Re Fremington School, Ex parte Ward* (1847), 9 L.T.O.S. 333; 11 Jur. 421; 19 Digest 608, *332*.

(6) *Leeds Corpn.* v. *Ryder*, [1907] A.C. 420; 76 L.J.K.B. 1032; 97 L.T. 261; 71 J.P. 484; 23 T.L.R. 721; sub nom. *Leeds Corpn.* v. *Woodhouse*, 51 Sol. Jo. 716, H.L.; 30 Digest (Repl.) 45, *345*.

(7) *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471; 58 J.P. 542; 42 W.R. 289; 10 T.L.R. 304; 9 R. 217, C.A.; 34 Digest 544, *24.*

(8) *R.* v. *Allan* (1864), 4 B. & S. 915; 33 L.J.M.C. 98; 10 Jur. N.S. 796; 122 E.R. 702; sub nom. *R.* v. *Hodgson*, 3 New Rep. 503; 9 L.T. 761; 28 J.P. 484; 12 W.R. 423; 33 Digest 298, *128.*

(9) *R.* v. *Gaisford*, [1892] 1 Q.B. 381; 61 L.J.M.C. 50; 66 L.T. 24; 56 J.P. 247, D.C.; 33 Digest 295, *102.*

(10) *R.* v. *Meyer* (1875), 1 Q.B.D. 173; 34 L.T. 247; 40 J.P. 645; sub nom. *R.* v. *Harrison*, 24 W.R. 392; 33 Digest 294, *100.*

(11) *Leeson* v. *General Council of Medical Education and Registration* (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303, C.A.; 34 Digest 544, *30.*

(12) *Dawkins* v. *Antrobus* (1881), 17 Ch.D. 615; 44 L.T. 557; 29 W.R. 511, C.A.; 8 Digest (Repl.) 652, *21.*

(13) *Jackson* v. *Barry Rail. Co.*, [1893] 1 Ch. 238; 68 L.T. 472; 9 T.L.R. 90; 2 R. 207, C.A.; 2 Digest (Repl.) 499, *477.*

(14) *Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q.B. 667; 71 L.T. 308; 9 R. 827, C.A.; 2 Digest (Repl.) 488, *407.*

(15) *R.* v. *Rand* (1866), L.R. 1 Q.B. 230; 7 B. & S. 297; 35 L.J.M.C. 157; sub nom. *R.* v. *Rand*, *R.* v. *Bradford Justices*, 30 J.P. 293; 33 Digest 292, *84.*

(16) *R.* v. *Sunderland Justices*, [1901] 2 K.B. 357; 70 L.J.K.B. 946; 85 L.T. 183; 65 J.P. 598; 17 T.L.R. 551; 45 Sol. Jo. 575, C.A.; 33 Digest 296, *109.*

(17) *Boyle* (*or Walsh*) v. *Wilson*, [1907] A.C. 45; 95 L.T. 763; 23 T.L.R. 124, H.L.; 30 Digest (Repl.) **114.*

Action for a declaration and injunction.

The plaintiff was a member of the defendant union, and until February, 1927, a member of the executive committee thereof. During that year the presidency of the union fell vacant and the plaintiff was nominated as a candidate. As such candidate he caused to be issued election addresses in the form of circulars, which were in due course sent to the branches of the union. They contained reflections on the conduct of the executive committee, the president and secretary. Rule 45 of the rules of the union provided that

"no address or circular shall be issued by any branch or member unless the same has first been approved by the executive committee . . . any branch and any member . . . violating this rule shall be fined 2s. 6d. . . . and such member . . . shall also be immediately suspended from all benefits of this union. . . . If the executive committee so decide such member . . . may be excluded from membership of this union."

By r. 3 (11):

"Every member of the union shall accept and be bound by these rules . . . and every decision of the executive committee in administering these rules shall be binding and conclusive upon every member, . . . and no . . . member . . . shall be entitled to question, vary, reverse or set aside any decision or order of the executive committee otherwise than in the manner provided in these rules."

By r. 24 (5):

"An appeal shall lie from the decision of the executive committee in the manner provided by this rule and not otherwise, that is to say: in the case of an appeal by an individual member . . . to an appeal tribunal provided by r. 48."

No approval by the executive committee of the circulars had been asked or obtained by the plaintiff prior to their issue, and at a meeting of the committee held in September, 1927, attended by the plaintiff, who spoke on his own behalf, it was resolved that a serious breach of the rules had been committed by him and that he be expelled. The plaintiff then issued the writ in this action, claiming a declaration that such resolution was ultra vires and an injunction to restrain the defendants from enforcing it or interfering in any way with his rights as a member.

Bennett, K.C., and *E. J. C. Neep*, for the plaintiff, referred to *Law* v. *Chartered Institute of Patent Agents* (1). A

Sir Henry Slesser, K.C., and *Howard Wright*, for the defendants, referred to *Jackson* v. *Barry Rail. Co.* (2), *Ives and Barker* v. *Willans* (3), *Thompson* v. *British Medical Association (N.S.W. Branch)* (4), *Re Fremington School, Ex parte Ward* (5), *Leeds Corpn.* v. *Ryder* (6).

Bennett, in reply, referred to *Allinson* v. *General Council of Medical Education and Registration* (7), *R.* v. *Allan* (8), *R.* v. *Gaisford* (9), *R.* v. *Meyer* (10). B

Cur. adv. vult.

Feb. 18. **MAUGHAM, J.**, read a judgment in which he stated the facts, and continued: Counsel for the plaintiff relied on three grounds in their attack on the validity of the resolution of Sept. 28, 1927. First, it is said that the executive committee, in C passing that resolution, were prosecutors as well as judges or, with a slight difference of meaning, were judges in their own cause. Secondly, it is asserted that the members of the committee were so biased against the plaintiff as to be incapable of performing the quasi-judicial functions required of them under r. 45, or, at all events, that two of their number, Mr. Lord and Mr. Cardinal, were so biased; and that this would vitiate the decision of the body. Thirdly, it is suggested that one of the number of the executive D committee, namely, Mr. Barnes, was not a duly elected member and must be regarded as a stranger who purported to act as a judge. The third ground, in my view, is devoid of substance, Mr. Barnes was, I think, properly elected.

The first and second grounds, however, raise questions of great importance. In a general sense it is, I think, true to say that the members of the executive committee in the circumstances of the case might fairly be suspected of a bias in a popular sense E against the plaintiff, and it is a reasonable inference of fact that, having regard to the letter from the plaintiff of Sept. 10, 1927, refusing to make the deletions in his election address for presidentship which the committee had required to be made and to the other facts which I have above mentioned, the committee, in directing the letter of Sept. 15, 1927, to be written to the plaintiff giving notice of their intention to consider the question of the publication by the plaintiff of the election address in accordance F with the provisions of r. 45 were in effect taking upon themselves the duties of acting as prosecutors in relation to the charge of having committed the breach in question. These circumstances make it necessary to examine the law in relation to the conduct of such bodies as the executive committee. At the outset it may be expedient to point out that the question will not be whether the court considers that the conduct of the defendants or their executive committee was fair and just; but the very different G question whether the case is one in which the court has power to interfere.

The jurisdiction of the courts in regard to domestic tribunals—a phrase which may conveniently be used to include the committees or the councils or the members of trade unions, of members' clubs, and of professional bodies established by statute or royal charter while acting in a quasi-judicial capacity—is clearly of a limited nature. Parenthetically, I may observe that I am not confident that precisely the same principles H will apply in all these cases; for it may be that a body entrusted with important duties by an Act of Parliament is not in the same position as, for example, the executive committee in the present case. Speaking generally, it is useful to bear in mind the very wide differences between the principles applicable to courts of justice and those applicable to domestic tribunals. In the former the accused is entitled to be tried by the judge according to the evidence legally adduced and has a right to be represented I by a skilled legal advocate. All the procedure of a modern trial, including the examination and cross-examination of the witnesses and the summing-up, if any, is based on these two circumstances. A domestic tribunal is in general a tribunal composed of laymen. It has no power to administer an oath, and—a circumstance which is, perhaps, of greater importance—no party has the power to compel the attendance of witnesses. It is not bound by the rules of evidence; it is, indeed, probably ignorant of them. It may act, and it sometimes must act, on mere hearsay, and in many cases the members present or some of them—like a British jury in ancient days—are them-

selves both the witnesses and the judges. Before such a tribunal counsel have no right of audience and there are no effective means for testing by cross-examination the truth of the statements that may be made. The members of the tribunal may have been discussing the matter for weeks with persons not present at the hearing, and there is no one even to warn them of the danger of acting on preconceived views. It is apparent, and it is well settled by authority, that the decision of such a tribunal cannot be attacked on the ground that it is against the weight of evidence, since evidence in the proper sense there is none and since the decisions of the tribunal are not open to any sort of appeal unless the rules provide for one.

There is, perhaps, a question whether the decision can be attacked on the ground that there is no evidence—a word used presumably in a popular sense—upon which the tribunal could possibly come to such a conclusion. The question does not directly arise in the present case, but I may point out that the view of the Court of Appeal in *Leeson* v. *General Council of Medical Education and Registration* (11) seems to me to put the matter in a more accurate way than it is put in the subsequent case of *Allinson* v. *General Council of Medical Education and Registration* (7). I accept with respect the views of COTTON, L.J., expressed in the first of these two cases, and of BOWEN, L.J., as laying down the right principle. BOWEN, L.J., says in reference to *Leeson's Case* (11) (43 Ch.D. at p. 383):

> "There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at if he has had a full opportunity of being heard. With respect of the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all. We have seen these conditions have been fulfilled by the inquiry and by the tribunal which institutes it. The functions of the court of law are at an end. It appears to me that we have no power to review the evidence any more than we have a power to say whether the tribunal came to a right conclusion. If, indeed, it could be shown that nothing was brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to show that the inquiry had not been a due inquiry; but if there is no blot of that kind upon the proceedings the jurisdiction of the domestic tribunal which has been clothed by the legislature with the duty of discipline in respect of a great profession must be left untouched by courts of law."

To my mind that statement of the case, mutatis mutandis, is applicable, apart from any special rule, to all such cases as I am considering, and it follows exactly the same lines as the well-known decision of the Court of Appeal in *Dawkins* v. *Antrobus* (12). On the other hand, for myself I am unable to attach any precise meaning to the phrase used by LORD ESHER in *Allinson* v. *General Council of Medical Education and Registration* (7), from which it appears that he considered that the court had to inquire into the question whether there was any evidence upon which the council could reasonably arrive at their finding; for I do not know how a court of law is to weigh statements made not on oath and views formed it may be on hearsay allegations. I incline to the view that in *Allinson's Case* (7) the Court of Appeal, which professed to be following *Leeson's Case* (11), did not really intend to lay down a different doctrine on the point I am now considering.

It is certain, therefore, that a domestic tribunal is bound to act strictly according to its rules and is under an obligation to act honestly and in good faith. It is not suggested in the present case that the rules as they stand have not been complied with, and on the evidence before me I am quite unable to hold that the committee acted otherwise than honestly and in good faith. Indeed I was not invited to do so. It is, however, contended that there are other implied rules or implied obligations, sometimes described as obligations of natural justice, which the plaintiff may invoke—for example, a rule that

no person or persons should sit on the tribunal or be present at the hearing if he or they are in effect prosecutors or if he or they may fairly be suspected of a bias against the accused. It is, therefore, desirable to consider the principle on which these contentions must ultimately rest. In such a case as the present, where the tribunal is the result of rules adopted by persons who have formed the association known as a trade union, it seems to me reasonably clear that the rights of the plaintiff against the defendants must depend simply on the contract, and that the material terms of the contract must be found in the rules. It is true that LORD ESHER, in *Allinson* v. *General Council of Medical Education and Registration* (7), appears to have invoked the principle of public policy. I need not consider whether that principle would be held at the present time to be properly applicable even in the case of a tribunal established by the Medical Act, 1858. In the case I have before me—and I may add in such a case as a power of expulsion in a members' club—it seems to me reasonably clear that the matter can only depend on contract, express or implied. If, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the courts would interfere with such a rule on the ground of public policy. Moreover, it is well settled by decisions of the Court of Appeal that, if the parties to a contract agree that a person who may well be suspected of a bias or who may be deciding in his own cause shall be the judge in a dispute between the parties, the courts will not interfere: *Jackson* v. *Barry Rail. Co.* (13), *Eckersley* v. *Mersey Docks and Harbour Board* (14). The position is one as DAVEY, L.J., remarked, in the latter case, which "primâ facie raises some surprise in a judicial mind"; but, he adds, "that is the contract of the parties."

Eminent judges have at times used the phrase "the principles of natural justice." The phrase is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is no such thing as justice in the modern sense. In ancient days, a person wronged executed his own justice. Among our Anglo-Saxon ancestors there was a system of infangthief, which was really no more than the system of summary execution without trial. At a later stage methods were adopted of compurgation or of ordeal; and it is hardly necessary to observe that, for example, a system of ordeal by water in which sinking was the sign of innocence and floating the sign of guilt, a system which lasted in this country for hundreds of years, has little to do with modern ideas of justice. It is unnecessary to give further illustrations. The truth is that justice is a very elaborate conception, the growth of many centuries of civilisation; and even now the conception differs widely in countries usually described as civilised.

A person who joins an association governed by rules under which he may be expelled, for example, such rules as in the present case exist in rr. 45 and 46, has, in my judgment, no legal right of redress if he be expelled according to the rules, however unfair and unjust the rules or the action of the expelling tribunal may be, provided that it acts in good faith. It is impossible to doubt that, if the rules postulate an inquiry, the accused must be given a reasonable opportunity of being heard. The phrase "the principles of natural justice," can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation. On that point there is no difficulty. Nor do I doubt that in most cases it is a reasonable inference from the rules that if there is anything of the nature of a lis between two persons, neither of them should sit on the tribunal. But when it is sought to lay down elaborate rules, taken from decisions as to courts of law, and to apply them in such a case as the present, I think it is prudent to remember that these more or less artificial principles have no application, except so far as they can be derived from a fair construction of the rules, and that the implication can only be made if it is clear that the parties, who are laymen and not lawyers, must have intended it.

There is a large number of well-known cases as to the disqualification of justices from adjudicating on matters in regard to which they are interested or where there is ground for a reasonable suspicion of bias: for example, *R.* v. *Allan* (8), *R.* v. *Rand* (15), *R.* v. *Gaisford* (9), and *R.* v. *Sunderland Justices* (16). The smallest pecuniary interest is a

A bar to the justice acting, and also a non-pecuniary interest of such a substantial nature as to make it probable that the justice has a bias. It is not easy to say what "bias" means in this context. BLACKBURN, J., in *R.* v. *Rand* (15) refers to the objection of bias as in the nature of "a challenge to the favour," a quaint phrase which was adopted and repeated by the Court of Appeal in *R.* v. *Sunderland Justices* (16). Whatever may be the precise meaning of this phrase, I think that mere personal prejudice, even resulting B from a previous dispute or altercation, is not comprehended within the term. In my opinion, however, these cases have no real application to the case of a domestic tribunal established by private contract and acting, as pointed out above, on a system and by methods so entirely different from those of a court of justice. If we consider first the case of a pecuniary interest it is impossible in general to imply from the terms of the rules such a disqualification as regards the members of a domestic forum. For example, C when members of a club expel another member under their rules, generally speaking, they all have a small pecuniary interest in the matter. Moreover, the members of a domestic tribunal have other interests in the decision which may well render them something less than impartial. They have, for example, the interests of their association or body to protect, and may properly regard these interests as a matter of great importance. In many cases the tribunal is necessarily entrusted with the duty of D appearing to act as prosecutors as well as that of judges, for there is no one else to prosecute. For example, in a case where a council is charged with the duty of considering the conduct of any member whose conduct is disgraceful and of expelling him if found guilty of such an offence, it constantly occurs that the matter is brought to the attention of the council by a report of legal proceedings in the Press. The member is summoned to appear before the council. The council's duty is to cause him to appear E and to explain his conduct. It may be said that in so acting the council are the prosecutors. In one sense they are; but if the regulations show that the council is bound to act as I have mentioned and to that extent to act as prosecutors, it seems to be clear that the council is not disqualified from taking the further steps which the rules require. That some members of the tribunal may go out of their way to put themselves in a special position as prosecutors and thus to disable themselves from sitting in a quasi-judicial F capacity at the inquiry cannot be denied. *Law* v. *Chartered Institute of Patent Agents* (1) is a conspicuous example; but in order to understand the decision in that exceptional case it is necessary to study the facts carefully and especially to bear in mind that the council had in the first instance applied to the Board of Trade to erase the plaintiff's name from the register, and had plainly acted as accusers and prosecutors in the lengthy proceedings that ensued.

G If an analogy from cases as to magistrates is required, I think one—though, of course, not an exact one—is to be found in the decision of the House of Lords in *Boyle (or Walsh)* v. *Wilson* (17), where it was held that magistrates forming a licensing court could before the hearing receive deputations of persons hostile to licences, rely on their personal knowledge of the facts, receive statements not on oath, and publicly declare their opinion that there were too many licensed houses in the district.

H If I am right so far, the real and the only question that arises in this case is whether on the true construction of the rules any members of the executive committee were disqualified from acting in relation to the breach by the plaintiff of r. 45—that is, from imposing the penalty laid down in that rule if they thought fit. The plaintiff asked for leave to issue his election address in its original form, and treated with contempt the decision of the committee that it must be altered. It was then, I think, the duty of the I committee to take the steps mentioned in the letter of Sept. 15, 1927, and if, in taking those steps, they were prosecutors, the answer is that the rules in such a case contemplate that they should be. Nor do I think that the fact that on Aug. 16 and 17 the committee had passed a resolution which was ultra vires and subsequently rescinded affected their position on Sept. 28, except so far as that circumstance might be evidence of bad faith, a matter on which I have already expressed my opinion. As regards Mr. Lord and Mr. Cardinal, they, no doubt, had in a sense ranged themselves, rightly or wrongly, in a camp hostile to the plaintiff; but in regard to the charge of a breach of r. 45, there was no lis between them, and the plaintiff, and I am satisfied that there is no

ground for contending that either of them was in any real sense acting as a judge in his own cause on Sept. 28. It may, perhaps, be true to say that the plaintiff had a long-standing dispute with them as regards the management of the defendant union; but what follows from that? It is impossible to infer from the rules that members of the executive committee who do not see eye to eye with him on a matter of trade union politics are not to act. Even if there were satisfactory evidence—which there is not—that Mr. Lord or Mr. Cardinal had had a personal quarrel with the plaintiff, I should doubt very much whether it would be right to infer from the rules that he was thereby disqualified from acting under r. 45 or r. 46. That, I think, would be a matter of good taste, not of a legal disqualification. A case may well arise in which the member has definitely quarrelled with every member of the committee. Such bias as may result in the minds of the members of the committee, even if it were—which I greatly doubt—within the principle of "a challenge to the favour" cannot, in my opinion, constitute a disqualification from acting under r. 45. The result is that the resolution in question is not open to objection in this court. The action, therefore, fails and must be dismissed with costs.

Solicitors: *T. J. Robinson & Sons*; *Pattinson & Brewer.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

THOMPSON *v.* LONDON, MIDLAND AND SCOTTISH RAIL. CO.

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Sankey, L.JJ.), May 14, 1929]

[Reported [1930] 1 K.B. 41; 98 L.J.K.B. 615; 141 L.T. 382]

Carriage of Passengers—Condition excluding liability for injury—Reasonableness—Statement on railway ticket referring passenger to other documents—Difficulty or delay in obtaining access to documents—Passenger unable to read.

An excursion ticket, which was issued by the defendant railway company at half the ordinary fare, was obtained for the plaintiff, who was unable to read, by her niece. The ticket bore on its face, in plain, easily legible type, the words: "For conditions see back. Day excursion." On the back of the ticket, also in clear type, was: "Issued subject to the conditions and regulations of the company's time-tables and notices and excursion and other bills." On the relevant company's excursion bill were printed the words: "Excursion tickets are issued subject to the notices and conditions shown in the company's current time-tables." In the company's time-table appeared the words: "Excursion tickets and tickets issued at fares less than the ordinary fares are issued subject to the condition that neither the holder nor any other person shall have any right of action against the company . . . in respect of . . . injury (fatal or otherwise), loss, damage, or delay, however caused." On arrival at her destination the plaintiff descended from the train on to the ramp of the platform, fell, and was injured. In an action by her against the company for negligence,

Held: the fact that the plaintiff was unable to read could not avail her; the condition exempting the company from liability for injury suffered by the holder of a ticket issued at a greatly reduced fare was not unreasonable; the company was to be taken as having made an offer to intending travellers that, if they would accept the conditions on which the offer was made, they could be taken on special occasions and by special train for the specified journey at a reduced fare; the fact that the conditions could not be immediately ascertained by the plaintiff, but were to be sought in a document or documents other than the ticket to find which

document or documents there might be some difficulty or delay, did not prevent the conclusion that the company had taken reasonable steps to bring the condition to the notice of the plaintiff; and, therefore, the company were entitled to rely on the condition which relieved them from liability.

Per LAWRENCE and SANKEY, L.JJ.: If the condition had been so unreasonable that nobody could contemplate that it existed, it would not have been binding.

Notes. As to special terms of a contract for the carriage of passengers, see 4 HALSBURY'S LAWS (3rd Edn.) 185 et seq.; and for cases see 8 DIGEST (Repl.) 114 et seq.

Applied: *Penton* v. *Southern Railway*, [1931] 2 K.B. 103. Distinguished: *Chapelton* v. *Barry U.D.C.*, [1940] 1 All E.R. 356. Referred to: *Fosbroke-Hobbes* v. *Airwork, Ltd. and British American Air Services, Ltd.*, [1937] 1 All E.R. 108.

Cases referred to:

(1) *Parker* v. *South Eastern Rail. Co.*, *Gabell* v. *South Eastern Rail. Co.* (1876), 1 C.P.D. 618; 45 L.J.C.P. 515; 34 L.T. 654; 25 W.R. 97, D.C.; reversed (1877), 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540; 41 J.P. 644; 25 W.R. 564, C.A.; 8 Digest (Repl.) 141, *909*.

(2) *Richardson, Spence & Co. and Lord Gough Steamship Co.* v. *Rowntree*, [1894] A.C. 217; 63 L.J.Q.B. 283; 70 L.T. 817; 58 J.P. 493; 10 T.L.R. 335; 7 Asp. M.L.C. 482; 6 R. 95, H.L.

(3) *Hood* v. *Anchor Line, Ltd.* (*Henderson Bros.*), [1918] A.C. 837; 87 L.J.P.C. 156; 119 L.T. 684; 34 T.L.R. 550; 62 Sol. Jo. 680, H.L.; 8 Digest (Repl.) 115, *743*.

(4) *Skrine* v. *Gould* (1912), 29 T.L.R. 19, C.A.; 36 Digest (Repl.) 45, *245*.

(5) *Nunan* v. *Southern Rail. Co.*, [1924] 1 K.B. 223; 93 L.J.K.B. 140; 130 L.T. 131; 40 T.L.R. 21; 68 Sol. Jo. 139, C.A.; 8 Digest (Repl.) 113, *730*.

(6) *Hearn* v. *Southern Rail. Co.* (1925), 41 T.L.R. 305, C.A.; 8 Digest (Repl.) 113, *731*.

(7) *Williamson* v. *North of Scotland, &c., Navigation Co.*, [1916] S.C. 554; 8 Digest (Repl.) 116, **521*.

(8) *Marriott* v. *Yeoward Bros.*, [1909] 2 K.B. 987; 79 L.J.K.B. 114; 101 L.T. 394; 25 T.L.R. 755; 53 Sol. Jo. 790; 11 Asp.M.L.C. 306; 14 Com. Cas. 279; 8 Digest (Repl.) 139, *900*.

(9) *Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C.B.N.S. 75; 31 L.J.C.P. 241; 6 L.T. 244; 8 Jur.N.S. 1213; 10 W.R. 578; 142 E.R. 1071; 8 Digest (Repl.) 141, *903*.

(10) *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178; 52 L.J.Q.B. 121; 48 L.T. 426; 47 J.P. 357; 31 W.R. 337; 22 Digest (Repl.) 62, *410*.

(11) *Grand Trunk Rail. Co. of Canada* v. *Robertson*, [1909] A.C. 325; 39 S.C.R. 506; 9 Can. Ry. Cas. 149; 8 Digest (Repl.) 172, **746*.

(12) *Harris* v. *G.W.R. Co.* (1876), 1 Q.B.D. 515; 45 L.J.Q.B. 729; 34 L.T. 647; 40 J.P. 628; 8 Digest (Repl.) 141, *908*.

(13) *Stewart* v. *London and North Western Rail. Co.* (1864), 3 H. & C. 135; 4 New Rep. 64; 33 L.J.Ex. 199; 10 L.T. 302; 10 Jur.N.S. 805; 12 W.R. 689; 159 E.R. 478; 8 Digest (Repl.) 138, *896*.

(14) *Richards* v. *London, Brighton and South Coast Rail. Co.* (1849), 7 C.B. 839; 6 Ry. & Can. Cas. 49; 18 L.J.C.P. 251; 13 L.T.O.S. 139; 13 Jur. 986; 137 E.R. 332; 8 Digest (Repl.) 135, *869*.

(15) *Zunz* v. *South Eastern Rail. Co.* (1869), L.R. 4 Q.B. 539; 10 B. & S. 594; 38 L.J.Q.B. 209; 20 L.T. 873; 17 W.R. 1906; 8 Digest (Repl.) 58, *380*.

(16) *Burke* v. *South Eastern Rail. Co.* (1879), 5 C.P.D. 1; 49 L.J.Q.B. 107; 41 L.T. 554; 44 J.P. 283; 28 W.R. 306; 8 Digest (Repl.) 114, *736*.

Appeal by the plaintiff from an order made by Mr. COMMISSIONER SIR WILLIAM F. K. TAYLOR, K.C., at the Manchester Winter Assizes on Feb. 22, 1929, by which he held that there was no evidence on which the jury could find that there had not been reasonable notice given by the defendants of the conditions upon which an excursion railway ticket had been issued to the plaintiff. The plaintiff, Mrs. Mary Elizabeth Thompson, the wife of George Thompson, claimed damages for the negligence of the defendants or their servants whereby she had been caused personal injuries. She had travelled by

an excursion train. She was unable to read, and her ticket was taken for her by her niece, Miss Aldcroft. On the face of the ticket was a reference to the conditions on the back of it, and on the back was printed: "Issued subject to the conditions and regulations in the company's time-tables" &c. The train, as the plaintiff alleged, was drawn up with her coach opposite the slope of the platform, and, it being dark, she got out and fell. In the first place the train stopped, with the coach in which the plaintiff and her friends were, opposite no platform at all, but they were then warned not to get out. The train went on again and drew up, as the plaintiff said, in a position which caused her to have the accident.

The learned commissioner left to the jury the following question: "Did the defendants, the railway company, take reasonable steps to bring the conditions to the notice of the plaintiff?" The jury answered this question in the negative and found for the plaintiff, assessing the damages at £176. Argument was then heard on the question whether there was any evidence on which the jury could properly answer the question as they had. The learned commissioner, in giving judgment, said:

> "I have not the slightest doubt that what the jury felt was that in order to inform oneself of the conditions on which one is travelling when one takes an excursion ticket, what one has to do first is to look at the back of the ticket, then pursue it through some excursion bill, and invoke a course of inquiry until one arrives at the time-table, and when one gets that volume, whether you have to pay for it or not, one has a considerable search before one finds the conditions. I myself do not think that in the line of cases under which I hold this case falls, that that does make any difference. It does not prevent the passenger having notice that there are conditions in writing, and that they are the conditions on which the company makes the offer, and if there is a written offer which refers to conditions which are to be found in a document which, if one likes one can search, it seems to me that the person accepting the offer is bound by the conditions, and that in such a case there is no evidence such as would come within the authorities on which a jury could say that reasonable steps had not been taken by the company to bring the conditions to the notice of the person purchasing the ticket."

The commissioner gave judgment for the defendants, and the plaintiff appealed.

Goldie, K.C., and *B. R. Rice-Jones*, for the plaintiffs, referred to *Parker* v. *South Eastern Rail. Co.* (1); *Richardson, Spence & Co. and Lord Gough Steamship Co.* v. *Rowntree* (2); *Hood* v. *Anchor Line, Ltd. (Henderson Bros.)* (3); *Skrine* v. *Gould* (4); *Nunan* v. *Southern Rail. Co.* (5); *Hearn* v. *Southern Rail. Co.* (6); *Williamson* v. *North of Scotland, &c., Navigation Co.* (7); *Marriott* v. *Yeoward Bros.* (8) and *Van Toll* v. *South Eastern Rail. Co.* (9).

J. C. Jackson, K.C., and *W. Gorman*, for the defendants, cited *Watkins* v. *Rymill* (10); *Grand Trunk Rail. Co. of Canada* v. *Robertson* (11); *Harris* v. *Great Western Rail. Co.* (12); *Stewart* v. *London and North Western Rail. Co.* (13); *Richards* v. *London, Brighton and South Coast Rail. Co.* (14); *Zunz* v. *South Eastern Rail. Co.* (15) and *Burke* v. *South Eastern Rail. Co.* (16).

LORD HANWORTH, M.R.—This action was brought by Mrs. Mary Elizabeth Thompson, the wife of George Thompson, and her case was that she had suffered damage by reason of the negligence of the defendants or their servants whereby she had been caused personal injuries. As stated in the statement of claim those injuries were severe and there is no doubt that she was put to cost and damage and that she suffered pain. In a case of that sort it must always be with reluctance that the tribunal comes to the conclusion that the suffering and expense must be borne by the plaintiff without any recourse at all to the defendant. On the other hand, it must be remembered that there are two parties to an action of this sort and it is a matter of wide-reaching effect whether or not every person while travelling by train has a right of action on whatever may be the conditions on which the travel or the transit is undertaken.

What happened in the case was this. Mrs. Thompson went with two other persons—the two other persons being her daughter and her niece, a Miss Aldcroft—on Jan. 21,

1928, to the railway station and she was a passenger on a train from Manchester to Darwen, the train reaching Darwen at about 10 p.m. at night. When the train arrived at Darwen station it was too long to be accommodated at the platform, with the result that it has to pull up a second time. The plaintiff was told not to get out at the first stopping of the train. Then the train drew up a second time and when it reached the platform it reached that part of it right at the end where the ramp begins and in stepping out on to the sloping platform she slipped and suffered the injuries which are set out in the statement of claim. The action is based on the negligence of the defendants in the course of carrying the plaintiff to her destination—Darwen. The defendants rely upon the conditions of the contract under which they undertook to convey the plaintiff from Manchester to Darwen and the particulars say this:

> "The ticket issued to the plaintiff by the defendants for the said journey was an excursion ticket and on the face of the said ticket were printed, inter alia, the words 'Excursion, For conditions see back,' and on the back of the said ticket were printed, inter alia, the words, 'Issued subject to the conditions and regulations in the company's time-tables and notices and excursion and other bills.' On the excursion bill of the said company were printed, inter alia, the words: 'Excursion tickets are issued subject to the notices and conditions shown in the company's current time-tables.' In the company's time-table were printed, inter alia, the words 'excursion tickets and tickets issued at fares less than the ordinary fares are issued subject to the general regulations and conditions and also the condition that neither the holders nor any other person shall have any right of action against the company . . . in respect of . . . injury (fatal or otherwise), loss, damage, or delay, however caused."

There is no dispute that the plaintiff was travelling by an excursion train. It is an excursion train which, apparently, the defendant company run so many times a week during particular periods of the year between Darwen and Manchester and Manchester and Darwen. The excursion train is run on terms of a much lower charge being made to passengers than is charged for the ordinary transit. The excursion trains are not part of the ordinary service of trains—they are trains on special days and special occasions and on special terms as to price. There is some evidence as to how the plaintiff came to travel. She says in her evidence that she cannot read. She paid Miss Aldcroft the sum which was required and Miss Aldcroft says this (this is the learned commissioner's note): "I took tickets—three half-day excursions to Manchester 2s. 7d. each"—that is from Darwen to Manchester and Manchester back to Darwen. The price 2s. 7d. each is just one-half of what would be charged as the ordinary fare for that amount of railway travelling between Darwen and Manchester and back again from Manchester to Darwen. She says that at that time nothing was said about handbills or conditions and she saw no handbill, but on cross-examination she says her father had been to see if there were excursion trains, and there is in the evidence a statement that he had looked and found that there were excursion trains as indicated by some of the bills which were hanging about in the booking hall of the railway company.

The case was tried before MR. COMMISSIONER SIR WILLIAM FRANCIS KYFFIN TAYLOR sitting at Manchester with the assistance of a special jury of Manchester men, and he left questions to the jury. The first question that had to be decided was, whether or not there was any negligence on the part of the defendants? and the second question was: What were the damages if they held that the defendants were liable? Then came the question of a special defence which had been argued on the particulars that I have already read. On that issue the learned commissioner took a course which has been taken before and taken prudently in order to prevent the case going back for a new trial through the want of that course having been taken. He says this in his summing-up to the jury:

> "There is the other part of the case, because I want to leave a question to you about this condition. I have written this question out and I will hand it to you: Did the defendants, the railway company, take reasonable steps to bring the conditions to the notice of the plaintiff? It may be that that question is not necessary, but I

think it wiser, in order to save expense and trouble, to get an answer from you at any rate if you would be good enough to bring your minds to bear upon it." A

It is, I think, quite plain from that introductory sentence that the learned commissioner left that question, not because he was satisfied in his mind that there was evidence which required or justified the question being put, but ex majore cautela so that it might be considered and the answer of the jury considered if it became necessary to do so. The jury, in answer to that question, replied: No, the defendants had not B taken reasonable steps and then they found on the other two questions for the plaintiff, that is, they found negligence and they found damages to the amount of £176 10s. The learned commissioner at a later date had the legal question arising upon the issue of the condition argued before him and ultimately came to the conclusion that the condition did afford a shield of defence to the railway company, and upon that he entered judgment for the defendants. It is from that judgment for the defendant railway company C that the plaintiff appeals.

The learned commissioner has come to his conclusion upon a ground which we are of opinion was right. Dealing with the condition, I must just say a word or two more as to what its nature was. The ticket which was issued to the plaintiff was one which had in plain and unmistakable terms in type as large as the other words upon the face of the ticket: "For conditions see back. Day Excursion." There is no difficulty in D reading those words any more than there is a difficulty in reading the words "Third Class" or "Manchester" down below. Then on the back of the ticket is printed also in type, which, if small, is easily legible: "Issued subject to the conditions and regulations of the company's time-tables and notices and excursion and other bills. Return as per bill." In the time-table there is this condition which is relied upon and which I have read. The condition on the back makes the first reference to the company's time-tables, E but it also refers to notices and excursion and other bills. In the excursion bills which contain some notes as to the tickets to be issued and the charges to be made and the dates on which one can travel at a single fare for a double journey, there is a reference to the conditions and the inquirer is directed to the time-table. Ultimately, therefore, the time-table is the place which does contain this particular condition. Any person who took the trouble to follow out the plain and legible words on the ticket, "See con- F ditions," would be directed without difficulty to the source of the conditions and would be able to find it. Obviously persons who are minded to go for a day journey of the sort do not take the trouble to make an examination of all the conditions, but two things are plain, first, that any person who takes this ticket is conscious that there are some conditions on which it is issued, and, secondly, that it is priced at a figure far below the ordinary price charged by the railway company, and from that it is a mere sequence of G thought that one does not get from the railway company the ticket which they provide at the higher figure of 5s. 4d.

The plaintiff cannot read, but, having regard to the authorities, and the condition of education in this country, I do not think that avails her in any degree. The ticket was taken for her by her agent. The time of the train was ascertained for her by Miss Aldcroft's father; and he had made the specific inquiry in order to see at what time and H in what circumstances there was an excursion train available for the intending travellers. He ascertained, therefore, and he had the notice put before him before ever the ticket was taken, that there were conditions on the issue of excursion and other reduced-fare tickets. It appears to me that the right way of considering such notices is put by SWIFT, J., in *Nunan* v. *Southern Rail. Co.* (5). He says this, after advising himself of a great deal by a number of cases which have been dealt with in the courts ([1923] 2 K.B. I 703 at p. 707):

> "I am of opinion that the proper method of considering such a matter is to proceed upon the assumption that where a contract is made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders it, and if the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound

by its contents and his act amounts to an acceptance of the offer to him whether he reads the document or otherwise and informs himself of its contents or not, and the conditions contained in the document are binding upon him."

In law it seems to me that that is right. The railway company is to be treated as having made an offer to intending travellers that, if they will accept the conditions on which the railway company make the offer, they can be taken at suitable times, on suitable days and by indicated trains from Darwen to Manchester and back at a price largely reduced from the common price. The conditions are rendered available, and of their existence there can be no doubt, for they are indicated clearly upon the ticket which is issued. Whether or not the father of Miss Aldcroft took the trouble to search out the conditions, or to con them over or not, it appears to me that when that ticket was taken it was taken with the knowledge that the conditions applied, and that the person who took the ticket was bound by those conditions. If that be so, the conditions render it impossible for the plaintiff to bring the case successfully. It is, however, argued that it is a question of fact for the jury, whether or not sufficient notice was given of these conditions, whether or not, therefore, the plaintiff ought to be held bound by the conditions, for it is said that the conditions are, I will not say past finding out, but difficult to ascertain. The learned commissioner who tried the case, in dealing with this point, said this. He appreciates that the verdict of the jury has been based probably on the fact that one has to make a considerable search before one finds out the conditions.

"I do not think myself that in the line of cases under which I hold this case falls, that that [considerable search] does make any difference. It does not prevent the passenger having notice that there are conditions in writing, and that they are the conditions on which the company makes the offer, and if there is a written offer which refers to conditions which are to be found in a document, which, if you like, you can search, it seems to me that the person accepting the offer is bound by the conditions, and that in such a case there is no evidence, such as would come within the authorities on which a jury could say that reasonable steps had not been taken by the company to bring the conditions to the notice of the person purchasing the ticket."

So that the learned commissioner deals with what is the pith and marrow of this point. I think he is right in saying that in the line of cases, and there are many, under which this case falls, it has not ever been held that the mere circuity which has to be followed to find the actual condition prevents the passenger having notice that there was a condition.

Starting as early as 1864, there is *Stewart* v. *London and North Western Rail. Co.* (13). It was a decision of the court in banco, and it is stated in the headnote to the case (33 L.J.Ex. 199):

"The holder of a railway excursion ticket—expressed to be 'issued subject to the conditions contained in the company's time and excursion bills,' one of which conditions was that 'luggage under 60 lb.' should be carried 'free, at passenger's own risk'—is bound by the terms of this special contract, which is not void under the Traffic Act, and he has consequently no claim against the company for the loss of his luggage, although it be proved that he did not know the condition on which it was being carried."

POLLOCK, C.B., said (33 L.J.Ex. at p. 200):

"There is a rule in the English law that every man must be taken to know that what he has the means of knowing, whether he has availed himself of those means or not. Now, as to this ticket, the plaintiff must be supposed to have read it. If he did not choose to consult the handbill, that is his fault, not the fault of the company. The bill points out the terms upon which these particular and special trains are to run."

Then he refers to the condition and says: A

"The plaintiff's ignorance, then, was of his own creation, and the luggage was lost in a place where he has agreed to take the risk himself. Under the circumstances, the railway company are not liable, and on that ground there should be no rule."

The other judges concurred. I have referred to that case not only because it is the earliest to which our attention has been called in matter of date, but also because it B refers to an excursion train. It appears to me important to bear in mind that we are dealing with a special contract made for a special transit by an excursion train. We are not dealing with the ordinary schedule of trains available to everyone at the usual rate. We are dealing with a particular transit, in respect of which the father of Miss Aldcroft went down to the station to find out if and when such transit was available, and ascertained both the time and learned the price; and he could have learned all the C conditions, if he had been so minded.

That consideration, that it was an excursion train and a special contract, must be borne in mind, for there are a number of cases which, if one does not bear that in mind, might be taken as applying and applying in a contrary sense to the present case. For instance, I think that in dealing with *Parker* v. *South Eastern Rail. Co.* (1), it must be remembered as to the condition which was there relied upon as to limitation of liability D in respect of goods deposited in a cloak-room, that the limitation there arose upon a ticket which had been handed to the depositor; but it was unnecessary for the purpose of the deposit and the safe custody that there should be any terms or conditions at all, or, indeed, that there should be a written contract at all. Therefore, the contract was one which could be made, and might very ordinarily be made, without any written conditions of any sort or kind; and that feature is dwelt upon as significant in the E judgment of LORD COLERIDGE in the court below, where he says (1 C.P.Div. at p. 626):

"Regard being had to the common and ordinary course of business, it seems to me to be reasonable that a man receiving such a ticket as this should look upon it as a mere voucher for the receipt of the package deposited, and a means of identifying him as the owner when he sought to reclaim it;"

and in that sense not containing any special condition to which his attention was to be F drawn. In the Court of Appeal observations are made which must be taken with that qualifying factor arising upon the issue of the ticket. BRAMWELL, L.J. (2 C.P.D. at p. 428), the same case in the Court of Appeal, says this:

"Would the depositor be bound? I might content myself by asking: Would he be, if he were told 'our conditions are on this ticket,' and he did not read them. In my G judgment, he would not be bound in either case. I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read."

But if there had been an indication that it had been said to the man: "Read that, it concerns the matter in hand"; that if the plaintiffs did not read it, they were as much bound as if they had read it and had not objected. H

There is the present case. It was quite clear, and everybody understood and knew that there would have to be a ticket issued. Without such ticket, which is the voucher showing the fare money has been paid, it would not be possible for the lady to go on the platform to take her train, or on reaching the end of her transit, to leave the platform without giving up the ticket. It is quite clear, therefore, that it was intended there should be a ticket issued; and on that ticket plainly on its face is a reference made to I the conditions under which it is issued.

The question then remains, the judge having left this question to the jury, and the jury having found it in favour of the plaintiff, ought that verdict upon that question to be set aside? Counsel for the plaintiff has said that there was some evidence on which the question was rightly left to the jury. I find no trace of any decision by the learned commissioner that there was such evidence which he felt bound to leave to the jury. At the same time counsel has said that there is evidence in that the condition was somewhat far to seek, and could not have been immediately discovered by the

person taking the ticket. I agree with the observations that have been made by the learned commissioner, SIR WILLIAM FRANCIS KYFFIN TAYLOR upon that point. I cannot find that that question of the difficulty or delay in turning up the condition has been relied on in any of the cases as making any difference.

The observations that were made in *Hood* v. *Anchor Line, Ltd.* (*Henderson Bros.*) (3), were all observations made by VISCOUNT HALDANE in a case where there was a question of fact upon which the tribunal must be informed by those who are the right persons to determine facts, namely, the jury. He says ([1918] A.C. at p. 844):

> "On this question even your Lordships sitting here are a tribunal of fact far more than of law, and what we have to do as lawyers is no more that to see that we have shaped for ourselves the question of fact to which I have referred."

But if there had been no question of fact, if it is a matter of law, we must give effect to the law, and it does not avail that the jury have answered that question, for the putting of that question to them was otiose.

It appears to me that this point is exactly dealt with in *Watkins* v. *Rymill* (10) (10 Q.B.D. at p. 190) in the judgment delivered by STEPHEN, J., a judgment of himself, HAWKINS and WATKIN WILLIAMS, JJ., and he deals with the question:

> "Ought we to enter a verdict for the defendant or to send the case for a new trial in order that the question suggested by MELLISH, L.J., may be put? We think we ought to enter judgment for the defendant. . . . It is in some cases difficult to say what is a question of law and what is a question of fact."

Then he applies the test which to them seems conclusive. Supposing the question was answered by the jury hostilely to the defendant, would that verdict be set aside? I think it would, because it is a question of fact to which by law one answer only can be given, and that is the same as the question of law here—once the offer has been made, an offer which makes it plain that it is an offer subject to conditions, the question whether or not those conditions impose a search on the part of the person accepting the offer does not avail in considering whether or not the conditions have been told him, or have been imposed in relation to the offer; and if a jury were to find that the mere difficulty in finding the precise terms of the condition was such as to negative notice of the condition, they would be finding a verdict in defiance of what they ought to find, for the plain terms upon the ticket indicate that there are conditions, and those conditions both in terms and where to find them are imposed by the very notice given upon the ticket in the offer made by the defendants. STEPHEN, J., concludes his judgment in this way (10 Q.B.D. at p. 190):

> "The only question which can be called a question of fact is, whether giving a man a printed paper plainly expressing the conditions on which a keeper of a repository is willing to accept a carriage for sale on commission is or is not equivalent to asking the owner of the carriage to read that paper, with intent that he should read it when he has a fair opportunity to doing so. This, we think, is a question of law, to be answered in the affirmative."

So there the giving of the ticket in plain terms indicated that there were conditions, and that one of the conditions is that the person shall find them at a certain place and accept them, is I think quite a plain indication that he has made that offer upon those terms and conditions only, and that any answer that he had not brought the conditions sufficiently to the notice of the person accepting the offer must be set aside as perverse. Following, therefore, the judgment in *Watkins* v. *Rymill* (10), it appears to me that the learned commissioner who dealt with this question here was quite right in saying that he could not give effect to the answer of the jury upon the question that he put for reasons of convenience; and that this must be determined upon the law applicable to the conditions upon which the ticket was issued; and that those conditions negative the right of the plaintiff to recover. For these reasons the appeal must be dismissed with costs.

LAWRENCE, L.J.—Notwithstanding the able argument of counsel for the plaintiff, I am of opinion that this appeal fails. The question to be decided is whether there was

any evidence upon which the jury could find that the railway company did not take reasonable steps to bring to the notice of the plaintiff the conditions on which she would be carried. The plaintiff was, I think, entitled to insist that all that was reasonably necessary as a matter of ordinary practice should have been done to bring to her notice the fact that the contract tendered to her when she paid her fare excluded her right of action in respect of injury, fatal or otherwise, however caused. Whether all that was reasonably necessary to bring that condition to her notice was done is a question of fact: see per VISCOUNT HALDANE in *Hood* v. *Anchor Line, Ltd.* (*Henderson Bros.*) (3). In the present case the learned commissioner has held that there was no evidence to the contrary.

The facts of the case are simple. On the ticket issued to the plaintiff's agent there was a statement in plain terms that it was issued subject to conditions which would be found on the back, and on the back there is a plain statement indicating where the conditions subject to which the ticket was issued were to be found. In these circumstances (the notice on the ticket not being tricky or illusory) it seems to me that there is no room for any evidence that the company had not done all that was reasonably necessary as a matter of ordinary practice to call attention to the conditions upon which the ticket was issued. Counsel strenuously contended that as the condition upon which the company now relies was of an unusual character in that it exempted the company from its ordinary liability, special attention ought to have been drawn to that condition. In my judgment, that argument is not sound, because if it were, the company would have to draw attention not only to the condition upon which it now relies, but to all the conditions which might become material according to the events which might afterwards happen, and that could not as a matter of ordinary practice be done upon a ticket such as this or verbally at the ticket office. It seems to me that the right view is the one which was expressed by BRAMWELL, L.J., in *Parker* v. *South Eastern Rail. Co.* (1) in the passage to which the Master of the Rolls has referred (2 C.P.Div. at p. 428). If there were a condition which was unreasonable to the knowledge of the company tendering the ticket, I do not think the passenger would be bound. Here it cannot be said that the condition in question in this case is an unreasonable one either from the point of view of the company or from that of the passenger. It is a condition, as appears from *Stewart* v. *London and North Western Rail. Co.* (13), which has existed in respect of excursion trains for upwards of half a century, and is, to my mind, a reasonable condition which need not have special attention directed to it. I, therefore, agree with the learned commissioner that there was no evidence upon which a jury could properly have found that the company had not taken reasonable steps to bring to the attention of the plaintiff notice of the condition upon which it was going to carry her between Manchester and Darwen on the occasion in question. I agree with the Master of the Rolls that this appeal ought to be dismissed.

SANKEY, L.J.—I agree, if I may be permitted to say so, with what LORD DUNEDIN says in *Hood* v. *Anchor Line, Ltd.* (*Henderson Bros.*) (3) ([1918] A.C. at p. 846). This is a class of case in which there is no end to the citing of authorities, but it is possible to say what is the conclusion of the whole matter, and I think counsel for the plaintiff was right in saying that *Parker* v. *South Western Rail. Co.* (1), which has been approved in every case since its date, really stereotyped the question which a tribunal always has to put to itself when the question arises. The learned commissioner did put a third question here: "Did the defendant railway company take reasonable steps to bring the condition to the notice of the plaintiff?"

Those who practise in this class of case know perfectly well the sort of considerations which are placed before juries when they are asked to give a verdict and an answer to that question. In some of the cases the ticket has been handed to the plaintiff folded up and it has been suggested to the jury that that fact shows that the defendants did not take reasonable steps to bring the conditions to the notice of the plaintiff. In the earlier cases one will find examples of an argument which has long since been abandoned, where it was contended that where the conditions were printed at the back of the ticket instead of upon the front of the ticket, the jury ought to say that there the defendants

had not taken reasonable steps to bring the conditions to the notice of the plaintiff. There is still a third class of case. If one looks at the authorities one will find that the attention of the jury has been called to the smallness of the print, and it is said: "The print was so small that no reasonable person could read it"; and the jury have been asked to say on that consideration that reasonable steps have not been taken by the defendants to bring the conditions home to the notice of the plaintiff, especially, as it is put in some of the cases, when one takes the ticket, if it is an excursion train, somebody behind one is of the opinion that one is taking too long to get the ticket and hustles one out of the ticket office or the place where one gets the ticket before one has time to see. No doubt all those are matters for the consideration of the jury. But in this present case I think rather a different state of affairs is involved. There can be no question here about the size of the print, as pointed out by my Lord, the Master of the Rolls, it is in big print and legible print, "For conditions see back." When you look at the back it is not possible I think to say merely because the condition was not printed upon the front that it did not give reasonable notice. There again the print although smaller is legible and refers to the notices, excursion and other bills and to the time-tables.

As I understand it, the real point made by counsel for the plaintiff, and I rather expect the point upon which the jury really gave their verdict, was this:

> "What we have to consider is that the conditions do not appear upon the ticket at all, either on the front or the back, but they do appear in a document, namely, the time-tables which it is extremely difficult to get. There was evidence that there was only one copy in the booking office, and that one had to pay 6d. to get a copy if one wanted to see for oneself, and it is suggested: 'That is not giving reasonable notice of the conditions.'"

I do not agree with that. I think that this is a class of case where one makes a contract in one document which clearly refers to conditions and incorporates conditions which are contained in another document, and if one does make a contract like that I do not think it is open to one to say either (i) that one did not look at the document which contained the incorporated terms, or (ii) that the document which contained the incorporated terms was one which one might have had some difficulty in finding. The fact remains that one made a contract which clearly said that the conditions were contained in a particular document. I cannot help thinking that the jury thought it was because of the difficulty in getting the time-table or the bills that the company had not taken reasonable steps to bring the condition to the notice of the plaintiff. That, I understand, is where the learned commissioner disagreed with the verdict of the jury. He says, and I should like to read the passage again:

> "I do not think myself that in the line of cases under which I hold this case falls, that that does make any difference [that is to say, the consideration whether you have to make a considerable search before you find the conditions]. It does not prevent the passenger having notice that there are conditions in writing, and that they are the conditions on which the company makes the offer, and if there is a written offer which refers to conditions which are to be found in a document, which, if one likes, one can search, it seems to me that the person accepting the offer is bound by the conditions, and that in such a case there is no evidence such as would come within the authorities on which a jury could say that reasonable steps had not been taken by the company to bring the conditions to the notice of the person purchasing the ticket."

I would like to guard myself in the way that BRAMWELL, L.J., and my brother, LAWRENCE, L.J., have guarded themselves with regard to the question whether, if the document to which one is referring imposed such unreasonable conditions that nobody could contemplate that they existed, one could not be bound by them. I think the example given was supposing one went to a cloakroom with goods bound by the conditions in the time-table and there were conditions in the time-table that if one did not remove one's goods within twenty-four hours they should be forfeited to the railway company or that one should pay £100, or some ridiculous condition like that—I do not

think the condition would be binding. Supposing the conditions in the time-table were printed in Chinese so that one could not understand them, there again I think it probably could not be said one would be bound by the conditions, but this condition is by no means an unreasonable condition, everybody familiar with the practice of the railway world knows the sort of conditions that are imposed upon people who take cheap tickets—sometimes they are drovers' tickets, sometimes they are tickets to enable workmen to go backwards and forwards, sometimes they are excursion tickets, and in respect of the latter tickets, in *Stewart* v. *London and North Western Rail. Co.* (13), which is now sixty-five years old (I see it was decided in 1864), in addition to the passage read from the judgment of the Chief Baron, PIGOTT, B., said (it was an excursion train) he looked upon it as a special contract, it was competent for the parties to make it, and the railway company did not incur the responsibility of common carriers in running excursion trains. I think it a reasonable bargain that if a railway company runs trains at a reduced rate each passenger must take care of his own luggage. Nor can I banish from my mind the fact here that the plaintiff knew perfectly well it was an excursion train, since inquiries had been made with regard to the time of its departure and so forth. In those circumstances I do not think that it was open to the jury to find that the company had not taken all reasonable steps to give the plaintiff notice of the conditions. I am of opinion that the learned commissioner was right in entering judgment for the defendants non obstante veredicto. I agree the appeal should be dismissed.

Appeal dismissed.

Solicitors: *John Carnegie*, for *C. St. Broadbent*, Darwen; *Alexander Eddie.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

MAY *v.* MAY

[COURT OF APPEAL (Scrutton, Greer and Russell, L.JJ.), May 13, 14, 1929]

[Reported [1929] 2 K.B. 386; 98 L.J.K.B. 770; 141 L.T. 629]

Husband and Wife—Separation deed—Covenant by husband to pay annuity to wife—Effect of divorce obtained by wife.

By cl. 4 of a deed of separation entered into between the plaintiff and the defendant while they were married, it was provided that the husband should "during the life of the wife so long as the wife shall perform and observe the stipulations on her part herein contained, pay to the wife such an annual sum as, after all deductions, including income tax, shall have been made, shall amount to the clear yearly sum of £600. . . ." In 1924, the wife obtained a decree absolute on the ground of the adultery of the husband. She did not apply to the Divorce Court for maintenance, but relied on the deed of separation. The husband having defaulted in his payments under the deed, the wife brought an action against him claiming the payment of the arrears under the deed.

Held: cl. 4 of the deed was not subject to an implied term that it should only remain in force while the parties to it remained husband and wife, and, therefore, the dissolution of the marriage did not put an end to the operation of the clause, and the wife was entitled to recover.

Charlesworth v. *Holt* (1) (1873), L.R. 9 Ex. 38, followed.

Notes. Followed: *Adams* v. *Adams*, [1941] 1 K.B. 536. Referred to: *Mann* v. *Mann*, [1936] 1 All E.R. 952; *Kirk* v. *Eustace*, [1937] 1 K.B. 278.

As to the operation of separation agreements, see 19 HALSBURY'S LAWS (3rd Edn.) 882–888; and for cases see 27 DIGEST (Repl.) 225 et seq., in particular 227–230.

Cases referred to:

(1) *Charlesworth* v. *Holt* (1873), L.R. 9 Exch. 38; 43 L.J.Ex. 25; 29 L.T. 647; 22 W.R. 94; 27 Digest (Repl.) 229, *1837*.

(2) *Hyman* v. *Hyman, Hughes* v. *Hughes*, [1929] P. 1; 98 L.J.P. 1; 139 L.T. 416; 44 T.L.R. 664; 72 Sol. Jo. 435; 26 L.G.R. 471; 66 L.Jo. 10, C.A.; affirmed ante, p. 245; [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; 45 T.L.R. 444; 73 Sol. Jo. 317; 27 L.G.R. 379, H.L.; 27 Digest (Repl.) 235, *1888*.

(3) *Goslin* v. *Clark* (1862), 12 C.B.N.S. 681; 31 L.J.C.P. 330; 6 L.T. 824; 9 Jur.N.S. 520; 142 E.R. 1310; 27 Digest (Repl.) 229, *1836*.

(4) *Reid* v. *Reid* (1886), 31 Ch.D. 402; 55 L.J.Ch. 294; 54 L.T. 100; 34 W.R. 332; 2 T.L.R. 254, C.A.; 27 Digest (Repl.) 95, *704*.

(5) *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex.Ch.; 12 Digest (Repl.) 696, *5334*.

(6) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 696, *5333*.

(7) *Krell* v. *Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; 19 T.L.R. 711, C.A.; 12 Digest (Repl.) 435, *3327*.

(8) *Chandler* v. *Webster*, [1904] 1 K.B. 493; 73 L.J.K.B. 401; 90 L.T. 217; 52 W.R. 290; 20 T.L.R. 222; 48 Sol. Jo. 245, C.A.; 12 Digest (Repl.) 463, *3461*.

(9) *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 32 T.L.R. 677; 21 Com. Cas. 299; sub nom. *Re F. A. Tamplin Steamship Co., Ltd. and Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; 13 Asp.M.L.C. 467, H.L.; 12 Digest (Repl.) 442, *3361*.

(10) *Bank Line, Ltd.* v. *A. Capel & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 35 T.L.R. 150; 63 Sol. Jo. 177; 14 Asp.M.L.C. 370, H.L.; 12 Digest (Repl.) 443, *3365*.

(11) *Clifford* v. *Clifford* (1884), 9 P.D. 76; 53 L.J.P. 68; 50 L.T. 650; 32 W.R. 747, C.A.; 27 Digest (Repl.) 246, *1983*.

(12) *Wasteneys* v. *Wasteneys*, [1900] A.C. 446; 69 L.J.P.C. 83, P.C.; 27 Digest (Repl.) 223, *1781*.

(13) *Horlock* v. *Beal*, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp.M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, *3322*.

Appeal from an order of HORRIDGE, J., in an action tried in the short cause list.

The action was brought by the plaintiff Christiane May, formerly the wife of John Johnston May, the defendant, to recover the sum of £50, being the balance of instalments alleged to be due to the plaintiff under the covenants in a deed of separation made between the parties and dated April 12, 1916. The deed recited that unhappy differences had arisen between the husband and wife by reason whereof they had agreed to live separate and apart from each other and to enter into the arrangement expressed in the deed. The deed also recited that there had been four children of the marriage, of which the eldest was seven years old and the youngest two years old. The deed provided (inter alia):

"(1) The wife may and shall hereafter during the life of the husband live separate and apart from him and free from his marital control and authority as if she were unmarried. (2) Neither the husband nor the wife shall in any way molest or interfere with the other of them, or shall require or by any legal proceedings for restitution of conjugal rights, or otherwise howsoever attempt to compel the other of them to return to cohabitation. (3) The wife shall and may retain as her separate property and dispose of accordingly all articles of dress or personal use or ornament and all other tangible personal property now in her possession either as part of her paraphernalia or as her separate property, and also all the real and all other personal estate to which she is now or shall hereafter become entitled to in her own right. And if she shall die in the lifetime of the husband without having disposed of such real and personal estate, articles, and property, or any part thereof,

then the same or so much thereof as shall remain undisposed of at her death shall devolve and belong to the persons or person who would at her death have become entitled thereto by law had she died seised or possessed thereof intestate and a widow free from all right or claim of the husband, his heirs, executors or administrators. (4) The husband shall and will during the life of the wife so long as the wife shall perform and observe the stipulations on her part herein contained, pay to the wife such an annual sum as, after all deductions, including income tax, shall have been made, shall amount to the clear yearly sum of £600, to be considered as accruing from day to day, but to be paid in advance on the first day of every month, the first payment to be made on the 1st May 1916."

By cl. 6:

"The wife shall be entitled to such of the furniture, effects, plate, linen, and other articles now in or upon the premises Castelnau, Mortello Park, Bournemouth, as she may require for the use of herself during her life, and the husband shall pay all the costs and expenses to be incurred in the removal of the same from the said premises to the new residence of the wife, and the sum of £10 towards the cost of installing the same therein. The husband shall also provide the wife with a piano for her use during her life."

By cl. 7 the children were to remain in the custody of the wife during their respective minorities and each of them the husband and the wife were to have the right to communicate by letter with the children residing with the other of them and the right of access to the children at all convenient times, and each of the children were to be allowed to spend one-half of their summer or winter holidays with the husband. By cl. 8:

"The wife shall out of the provision made for her by the deed provide a home for herself and the children and support and maintain herself and the children and pay for their education, and also pay and discharge all debts, engagements and liabilities which she might incur or enter into, and keep the husband, his heirs, executors and administrators indemnified from or against the same, and all actions, proceedings, costs, damages and all liability on account of them."

By cl. 9:

"If the husband and the wife shall be reconciled to each other and return to cohabitation then these presents shall become void."

In 1924 the marriage between the parties was dissolved on the ground of the husband's adultery. In October, 1928, the defendant did not pay to the plaintiff the full amount due under the deed of separation, and in November, 1928, the plaintiff brought this action by a specially endorsed writ.

The defendant, by an affidavit, said that since the deed of separation now sued on was executed the marriage between the plaintiff and defendant had been dissolved. After the decree dissolving the marriage had been pronounced correspondence took place between the plaintiff's then solicitors and the defendant's solicitors with regard to the allowance which the defendant should make to the plaintiff in the future, as the result of which the defendant undertook to make to the plaintiff a voluntary allowance of £50 per month, being the sum which he had theretofore been paying under the deed, but it was distinctly understood and agreed that the defendant would only pay that sum so long as he was in a position to do so. It was further understood and agreed that in the event of the defendant not being prepared to continue that allowance, or of his making default the plaintiff's right to apply to the Probate, Divorce and Admiralty Division of the court should not be prejudiced. At the time when the deed of separation was executed and for some time thereafter the defendant was in practice as a manipulative surgeon at No. 7, Park Lane, London, and was in receipt of a substantial professional income, and he was still in practice at No. 7, Park Lane when the marriage was dissolved. In 1925 his health failed and he was compelled to give up his practice in London and to live in the country. He had since 1925 been living at the Holt, Canford Cliffs, West Bournemouth, and had, so far as his health permitted, practised as a manipulative surgeon, but in the altered circumstances his practice was a small one

carried on under great difficulties and his professional income had been considerably reduced. The defendant gave particulars of his income from fees, showing that his professional income had declined. He had no income beyond that derived from his profession. In addition to the allowance which he had hitherto made to the plaintiff he had, he said, paid considerable sums for the education of the two sons and had made an allowance to his two daughters of the marriage. The defendant submitted that by reason of the decree of dissolution the deed of separation sued on was no longer valid and that the action was misconceived. He further submitted that, while he was willing to make to the plaintiff such allowance as his means from time to time permitted, it was impossible for him to make to the plaintiff an allowance of £50 per month, and that the question of the amount which he ought in fairness to pay to the plaintiff should be determined in the ordinary way in the Probate, Divorce, and Admiralty Division of the High Court of Justice in accordance with the arrangement made between the solicitors after the dissolution of the marriage.

HORRIDGE, J., gave judgment for the plaintiff for the amount claimed, and the defendant appealed.

Hildesley, K.C., and *Rowe* for the defendant.

A. M. Sullivan, K.C., and *Ralph Thomas* for the plaintiff.

The following authorities were referred to during the arguments: *Hyman* v. *Hyman* (2); *Charlesworth* v. *Holt* (1); *Goslin* v. *Clark* (3); *Reid* v. *Reid* (4); *Appleby* v. *Myers* (5); *Taylor* v. *Caldwell* (6); *Krell* v. *Henry* (7); *Chandler* v. *Webster* (8); *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (9); *Bank Line, Ltd.* v. *A. Capel & Co.* (10); *Clifford* v. *Clifford* (11) and *Wasteneys* v. *Wasteneys* (12).

SCRUTTON, L.J.—This is an action brought by a lady to recover sums due under a deed of separation executed by herself and her husband, from whom she has been divorced on the ground of his adultery. The deed was executed before the passing of the Matrimonial Causes Act, 1923, which enabled a wife to obtain a decree of divorce on the ground of her husband's adultery without proof of any other matrimonial offence. The deed recites that unhappy differences had arisen between the parties and that there were four children of the marriage. By cl. 4 of the deed it was provided that

> "The husband shall and will during the life of the wife so long as the wife shall perform and observe the stipulations on her part herein contained pay to the wife such an annual sum as after all deductions including income tax shall have been made shall amount to the clear yearly sum of £600 to be considered as accruing from day to day, but to be paid in advance on the first day of every month, the first payment to be made on the 1st May 1916."

When the decree of dissolution of the marriage was pronounced, the plaintiff did not apply to the court for an award of permanent maintenance, but relied on the terms of the deed. In October and November, 1928, the defendant paid only half of the amount which he had covenanted to pay, and on Nov. 7, 1928, the plaintiff issued a writ claiming to recover two sums of £25, which the defendant (the husband) had omitted to pay. The defendant contended that the deed was only to be read, by reason of an implied term, as relating only to the period during which the parties were living apart as husband and wife, and that by virtue of the implied term, the deed was to cease and become void if the marriage was dissolved, and it was contended on the defendant's behalf that for that purpose it was immaterial whether the decree of divorce was pronounced in consequence of the act of the husband or that of the wife.

The reason why this point, which might have arisen long ago, has been taken now for the first time is the decision of this court in *Hyman* v. *Hyman*, *Hughes* v. *Hughes* (2) affirmed in the House of Lords. The actual point raised in those two cases was different from that which we have to decide now. There was a separation deed containing a covenant by the wife not to sue for maintenance beyond the amount specified in the deed. The wife obtained a decree of dissolution of the marriage by reason of the husband's adultery. The wife then petitioned for permanent maintenance; the husband

resisted the petition on the ground of the covenant in the separation deed; the wife replied that Parliament had conferred on the court power to grant maintenance and that the jurisdiction of the court in that respect could not be ousted by the mere agreement of the parties. The full Court of Appeal, by a majority of four lords justices to two, upheld the wife's contention that the power of the court was not ousted by the covenant in question. But in the course of the argument many other points were considered. One of these was whether the doctrine of frustration operated to annul and avoid a deed of separation when the relation of husband and wife came to an end and whether the husband was freed from the burden of his covenant; and *Charlesworth* v. *Holt* (1) was referred to.

In *Charlesworth* v. *Holt* (1) there was a separation deed in which the husband had covenanted with trustees to pay an annuity for the support of the wife during the joint lives of the spouses, and so long as they should live separate and apart. The marriage was dissolved on account of the wife's adultery. Thereupon it was argued that the deed had ceased to be operative. The Court of Exchequer decided that on the proper construction of the deed the termination of the matrimonial relation did not involve a termination of the effect of the deed. That case was considered by the Court of Appeal in *Hyman* v. *Hyman* (2). Three members of the court expressed doubts whether at the present day *Charlesworth* v. *Holt* (1) would be decided as it was in the year 1873. The main decision in *Hyman* v. *Hyman* (2) was affirmed in the House of Lords, but again there are passages in the opinions of the noble lords which suggest that the House was not unanimously in favour of the decision in *Charlesworth* v. *Holt* (1). In these circumstances, it is not surprising that before long the question now in dispute should come up for consideration, or that when it did the husband should contend that the separation deed was subject to the implied term that it should only remain in force while the parties to it remained husband and wife, and that the wife should insist that there was no such implied term, and that *Charlesworth* v. *Holt* (1) ought to be followed.

I have come to the conclusion that, whatever view this court might have expressed, if the questions in *Charlesworth* v. *Holt* (1) arose for the first time, now, when the doctrine of frustration has reached the present stage of development, the court will not interfere with a decision which has stood so long and has been the foundation of so many deeds of separation between so many married couples. If the case had never arisen until now, there would have been a good deal of ground for saying that the deed made for the purpose of defining the rights and obligations of two parties to a marriage was subject to the condition that the marriage should continue. The "doctrine of frustration" is used to express the principle on which a contract may be interpreted subject to a defeasance if a certain state of things ceases to continue.

"Frustration" is not an apt term to describe the principle. I take the explanation of it given by LORD LOREBURN in *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (9). After saying that, unless some Act of Parliament gives the necessary jurisdiction, a court of law has no power to discharge either party from a performance of a lawful contract where there is no default, LORD LOREBURN said ([1916] 2 A.C. at p. 403):

> "But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist; and if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract."

It is from this total frustration of the purpose of the contract that the doctrine derives its name. So when a hall was let for the purpose of giving a series of concerts and before the date fixed for the first concert the hall was burnt down, it was held that the contract was subject to an implied condition that the hall should continue to exist: *Taylor* v. *Caldwell* (6). And where a landlord agreed to let rooms in Pall Mall to a

A tenant for two named days for the purpose of viewing the celebrations in connection with the coronation of King Edward VII, and the coronation was postponed owing to the illness of the King, it was held that the contract was subject to an implied condition that the celebrations should take place on the days named: *Krell* v. *Henry* (7). When the war of 1914–18 broke out a number of ships were under voyage contracts and time charters. The government stepped in and took control of the ships, and the question B arose in many cases whether the particular charterparty was subject to a condition that the contract should continue to be capable of being performed. *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (9); and *Bank Line, Ltd.* v. *A. Capel & Co.* (10), are instances of this.

If the question in the present case had no previous history, but had arisen for the first time after the decision of those cases, there would be much encouragement for the view C that this husband and wife in providing the terms on which they should separate were providing for the time during which they should continue to be husband and wife, although separated, and on the footing that if they should cease to be husband and wife the operation of the deed should cease also. But the question is not whether the parties might, but whether they must, have made their bargain on this footing. Can it be said that all husbands and wives who have executed deeds of separation must have made D their bargains on the footing that the relation of husband and wife should in each case continue? Separation agreements have been drafted which provide that they shall continue valid although that relation should cease to exist. It is also the common practice for the court in matrimonial cases to treat separation deeds as still existing when making a decree of maintenance or varying a settlement. Considering the number of years during which *Charlesworth* v. *Holt* (1) has stood as good law, the number of E separation deeds in existence, and the number of persons who are living under the provisions contained in them, I do not feel able to give effect to the doubt which I expressed in *Hyman* v. *Hyman* (2), and which I still entertain. Therefore, notwithstanding that doubt I think this appeal must be dismissed.

GREER, L.J.—I agree. I have come to the conclusion that the judgment of HORRIDGE, J., was right. In my judgment, we ought to hold ourselves bound by the F decision in *Charlesworth* v. *Holt* (1). I expressed this opinion in *Hyman* v. *Hyman* (2), although in that case it was not necessary to decide the point. In this case it is necessary to decide it.

It is urged that we ought not to consider ourselves bound by the decision in *Charlesworth* v. *Holt* (1), because that case does not expressly deal with the doctrine of frustra- G tion of adventure, but although the doctrine is not mentioned in so many words, the reasoning of the Court of Exchequer excludes its application. The question was whether the deed in that case was subject to an implied term that the covenant to pay the annuity should only be binding during the continuance of the marriage tie. KELLY, C.B., in giving judgment said (L.R. 9 Exch. at p. 40):

H "I think the plaintiffs [trustees of the deed] are entitled to our judgment. The husband might, in this case, have introduced express words limiting his liability to the period during which Lucy Holt remained his wife. But there are no such words, and Mr. Holker has not satisfied me that any words are used which necessarily imply that the covenant is only to be binding during the continuance of the marriage tie. It is impossible for the court to add such a term to the contract. If I the contract were to be so construed, it would be possible for the husband, by giving grounds to his wife for a petition for divorce against him, to put an end to his liability. Suppose, for example, he were guilty of adultery and desertion, and the wife obtained a decree for dissolution of the marriage, he would be freed by means of his own misconduct. We certainly ought not, unless constrained by express words or clear implication, so to interpret the contract."

It is clear from that judgment that the court were considering whether the terms for which the defendant contended could be added to the contract. BRAMWELL, B., said (L.R. 9 Exch. at p. 41):

"I am of the same opinion. Mr. Holker does not ask us to imply the condition he contends for, but to hold that the language of the deed itself in effect expresses that it is only to operate so long as the marriage remains undissolved. Now a man who becomes a party to such a deed as this, the object of which is once for all to provide for the wife during the separation, could by unmistakable words limit his liability to the period during which the marriage relation continues. Mr. Holker contends that the covenant is only operative as long as the parties live apart and the status of husband and wife exists between them. But I think the husband's covenant is absolute; and even in the case of the husband and wife resuming cohabitation, the trustees would be entitled to insist upon payment of the annuity, were it not for the clause which limits the obligation to such time as they shall live apart from each other."

After alluding to certain expressions in the deed, the learned Baron continues:

"From these and other clauses it is plain that a divorce was not in the contemplation of either party; but I nevertheless see nothing to restrict the operation of the defendant's covenant, except the single condition that Lucy Holt and himself shall be living separate and apart."

These expressions clearly indicate the opinion of the Court of Exchequer that the deed in *Charlesworth* v. *Holt* (1) was subject to no implied term which would bring its operation to an end if the relation of husband and wife should come to an end. The same consideration applies to the deed before us in the present case, if, as I think, we are bound to follow the decision in *Charlesworth* v. *Holt* (1). Apart from the length of time during which that case has stood unchallenged I say nothing as to how the question would be decided at the present day. The doctrine of frustration is not based on an addition by force of law to the obligations expressed in the contract. It rests on an implied term in the contract: see *Horlock* v. *Beal* (13), and *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (9).

RUSSELL, L.J.—I agree that the appeal fails. The success of the defendant's argument would involve the conclusion that every separation deed contains by implication a clause bringing to an end the operation of the deed in the event of the dissolution of the marriage between the parties. This conclusion is inconsistent with *Goslin* v. *Clark* (3), *Charlesworth* v. *Holt* (1), and *Clifford* v. *Clifford* (11). Of these the first two decisions are not binding on this court, but the third is a decision of the Court of Appeal. The conclusion would be contrary to a long established practice of the matrimonial courts of treating as subsisting any deed of separation between the parties when exercising its jurisdiction formerly under s. 5 of the Matrimonial Causes Act, 1859, and now under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. Even if I thought the older decisions were of doubtful authority I should still be of opinion that we ought not to overrule them and interfere with the rights and liabilities of the parties to unnumbered separation deeds, but I do not wish to be taken as questioning the soundness and correctness of the old decisions.

Appeal dismissed.

Solicitors: *Gush, Phillips, Walters & Williams*; *Cardew Smith & Ross.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

Re ATKINSON. WEBSTER *v.* WALTER

[CHANCERY DIVISION (Clauson, J.), July 4, 1929]

[*Reported* [1930] 1 Ch. 47; 99 L.J.Ch. 35; 142 L.T. 129]

Administration of Estates—Order of application of assets—Property undisposed of by will—Debts, funeral and testamentary expenses charged on personal estate—Lapsed devise of real estate—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *Sched. I, Part II, para.* 1.

By his will made before the coming into operation of the Administration of Estates Act, 1925, the testator, who died in 1928, devised his real property to A. absolutely, and directed his trustees to pay his funeral and testamentary expenses and debts out of the proceeds of the sale and conversion of his personal estate. Owing to the death of A. before the death of the testator, the devise of the real estate had lapsed. On the question whether, in view of the directions in the will, the personal estate was liable for payment of funeral and testamentary expenses and debts in priority to the real estate,

Held: the real estate was "property undisposed of by will" within the meaning of Sched. I, Part II, para. 1, to the Act (*Re Lamb* (1), ante, p. 82, followed), but, the direction in the will being a "provision" within the meaning of s. 34 (3), therefore, the personal estate was liable in priority to the real estate which, but for the provision in the will, would have been primarily liable under Sched. I, Part II, para. 1.

Notes. Considered: *Re Kempthorne, Charles* v. *Kempthorne*, post, p. 495. Applied: *Re Littlewood, Clark* v. *Littlewood*, [1930] All E.R.Rep. 151. Considered: *Re Tong, Hilton* v. *Bradbury*, [1930] All E.R.Rep. 262; *Re Sanger, Taylor* v. *North*, [1938] 4 All E.R. 417; *Re Harland-Peck, Hercy* v. *Mayglothing*, [1940] 4 All E.R. 347; *Re James, Lloyds Bank, Ltd.* v. *Atkins*, [1947] 1 All E.R. 402. Followed: *Re Martin, Midland Bank Executor and Trustee Co., Ltd.* v. *Marfleet*, [1955] 1 All E.R. 865. Referred to: *Re Meldrum's Will Trusts, Swinson* v. *Meldrum*, [1952] 1 All E.R. 274.

As to the order of application of assets, see 16 HALSBURY'S LAWS (3rd Edn.) 344 et seq.; and for cases see 23 DIGEST (Repl.) 539–545, *6043–6077*. For the Administration of Estates Act, 1925, s. 34 and Sched. I, Part II, see 9 HALSBURY'S STATUTES (2nd Edn.) 737, 767.

Cases referred to:

(1) *Re Lamb, Vipond* v. *Lamb*, ante, p. 82; [1929] 1 Ch. 722; 98 L.J.Ch. 305; 141 L.T. 60; 45 T.L.R. 190; 73 Sol. Jo. 77; 23 Digest (Repl.) 540, *6046*.

(2) *Re Petty, Holliday* v. *Petty*, post, p. 493; [1929] 1 Ch. 726; 98 L.J.Ch. 207; 141 L.T. 31; 23 Digest (Repl.) 544, *6071*.

Adjourned summons

By his will made on Sept. 13, 1921, the testator devised all his real estate to his brother Herbert Swainson Atkinson absolutely, and he bequeathed his personal estate to the trustees of the will on trust for sale, and on trust out of the proceeds of the moneys so produced to pay all his funeral and testamentary expenses and debts, and to stand possessed of the residue in trust as to one-third for his sister Susan M. Atkinson, as to one other third for his sister Ella L. Atkinson, and as to the remaining one-third, for his friend Florrie May Walter. The testator died on June 28, 1928, without issue, leaving surviving him his wife, Amy Atkinson, who died on Dec. 17, 1928, his mother, Margaret Atkinson, and the two above-named sisters. His brother, Herbert Atkinson, died before the testator on Feb. 3, 1927. The testator's real estate was valued at more than £8,000, and his personal estate at about £576. The funeral expenses and debts amounted to £680. This summons was taken out by the trustees of the will to determine the question whether, in view of the directions in the will, the personal estate was liable for payment of the funeral and testamentary expenses and debts in priority to the real estate in spite of the fact that the latter, by reason of the death of the devisee, Herbert Atkinson, before the testator's death, lapsed and was undisposed of by the will.

C. D. Myles for the plaintiffs.
John H. Boraston for Florrie May Walter, referred to *Re Lamb* (1) and *Re Petty* (2).
H. W. Dollar for the defendants, Susan and Ella Atkinson.
Wilfrid Hunt for the defendant, Margaret Atkinson.

CLAUSON, J., stated the facts and continued: The question I have to decide is in what order are the testator's assets applicable towards the discharge of his funeral, testamentary expenses and debts. Although he died after the commencement of the Administration of Estates Act, 1925, with the consequence that, in administering his estate, the provisions of that Act relating to the order of the application of his assets must be applied, yet in construing the will regard must be had to the law in force at the time of its execution, that is, before the alterations in the existing law were made by the new Act.

The testator died leaving a solvent estate, as his real and personal estate together were more than enough to discharge his debts and other liabilities. Therefore s. 34 (3) of the new Act became applicable, under which—subject to the provisions, if any, contained in the will—his real and personal estate are to be applied towards the discharge of the debts, &c., payable thereout, in the order mentioned in Part II of Sched. I to the Act, according to which, property of the deceased undisposed of by his will is applicable for that purpose in priority to any other of his assets. It was decided in *Re Lamb* (1), a decision by which I feel myself bound, that "property undisposed of by will" referred to in para. 1 of Part II, was not to be confined to cases where no attempt was made by a testator to dispose of it by his will and, therefore, included a share of residue which had lapsed by reason of the death of the legatee in the testator's lifetime. Accordingly here, the testator's brother, to whom he had devised his real estate, having died in his lifetime, the real estate so devised was property undisposed of by will within the meaning of para. 1 of Part II. It has been contended on behalf of the residuary legatees that, by force of the new Act, the debts were made primarily payable out of the undisposed of real estate. On the other hand, it was contended on behalf of those who would take the undisposed of property that, before the provisions of Part II can be applied, regard must first be had to the provisions, if any, contained in the will. The question then is whether there is to be found in the will any provision which has the effect of altering the statutory order of application and putting some other assets of the deceased in front of the undisposed of real estate. In *Re Lamb* (1) there was no such provision to be found in the will; and in *Re Petty* (2) a mixed fund was created for payment of debts, &c., and there was there no undisposed of moiety of the balance of residue until the debts had been paid. Here, the will contains a clear direction to the trustees to convert the personal estate, and out of the moneys produced by such conversion to pay his funeral and testamentary expenses and debts; until that provision is worked out there is no necessity to have recourse to Part II of Sched. I to the Act. The conclusion I have reached, independently of any authority (except on the point as to the lapsed real estate being property undisposed of by will, within the meaning of para. 1 of Part II), is that the trustees must convert the personal estate into money, and out of the proceeds of the conversion pay the funeral and testamentary expenses, debts and liabilities payable out of the estate of the deceased (except death duties imposed on the real estate) in priority to the real estate undisposed of by the will; and I will make a declaration to that effect.

Solicitors: *Arkoll, Barraud & Chadwick*, for *Talbot, Rheam & Webster*, Milnthorpe; *Vizard, Oldham, Crowder & Cash*; *Jacques & Co.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

Re PETTY. HOLLIDAY *v.* PETTY

[CHANCERY DIVISION (Astbury, J.), March 13, 14, 1929]

[Reported [1929] 1 Ch. 726; 98 L.J.Ch. 207; 141 L.T. 31]

Administration of Estates—Order of application of assets—Trust for sale—Mixed fund for payment of debts, etc.—Balance given in moieties—Lapse of one moiety—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *Sched. I, Part II, para.* 8 (*a*).

By the Administration of Estates Act, 1925, s. 33 (7): "Where the deceased leaves a will, this section has effect subject to the provisions contained in the will." By s. 34 (3): "Where the estate of a deceased person is solvent his real and personal estate shall, subject to . . . the provisions (if any) contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of Sched. I to this Act." Schedule I, Part II, provides: "Order of application of assets where estate is solvent. 1. Property of the deceased undisposed of by will . . . 8. The following provisions shall also apply—(a) The order of application may be varied by the will of the deceased. . . ."

A testator by his will devised his real and personal estate to his trustees on trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary debts and legacies and to stand possessed of the residue of the proceeds of sale in trust to divide the same into two equal parts and to pay one equal moiety to his wife and to hold the other equal moiety in trust for two of his daughters in equal shares. The testator's wife died in his lifetime and her moiety, therefore, lapsed and was undisposed of. On the question whether the testator's funeral and testamentary expenses and debts should be paid out of the whole of the residuary estate, or whether, under the provisions of the Administration of Estates Act, 1925, they should be paid primarily out of the lapsed moiety,

Held: the order of application of assets under the Act of 1925 being made, by para. 8 (a) of Part II of Sched. I to the Act, subject to variation by the provisions of the will, the funeral and testamentary expenses and debts were payable out of the whole mixed fund before division.

Re Lamb (1), ante, p. 82, distinguished.

Notes. Distinguished: *Re Atkinson, Webster* v. *Walter*, ante, p. 491. Approved: *Re Kempthorne, Charles* v. *Kempthorne*, post, p. 495. Considered: *Re Sanger, Taylor* v. *North*, [1938] 4 All E.R. 417; *Re Harland-Peck, Hercy* v. *Mayglothing*, [1940] 4 All E.R. 347. Referred to: *Re James, Lloyds Bank, Ltd.* v. *Atkins*, [1947] 1 All E.R. 402.

As to the order of application of assets, see 16 HALSBURY'S LAWS (3rd Edn.) 344 et seq.; and for cases see 23 DIGEST (Repl.) 539–545, *6043–6077*.

For the Administration of Estates Act, 1925, ss. 33, 34 and Sched. I, Part II, see 9 HALSBURY'S STATUTES (2nd Edn.) 734, 737, 767.

Case referred to:

(1) *Re Lamb, Vipond* v. *Lamb*, ante, p. 82; [1929] 1 Ch. 722; 98 L.J.Ch. 305; 141 L.T. 60; 45 T.L.R. 190; 73 Sol. Jo. 77; 23 Digest (Repl.) 540, *6046*.

Adjourned Summons

Wesley Petty, by his will dated Aug. 29, 1921, appointed executors and trustees, and after making certain bequests, by cl. 17, devised and bequeathed all his real and personal estate not otherwise disposed of unto his trustees on trust for sale and conversion, and with and out of the proceeds to pay his funeral and testamentary expenses—except the estate duty on his ordinary shares in Petty & Sons (Leeds), Ltd., and a certain sum of £4,000, as to which duties he had made other provisions—and debts and the pecuniary legacies bequeathed by his will or any codicil thereto, and all duties payable in respect of all such annuities, legacies, and other gifts as were given free of duty. By cl. 18, the testator directed his trustees to stand possessed of the residue—which he referred to as the residuary trust fund—in trust to divide the same into two equal

parts and to pay one equal half part to his wife Frances Elizabeth Petty, and to hold the other equal half part in trust for his daughters Christine Alice Barker and Catherine Jennings in equal shares. By cl. 19, the testator directed that the shares of his two daughters in the residuary trust fund should be settled. By cl. 20, the testator directed that if any child of his should die in his lifetime having a child or children who should attain the age of twenty-one years, such child or children should take the share which his, her, or their parent would have taken in the residuary trust fund or under any other bequest. The testator died on April 22, 1928, his wife having died on Sept. 6, 1922, in his lifetime, and in consequence of her death the one-half of the residuary trust fund bequeathed to her lapsed. Four of the five sons of the testator named in his said will survived him, but one son, Charles Edgar Petty, died in the testator's lifetime, leaving a daughter, Frances Margaret Louise Petty, who was an infant, but who, under the terms of the will if she attained twenty-one, would take her father's share. The testator's daughters, to whom one-half of the residuary trust fund was bequeathed, survived the testator.

One of the trustees of the will issued this summons to determine whether the testator's funeral and testamentary expenses and the duties and debts should be paid out of the whole of his residuary estate, or whether, under the provisions of the Administration of Estates Act, 1925, they should be paid primarily out of the share which had lapsed owing to the death of the wife.

The Administration of Estates Act, 1925, provides:

"33 (7). Where the deceased leaves a will, this section has effect subject to the provisions contained in the will."

"34 (3). Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on the property of the deceased, and to the provisions (if any) contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of Sched. I to this Act."

"Sched. I, Part II. Order of application of assets where the estate is solvent.

"1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies. . . .

"8. The following provisions shall also apply—

(a) The order of application may be varied by the will of the deceased. . . ."

Harold Christie for the plaintiff.

Mumford for the two daughters entitled to the moiety referred to: *Re Lamb* (1).

C. Harman for the sons; *Winterbotham*, for the child of a deceased son, and *Danckwerts*, for other parties interested, referred to THEOBALD ON WILLS (8th Edn.), p. 942, and WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES (11th Edn.), vol. 2, p. 583.

ASTBURY, J., stated the facts and continued: The question is whether, under the provisions of the Administration of Estates Act, 1925, the debts and funeral and testamentary expenses are to be paid out of the share of ultimate residue which has lapsed owing to the death of the wife in the lifetime of the testator, or whether they are to be paid out of the whole residuary estate before it is divided into two moieties. The pertinent sections of the Act are as follows. [His Lordship then read s. 33 (7), s. 34 (3), and para. 1 and para. 8 (*a*) of Part II of Sched. I, and continued:] I cannot believe that the statute intended to interfere with the right of a testator to dispose of his estate as he pleases so long as he keeps within the law. In the present case, the testator created a mixed fund by the sale and conversion of his real and personal estate to be held on trust to pay thereout his funeral and testamentary expenses—including estate duty except as otherwise provided for—and his debts and the legacies given by his will. There could be no undisposed of property until after these payments had been made. The property that lapsed owing to the death of the wife, and was undisposed of, was one moiety of the balance after the payments had been made. The estate must be administered according to the directions of the testator.

A It has been said that *Re Lamb* (1) is opposed to this view. A copy of the will in that case has been produced and it appears that in that case there was a mere charge of the funeral and testamentary expenses and nothing to alter their incidence. The learned judge held that the undisposed of share of the residue was the primary fund for payment. There was there nothing either in the old or the new law to alter the provisions of the will. The present case is entirely different. The debts and funeral and testamentary B expenses are not thrown on the lapsed share at all. The lapsed share is only part of the ultimate residue after those payments have been made. The estate, therefore, must be administered according to the declared intention of the testator, and the debts, funeral and testamentary expenses paid out of the whole mixed fund before division.

Solicitors: *Paterson, Snow & Co.*, for *Lupton & Fawcett*, Leeds.

C [*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

D

Re KEMPTHORNE. CHARLES *v.* KEMPTHORNE

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), October 21, 22, 23, November 1, 1929]

E [Reported [1930] 1 Ch. 268; 99 L.J.Ch. 107; 142 L.T. 111; 46 T.L.R. 15]

Will—Real estate—Devise—Statutory trust for sale—Conversion into personalty—Inclusion in bequest of personal property—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 28 (1), *s.* 35, *Sched. I, Part* 4, *para.* 1 (1) (b)—*Settled Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 18), *s.* 75 (5).

F *Administration of Estates—Order of application of assets—"Property of deceased undisposed of by will"—Lapsed share of residue—"Property appropriated" or "charged with payment of debts"—Residuary gift—Administration of Estates Act*, 1925 (15 & 16 *Geo.* 5, *c.* 23), *s.* 34 (3), *Sched. I, Part* 2, *paras.* 1, 3, 4.

By his will, dated Dec. 2, 1911, the testator, after devising "all my freehold and copyhold property" to his brother, C. K., bequeathed all his leasehold property G and personal estate and effects "subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed" to trustees to be divided into seven equal parts, and to be held for his brothers and sisters in certain shares. At the date of his death the testator was possessed of an interest under his father's will which consisted of an equitable interest as to two-ninths of undivided shares in the residuary real estate of his father and a legal interest in one equal H fourth part of certain mines and minerals purchased by him. By the deaths of beneficiaries of the leasehold and personal property named in the will in the lifetime of the testator there was a lapse of three-sevenths of the fund to be divided. The testator died on Aug. 15, 1928. On an originating summons to determine questions arising on the construction of the will,

Held: (i) the freehold and copyhold property disposed of by the testator came I within para. 1 (1) of Part 4 of Sched. I to the Law of Property Act, 1925, and by sub-para. (b) thereof it was to be held by the trustees of the will on the statutory trusts stated in s. 35, namely, a trust for sale; primâ facie, therefore, it was converted into personalty and passed under the gift of personal property in the will; and there was nothing in s. 28 (1) of the Law of Property Act, 1925, or s. 75 (5) of the Settled Estates Act, 1925, to displace that primâ facie conversion.

Re Price (1), [1928] Ch. 579, approved.

(ii) assuming, without deciding, that para. 1 of Part 2 of Sched. I to the Administration of Estates Act, 1925 (which referred to "property of the deceased undisposed

of by will"), applied to a lapsed share of residue, there was in the will an express direction that the expenses, debts, and legacies should be borne by the whole of the testator's estate, and under s. 34 (3) of the Act that was sufficient to override the order of application of assets stated in the schedule.

Re Lamb (2), ante, p. 82, questioned and distinguished.

Per **Curiam:** Paragraphs 3 and 4 of Part 2 of the schedule operated where the payment of debts, &c., was specifically charged on some particular property, and did not comprise property included in a general or residuary gift to be ascertained after the payment of the sums charged.

Notes. Considered: *Re Cruse, Gass* v. *Ingham*, [1930] W.N. 206. Distinguished: *Re Tong, Hilton* v. *Bradbury*, [1930] All E.R.Rep. 262. Considered: *Re Warren, Warren* v. *Warren*, [1931] All E.R.Rep. 702; *Re Hind, Bernstone* v. *Montgomery*, [1932] All E.R.Rep. 909. Distinguished: *Re Worthington, Nichols* v. *Hart*, [1933] All E.R.Rep. 189; *Re Sanger, Taylor* v. *North*, [1938] 4 All E.R. 417. Considered: *Re Gordon, Watts* v. *Rationalist Press Association, Ltd.*, [1940] 3 All E.R. 205. Followed: *Re Harland-Peck, Hercy* v. *Mayglothing*, [1940] 4 All E.R. 347. Considered: *Re Harvey, Public Trustee* v. *Hoskin*, [1947] 1 All E.R. 349. Distinguished: *Re James, Lloyds Bank, Ltd.* v. *Atkins*, [1947] 1 All E.R. 402. Considered: *Re Wellsteds Will Trusts, Wellsted* v. *Hanson*, [1948] 2 All E.R. 209; *Re Bradshaw, Bradshaw* v. *Bradshaw*, [1950] 1 All E.R. 643; *Re Meldrum's Will Trusts, Swinson* v. *Meldrum*, [1952] 1 All E.R. 274.

As to the equitable doctrine of conversion, see 14 HALSBURY'S LAWS (3rd Edn.) 576 et seq.; and as to the order of application of assets in administration, see ibid., vol. 16, 344 et seq. For cases see 20 DIGEST 335 et seq.; 23 DIGEST (Repl.) 539 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427; and for Administration of Estates Act, 1925, see 9 HALSBURY'S STATUTES (2nd Edn.) 718.

Cases referred to:

(1) *Re Price*, [1928] Ch. 579; 97 L.J.Ch. 423; 139 L.T. 339; Digest Supp.
(2) *Re Lamb, Vipond* v. *Lamb*, ante, p. 82; [1929] 1 Ch. 722; 98 L.J.Ch. 305; 141 L.T. 60; 45 T.L.R. 190; 73 Sol. Jo. 77; 23 Digest (Repl.) 540, *6046*.
(3) *Re Wheeler, Jameson* v. *Cotter*, [1929] 2 K.B. 81, n.; 141 L.T. 322; Digest Supp.
(4) *Re Mellish, Clark* v. *Buchannan* (1927), unreported, cited in [1929] 2 K.B. at p. 83; 141 L.T. at p. 322.
(5) *Re Petty, Holliday* v. *Petty*, ante, p. 493; [1929] 1 Ch. 726; 98 L.J.Ch. 207; 141 L.T. 31; 23 Digest (Repl.) 544, *6071*.

Appeals from orders made by MAUGHAM, J., on an originating summons to determine the true construction of the will of Lewis John Kempthorne, deceased.

By his will dated Dec. 2, 1911, the testator, devised to his brother, Charles Henry Kempthorne, "all my freehold and copyhold property," and gave all his leasehold property and personal estate and effects "subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto" upon trust for division into seven equal parts for his brothers and sisters in certain shares. The testator died on Aug. 15, 1928. Practically all the freehold and copyhold property of the testator was held by him in undivided shares, and became subject on the coming into operation on Jan. 1, 1926, of the Law of Property Act, 1925, to a trust for sale. The testator not having altered his will after the passing of the Act, the question arose whether his brother, Charles Henry, took the property under the devise to him contained in the will, or whether it was converted by the operation of the Act into personalty and passed under the bequest in the will of the personal property.

MAUGHAM, J., held, following the decision of CLAUSON, J., in *Re Price* (1), that, as a result of the Law of Property Act, 1925, Sched. I, Part 4, para. 1, and s. 35, the freehold and copyhold property held by the testator in undivided shares became on Jan. 1, 1926, subject to a trust for sale which effected a conversion of the property into personalty so that it passed under the gift of personal property. Charles Henry Kempthorne appealed.

A *Alexander Grant, K.C.*, and *W. F. Swords* for the appellant.

H. B. Vaisey, K.C., and *R. Gwyn Rees* for persons interested in the personalty.

F. D. Morton, K.C., and *A. L. Ellis* for a respondent representing the next-of-kin interested in the personalty.

H. H. King for the trustee under the will.

Cur. adv. vult.

B Oct. 23. The following judgments were read.

LORD HANWORTH, M.R.—I think this appeal fails. It arises from a decision of Maugham, J., who had to give certain directions and decisions upon an originating summons which was taken out for the purpose of interpreting what was the true effect of the will of Lewis John Kempthorpe. Mr. Kempthorne died on Aug. 15, 1928. His C will was made on Dec. 3, 1911, and he made a codicil on June 18, 1918. The appeal is on behalf of Mr. C. H. Kempthorne, who was the brother of Mr. Lewis John Kempthorne. In the will made by Mr. Lewis John Kempthorne there is this devise: "I devise to my said brother, Charles Henry Kempthorne his heirs and assigns, all my freehold and copyhold property." At the date of his death the testator was possessed of an interest under his father's will. It was an equitable interest as to two-ninths of D undivided shares under the will of his father, James Kempthorne, who died in 1899, He also had a legal interest, which he had purchased, of one-fourth interest in certain freehold mines; and he had, apart from that, some freehold property which was his own absolutely, and which is not in question in this case. The total value of the property which is in question in this case is large. It is £16,200. What has been determined by Maugham, J., is that by virtue of recent legislation, this freehold and E copyhold property has been turned into personal property, and does not pass under that devise which I have read, but does pass under the latter part of the will which deals with the testator's personal estate and effects. It is said, and it may be so, that this effect of the recent legislation is a great hardship to Mr. Charles Henry Kempthorne. We do not know, and it is not right for the court to speculate, whether or not this testator had considered the effect of the recent legislation, and had come to the con- F clusion to leave his will as it was. All we know is that the Law of Property Act came into force on Jan. 1, 1926, and that the death of Mr. Lewis John Kempthorne did not take place until Aug. 15, 1928, and during that time, although he was a solicitor, he made no alteration in his will. The case may, however, be an indication that it is wise for some persons to review their wills in the light of recent legislation. The terms of the devise are of the simplest—"all my freehold and copyhold property." With regard G to the freehold property, counsel for the appellant admits that, inasmuch as there is some small freehold property, it might be that there is an adequate purpose in those words in the will. But apart from that, we are dealing broadly with the effect of recent legislation upon the nature of freehold and copyhold property. It is admitted that where there is a trust for sale, that creates a conversion into personal property of the property to be sold. It is also admitted that at the time of the commencement of this H Act, land, either copyhold or freehold, which we are dealing with, was not settled land.

Therefore, we have to turn to the legislation under the Law of Property Act, 1925. Part 4 of Sched. I to the Act begins:

> "Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall I have effect . . . (1) (b) the land shall be held by such trustees or personal representatives upon the statutory trusts."

This land is caught by those operative words in the schedule, and it is held, therefore, upon statutory trusts. Section 35 tells us what these statutory trusts are; it gives the meaning of "statutory trusts":

> "For the purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of

insurance, repairs and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage), interested in the land."

It is plain, when one has read those parts of the Act, that this property, the two-ninths of the copyhold in which he had an equitable interest, and the one-fourth in which he had a legal interest, are lands or property which are caught, and the interest in which, therefore, was, under s. 35, a trust for sale, and, it being a trust for sale, it is, by the ordinary law, converted into personalty.

Some effort has been made (and not at all an unworthy effort) on the part of both counsel for the appellant to point out that in s. 35, as well as in Part 4 of the schedule, one will find references in the use of the word "land" to a later stage contemplated by the statute, namely, a point at which the sale or conversion has taken place. It is said it is there still called land. But the point is this. Section 35 opens:

"For the purposes of this Act land held upon the 'statutory trusts,'" and it ends up with a statement of how the proceeds are to be dealt with in favour of this interest in the land. What was the land? It was the land which was subject to the "statutory trusts."

I do not think, from the use of the words "land" scattered over some of these sections and in the schedule, it can be held that there was an intention in the Act to treat the proceeds as being realty though now converted under the trust for sale into personalty.

But it is said that one may look at other sections, and that in other sections one will find an indication that the proceeds of sale under the statutory trusts are to be treated as realty. Such an illustration is given by s. 28, for instance, which deals with the powers of management conferred on the trustees for sale. That section has been amended, and our attention was called to the amendment, which gives some enlarged powers of management and the like during a minority. It is said, if one will look at s. 28, the powers are to operate upon the proceeds of sale. But it appears to me that s. 28 is passed alio intuiti. It has no reference to revoking or altering the natural effect in law of a trust for sale which operates to effect conversion. Let me take another section, s. 16. Under s. 16 (4) and (5) there are clauses which say: "Nothing in this Act shall alter any duty payable in respect of land," and so on. For the purposes of the revenue the land remains the land, and the revenue are not to have their rights altered by the trust for sale. Those sections, however, appear to me to have an effect rather contrary to that of favouring the argument of the appellant, because, though a definite statutory provision is made in respect to or relating to the proceeds of sale, at no point in any of these sections is there any clear countervailing statement that the effect of s. 35 is not what would be effected by conversion. It is said under the Settled Land Act there is a provision, s. 75 (5), which says this:

"Capital money arising under this Act, while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall for all purposes of disposition, transmission and devolution, be treated as land,"

and so on. No doubt that is so; and it is a definite provision in the Settled Land Act. There is a definition of "capital money arising under this Act," which is to be found in the interpretation section, which is s. 117, and is sub-cl. (2) of that section:

"'Capital money arising under this Act' means capital money arising under the powers and provisions of this Act, or the Acts replaced by this Act, and receivable for the trusts and purposes of the settlement, and includes securities representing capital money."

When one reads that definition into s. 75 (5), it appears to me clear that that sub-s. (5) cannot be used as applicable to property or proceeds of property that we have to deal with, because, by the very condition, it is clear that this property is not covered or brought within the ambit of s. 75 (5).

One other observation which falls to be made is this. Inasmuch as there is a definite direction in sub-s. (5) as to capital money "and shall for all purposes be treated as land,"

it is remarkable that there is no such provision in the Law of Property Act. Having regard to the fact that these statutes were passed at the same time, so that there is an affinity between them, it is remarkable that in the Law of Property Act there is no such provision re-converting the proceeds of sale into realty and preventing it becoming, as it is under the ordinary law, personalty. It appears, therefore, that we have to apply to this will the law which is super-induced upon the will by the Law of Property Act. Then we find those words: "All my freehold and copyhold property," which, in the circumstances of it being held in undivided shares as to two-ninths and one-fourth, is held on a trust for sale, and is thus, under the will, converted into personalty—the effect of the legislation is to convert in these circumstances this property so held into personalty.

Maugham, J., in his judgment, with which I should like to say I entirely concur, held, following the judgment of Clauson, J., in *Re Price* (1) in the sense that I have already indicated. He cited and followed the passage in the judgment of Clauson, J., in *Re Price* ([1928] 1 Ch. at p. 589) beginning:

> "The result of this survey of the new Acts seems to show that on the 1st Jan., 1926, Thomas John Price ceased to have any estate in the fourteen acres, or any part of it and became entitled to an equitable interest in the proceeds of sale of the fourteen acres."

I agree with that passage, and I, like Maugham, J., desire to adhere to what is said by Clauson, J., in that passage.

There remain two other cases which have been cited to us. One is *Re Wheeler, Jameson* v. *Cotter* (3), and the other is *Re Mellish, Clark* v. *Buchannan* (4) which is referred to in it. Neither of those cases, to my mind, covers the point that we have to decide. In *Re Mellish* (4), Eve, J., held that there was an effective devise, which was not prevented or altered by the Law of Property Act. The terms of the devise there were:

> "All his share and interest in an estate known as the Rushall estate in the county of Stafford, to the defendant Buchannan in fee simple."

Eve, J., held that those words were sufficient to indicate a definite devise of that portion of that estate, and it took effect as a bequest of all the testator's interest therein and proceeds of sale thereof. In *Re Wheeler* (3), Tomlin, J., held, by parity of reasoning with Eve, J., that the words in the case before him were sufficiently similar to the circumstances of *Re Mellish* (4) to justify his holding in the same way as Eve, J., had held. The terms in that will were a gift of the testator's interest "in an undivided moiety of the real estate in the county of York." Tomlin, J., held that in those circumstances s. 16 (4) and (5) operated, and that Sir Delaval Cator took the estate indicated and was bound to repay under sub-s. (5) of s. 16 the duty which had been paid in respect of it. Those two cases are, to my mind, based upon the interpretation which is given to the two wills which were before the two learned judges, and in which they found there was a specific bequest. Per contra, we have the general terms "All my freehold and copyhold property." Those general words must be construed in accordance with the directions of the legislature in the new statutes. Inasmuch as they are subject, in the circumstances of the present case, to a trust for sale, those words are not adequate to cover the proceeds of sale, because the property has been turned into personalty, with the result that this bequest fails. I desire to say no more, for I do not know what the intention of the testator was. I agree on the face of it, it looks as if the intention of the testator was reversed. That may or may not be so—I do not know. What we have to determine is what is the effect of the legislation; and, in my view, Maugham, J., was quite right in his judgment, and rightly followed Clauson, J. Therefore, I think, that this appeal must be dismissed.

Lawrence, L.J.—I agree. Maugham, J., in deciding this case, followed the decision of Clauson, J., in *Re Price* (1). In that case Clauson, J., after carefully and exhaustively reviewing the provisions of the new Acts, came to the conclusion that the statutory imposition of a trust for sale operated to convert an undivided share of real

estate into a corresponding share of the proceeds of sale of the entirety, and, accordingly, that, as from the passing of the Act of 1925, the interest of the owner of the undivided share became personal estate and passed as such. I agree with CLAUSON, J., that this is the true effect of the recent legislation in the case of an unsettled undivided share of real estate. It follows, therefore, that on Jan. 1, 1926, before the will in the present case became operative, the testator's undivided shares in question ceased to be "freehold property," and on his death they passed under the bequest of his personal estate.

Counsel for the appellant contended that the decision in *Re Price* (1) was wrong, and that the undivided shares in question remained "freehold property." In support of this contention he relied on the provisions of s. 28 (1) of the Law of Property Act, 1925. That section, however, so far from supporting his contention, tends in the opposite direction. It recognises the distinction between settled land and land held upon trust for sale, and in the concluding words of the first paragraph negatives the idea that the proceeds of sale under a trust for sale should devolve in the same manner as capital money arising from a sale of settled land. It enacts in terms that all capital money arising under the powers which the trustees might exercise under s. 28 should (unless paid or applied for any of the purposes authorised by the Settled Land Act, 1925), "be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale"; and it goes on to provide that all land acquired under this subsection (that is to say, by the exercise of any of the powers thereby conferred) should be conveyed to the trustees on trust for sale, thus drawing a sharp distinction between capital moneys arising from a sale of land under a trust for sale and capital moneys arising from a sale of settled land (whether consisting of an undivided share or of the entirety) under the provisions of the Settled Land Act, 1925. In the latter case, s. 75 (5) of the Settled Land Act, 1925, provides that the proceeds of sale shall devolve in the same manner as the land from which such proceeds arise would have devolved, whereas in the case of a sale under the statutory trust for sale there is no provision to be found in either of the Acts which operates to re-convert the proceeds into land. Counsel admitted that primâ facie s. 35 of the Law of Property Act, 1925, operated to convert the undivided shares in question into personalty. After having carefully considered all the provisions to which our attention has been called, I find nothing in the Acts which displaces that primâ facie conversion. As the only question which we have to decide is whether at the date of the death of the testator the undivided shares in question partook of the quality of freehold property or personal property, it follows from what I have said that there is no escape from the conclusion that they partake of the latter character and that the decision of MAUGHAM, J., was right.

RUSSELL, L.J.—I am of the same opinion. On the coming into force of the Law of Property Act, 1925, the freehold property of the testator in question here became vested in trustees upon the statutory trusts. It is sufficient to say that the statutory trusts include an imperative trust for sale. The result of that is, that primâ facie the freehold property which he formerly owned became converted into part of his personal estate, unless we can find in the Act which effects the conversion some provisions which bring about the re-conversion, or which prevent the ordinary operation of the imperative trust for sale. I am unable to find any such provision in the Act in question. Reliance was placed upon s. 28; but, as I read that section, all that it does, so far as the present case is concerned, is to confer upon the trustees for sale the powers given to a tenant for life, or to the trustees of a settlement under the Settled Land Act, 1925. But it is careful to provide that, in so far as the capital money which they may receive is not paid or applied for any purposes authorised by the Settled Land Act, 1925, all capital money is to be applicable in the same way as if the money represented proceeds of sale arising under the trust for sale. It further goes on carefully to provide that if in the exercise of any of the powers given by that section, the money or any part of it is invested in land, that land is to be conveyed to the trustees on trust for sale. So I can get no assistance from that section in favour of the view that conversion has not been effected. In the next place, reliance was placed upon the presence, at the end

A of s. 35, and in other places, of the words, "interested in the land," by which words it was said the statute showed that the former owner of the freehold property, notwithstanding the imperative trust for sale, still remained interested in the land; and, therefore, it was said his property continued to be freehold property, and had not been changed into personal estate. I am quite unable to accept that view. There is no doubt that he is interested in the land; but his interest has ceased to be freehold pro-
B perty, and his interest has become leasehold estate. To borrow an old phrase, frequently used in another connection, his interest, though an interest which savours of realty, is none the less personal estate.

That being the effect of the Act, the next question which arises is: What is the effect of the Act upon the disposition made by this testator in his will? That has been called the ademption point; but I am not sure that that is a strictly accurate description.
C The position is this. The testator has died leaving a will in which he makes a disposition in general terms of "all my freehold property," and also makes a general disposition of all his personal estate. The question is which of those two dispositions carries this particular interest of the testator? Once you arrive at the conclusion that the effect of the Act is to turn his freehold into personal estate, there can be only one answer to the question, namely, that the property passes under the general gift of the testator's
D personal estate.

I desire to add nothing to the judgment of CLAUSON, J., in *Re Price* (1), which was adopted and approved of by MAUGHAM, J., in his judgment in the present case. As regards the two other cases which counsel for the appellant relied upon—the cases before EVE, J., and TOMLIN, J.,—they are, in my opinion, clearly distinguishable. So far as the case before EVE, J., is concerned, *Re Mellish* (4), the terms of the disposition
E contained in the will there were such as to cover the interest, whether it was freehold property or whether it was personal estate. The gift there was of "all the testator's share and interest" in a certain estate. In the case before TOMLIN, J., in my opinion, the distinguishing feature was that, although the devise was of all his real estate and undivided moiety of his real estate in the county of York, he had, after the Act had been passed, made a codicil by which he confirmed his will, so that he brought his testa-
F mentary disposition down to, and made it one at the date of his codicil. The learned judge must necessarily have taken the view that, when the testator used that language, he must be intending to apply it to the interest, whatever it was, which he had in the real estate or undivided share of real estate in the county of York. Those two cases are, in my opinion, clearly distinguishable; but, in any event, if they do by any chance conflict with the decision of CLAUSON, J., and the decision of MAUGHAM, J., in the present
G case, I prefer those decisions to any views inconsistent therewith which may be involved in the decisions in the other two cases. For these reasons I agree that the appeal fails and must be dismissed.

Appeal dismissed.

H Some of the beneficiaries under the bequest in the will of the personal property of the testator predeceased him with the result that the gift lapsed as to three-sevenths of it. The question arose whether, having regard to the Administration of Estates Act, 1925, s. 34 (3) and Sched. I, Part 2, the expenses and debts were charged solely on the lapsed shares or whether the provisions of the will prevailed with the result that the whole of the leasehold and personal estate and effects bequeathed were subject to the charge for
I expenses as debts as directed in the bequest. MAUGHAM, J., held that the fact that the provision in the will that the property of the deceased should be subject to a charge for the payment of debts brought the case within para. 4 of Part 2 of Sched. I to the Act of 1925 did not take it out of para. 1 which referred to "property of the deceased undisposed of by will"—which included lapsed shares of residue—"subject to the retention thereout of a fund sufficient to meet any pecuniary legacies," and, therefore, that the lapsed shares were primarily to be applied in payment of the expenses and debts in question in exoneration of the other shares. The next-of-kin, who became entitled to the lapsed shares, appealed.

Morton, K.C., and *A. L. Ellis* for the next-of-kin. A
Grant, K.C., and *Swords* for C. H. Kempthorne.
Vaisey, K.C., and *Gwyn Rees* for parties interested.
H. H. King for the trustee.

Cur. adv. vult.

Nov. 1. The following judgments were read. B

LORD HANWORTH, M.R.—This is an appeal from an order of MAUGHAM, J., made upon the second question propounded in an originating summons before him, taken out to obtain decisions as to the true meaning and effect of the will and codicil of Lewis John Kempthorne, deceased. The portion of his will in question upon the present appeal is as follows:

C

> "As to all my leasehold property and all my personal estate and effects, including my stocks and shares and all money due to me on debentures and mortgages of or to which I shall be possessed at the time of my death, subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and the duty on any legacies bequeathed free of duty, the same shall be divided into seven equal parts."

D

Then follow the names of five persons, who were the brother and four sisters of the deceased, and who are to be the recipients of the seven fractions. To two of the sisters he gave two-sevenths, and to each of the others one-seventh. Two of the persons so named died after the date of the codicil, but before the testator, with the result that there is a lapse of three-sevenths of the fund to be divided. His sister, Elizabeth, died between the date of the will and the codicil; and her share was given by the codicil E to be equally divided between her son and daughter. The terms of the codicil, which are relied upon as indicating the intention of the testator, are are follows:

> "And whereas by my said will I bequeathed to my sister Elizabeth one-seventh part of my leasehold property and personal estate and effects after certain payments had been made thereout."

F

MAUGHAM, J., found the case one of difficulty because of the terms of the Administration of Estates Act, 1925, which drove him to the conclusion that he reached. Before that Act came into force, as he says, there would have been no question as to the fund applicable for the payment of the funeral and testamentary expenses and debts of the testator. The personal estate in its entirety would have been applicable for payment of them, and that notwithstanding that some of the residue became undisposed of by G reason of the lapse of the three-sevenths.

Before dealing with the effect of the Act, it is important to come to a definite conclusion as to the meaning of the terms of the will and codicil. MAUGHAM, J., finds the terms explicit in regard to the legacies. He holds that they clearly indicated that the payment of the legacies is to be completed before the divisible fund is created, and he holds that the terms of the Act do not apply because the fund is not ascertained until H after payment of the legacies. It is clear, therefore, that upon the question of the legacies the learned judge attached importance to the word "after," as indicating the point of time at which the fund is to be ascertained. I agree in this view, but it seems to me that the same reasoning applied to the same word in relation to the payment of the expenses and debts. In this interpretation, the terms of the will are explicit and the fund, or net residue, is not ascertained—does not come into being—until the I expenses, debts, and legacies have been paid. ASTBURY, J., held, in *Re Petty, Holliday* v. *Petty* (5), that in such a case, where the terms of the will are clear and provision is made for payment of the expenses, debts, and legacies out of a fund created by the will, there is no room for the application of the Administration of Estates Act to disturb the directions of the will. I agree with this decision, and think that the principle on which it was decided applies in the present case.

The difficulty arising from the Act which caused MAUGHAM, J., to decide otherwise is this. By s. 34 (3), it is provided:

"Where the estate of a deceased person is solvent, his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary, and administration expenses, debts, and liabilities payable thereout in the order mentioned in Part 2 of Sched. I to this Act."

The estate is solvent here; and Part 2, para. 1, directs: "Property of the deceased undisposed of by will subject to the retention thereout of a fund sufficient to meet any pecuniary legacies." Eve, J., decided in *Re Lamb*, *Vipond* v. *Lamb* (2) that a share of residuary estate which lapses is "property undisposed of by will." We have had no argument upon the point of that case, and it is unnecessary to come to a final conclusion upon it, for that decision is not relevant upon the point whether the provisions of the will exclude the operation of the schedule. Maugham, J., would have given effect to the terms of the will, but for paras. 3 and 4 of the schedule. He held that a specific appropriation of property for the payment of debts referred to in para. 3 and a charge upon property, or a devise or bequest of property subject to a charge for the payment of debts in para. 4, indicated that where such an appropriation or charge had been made by a will, it was not to be taken as a contrary provision in the will excluding the operation of those two paragraphs, but rather as directions in the will which were to be the foundation of the operation of those paragraphs. My own view, however, is that those paragraphs operate where the payment of debts is specifically charged upon some particular property, or where some property is dealt with and subjected to the payment of the debts, and that they do not operate to override or prevent the creation of a general fund or residue which is to be ascertained, and does not come into being until, after the payment of the expenses and debts and legacies, and legacy duty, if any.

The result is that, in my opinion, the terms of the will do exclude the operation of the schedule, and that there is no appropriation or charge such as is indicated in paras. 3 and 4 of it; and I find myself free from the difficulty which pressed upon Maugham, J. This appeal will be allowed, and a declaration made as to the payment of the funeral and testamentary expenses and debts of the testator, and a direction as to the costs here and below, which will be stated by Lawrence, L.J.

LAWRENCE, L.J.—Maugham, J., has held that the funeral and testamentary expenses and debts of the testator ought to be paid out of the lapsed shares of his residuary personal estate in exoneration of the other shares of such residue. The learned judge has felt himself constrained to come to this conclusion by reason of the order of application of assets prescribed by Part 2 of Sched. I to the Administration of Estates Act, 1925, notwithstanding that under s. 34 (3) of the Act such order of application is only to take effect subject to the provisions contained in the will of the testator, and that the will in the present case contains an express provision that the residuary personal estate is only to be divided into shares subject to and after payment of his funeral and testamentary expenses and debts. The reasons given by the learned judge for his decision, shortly stated, are that the first item of property in the schedule includes a lapsed share of residue which, therefore, comes in order of application before property by the will specifically appropriated for payment of debts and before property by the will charged with or bequeathed subject to a charge for the payment of debts, thus, in the opinion of the learned judge, showing that such an appropriation or charge expressed in a will is not considered by the legislature to be a provision overriding the order of application of the first and second items in the schedule within the meaning of s. 34 (3). The learned judge has further concluded that as in the present case the testator has bequeathed his personal estate subject to and after payment of his debts, it is property coming within the fourth item in the schedule.

In deciding that the first item in the schedule includes a lapsed share of residue, the learned judge has followed the decision of Eve, J., in *Re Lamb* (2). I am not at present convinced as to the correctness of this decision. The residue of personal estate is what remains after payment of funeral, testamentary and administration expenses, debts

and legacies. It is obvious, therefore, that in the case of a lapsed share of residue, there is nothing undisposed of except what remains after payment of the expenses, debts and legacies; until these are paid, there is no net residue at all, and it is impossible to say what (if anything) has lapsed. Moreover the Act is dealing with the application of the assets of the testator; and it is open to question whether a share of residue which does not come into existence and cannot be ascertained until the expenses, debts and legacies are paid, can properly be described as an asset of the testator for the payment of his debts any more than a pecuniary legacy can properly be so described. At the date of the Act coming into force it had been firmly established by a long line of authorities that a share of residue (whether undisposed of by reason of lapse or because the legatee was incapable of taking) bore only its proportion of expenses, debts and legacies rateably with the other shares. There is much force in the argument that, as regards the order of application of assets, the Act on its proper interpretation intended no more than to place real property on the same footing as personal property, and did not otherwise alter the order of application. Had it been necessary for our decision in the present case to arrive at a definite conclusion on this point, I should have desired to have the question more fully argued. Counsel for the next-of-kin, while not admitting that a lapsed share of residue fell under the first item of property in the schedule, contented himself with assuming that *Re Lamb* (2) was rightly decided and rested his case solely on the express provisions of the present will. As, in my judgment, *Re Lamb* (2) is distinguishable from the present case, I prefer to reserve my opinion on the question whether it was rightly decided. In *Re Lamb* (2) the testator by his will appointed executors and trustees, and directed that all his just debts, funeral and testamentary expenses should be paid by them as soon as possible after his decease; after such appointment and direction, he proceeded to make a specific devise and some specific and pecuniary bequests, and then he directed that the residue of his real and personal estate should be equally divided between certain named persons. The provision as to the debts, funeral and testamentary expenses in that case amounted in effect to nothing more than a direction to pay them in due course of administration, and there was no such express provision as occurs in the present will.

I agree with MAUGHAM, J., that the introduction into the schedule of the third and fourth items of property (to be applied in that order) might in some cases create a difficulty in determining the true effect of the words "subject to the provisions if any contained in his will," in s. 34 (3), as an express provision contained in a will that property should be appropriated or be subjected to a charge for the payment of debts would primâ facie appear to indicate an intention inconsistent with the order of application contained in the schedule which places property undisposed of and property included in a residuary gift as the first and second items to be resorted to for the payment of expenses and debts. I do not, however, agree with the learned judge that this difficulty arises in the present case; or that in the present will any property is bequeathed subject to a charge for the payment of debts within the meaning of para. 4 of the schedule.

Under the provisions of s. 34 (3) and the schedule, property included (either by a specific or general description) in a residuary gift would have to be exhausted before the property comprised in either the third or the fourth item could be resorted to. It follows that the property mentioned in paras. 3 and 4 of the schedule cannot comprise property included in a residuary gift, either under a specific or general description. The third and fourth items of property must, therefore, be read as referring to property other than property included in a residuary gift. In the present case the personal estate charged with the payment of debts is properly included in a residuary gift, and clearly comes within the second item of property in the schedule. The result is that there is no such property as is described in either the third or fourth item in the schedule, and, therefore, the court is not concerned with the problem which would have arisen if there had been any such property. The language of s. 34 (3) and of para. 8 (a) of the schedule shows that the legislature did not intend (except possibly in cases where there is property coming within the third and fourth items) that the order of application of assets contained in the schedule should override the express directions contained in the will; and I agree with the view expressed by ASTBURY, J., in *Re Petty* (5), that

A the statute did not intend to interfere with a testator's right to deal with his own estate as he liked. In the present case we find that the testator expressly makes the whole of his personal property which he bequeaths in the form of a residuary gift subject to the payment of his funeral and testamentary expenses, debts, and legacies; and only directs a division of his residuary personalty into shares after those expenses, debts, and legacies have been paid. Consequently, the only bequest to each residuary legatee B is a bequest of a share in the net residuary personalty remaining after the payment thereout of the funeral and testamentary expenses and debts and legacies. Even assuming, therefore, that the first item in the schedule includes a lapsed share of residue, there is in the present will an express direction that the expenses and debts are to be borne by the whole of the testator's personal estate; which direction overrides the order of application of assets in the schedule and must be carried out. The result of this is C that the shares of residue undisposed of by reason of lapse will bear only their proportion of the expenses and debts rateably with the other shares. For the reasons stated I agree that the appeal should be allowed.

RUSSELL, L.J.—In order to answer the questions submitted for our consideration on the hearing of this appeal, the first thing to do is to ascertain whether the testator's D will contains any and what provisions relating to the discharge of his funeral, testamentary, and administration expenses, debts, and liabilities. If such provisions exist in the will, they will control the operation of s. 34 (3) of the Administration of Estates Act, 1925. The testator in the present case has made, as it seems to me, a particularly clear provision by his will. As to all his personal estate he directs that, subject to and after payment of his funeral and testamentary expenses and debts and legacies it is to E be divided into seven equal parts, which he bequeaths to five named persons in unequal shares. There is no gift to any of those persons except of a share of the balance of the general personal estate remaining after the expenses and debts and legacies have been borne and paid out of the entirety thereof. If the words used in the will left any doubt on this score (which they do not), the doubt would be removed by the codicil, which recites that by his will the testator had bequeathed to his sister, Elizabeth, F "one-seventh part of my . . . personal estate and effects after certain payments had been made thereout." In the circumstances of the present case I fail to see how Part 2 of Sched. I can come into play as regards the real and personal estate of this testator. The statutory order of application of assets is overridden by the testator's own provisions, the effect of which is (to put the result in another way) that the only personal estate as to which he has died intestate is a share of what personal estate remains G after the expenses and debts have, in fact, been paid thereout.

As I read the judgment of MAUGHAM, J., its foundation is this: that, although s. 34 (3) of the Administration of Estates Act, 1925, is stated to be subject to the provisions, if any, contained in the will of the deceased person, yet the provisions contained in this particular will are not strong enough to negative the operation of the subsection. He argues thus: that a consideration of paras. 3 and 4 of Part II of Sched. I indicates that H even if a testator has made a disposition of property, as described in paras. 3 or 4, nevertheless, the property described in para. 1 must first be applied; this shows that a disposition of property as described in para. 4 will not be a provision contained in the will strong enough to negative the operation of the subsection. He then states that the provision contained in this will is a disposition of property as described in para. 4, and that, accordingly, he is driven to hold that it is ineffective to override the subsection. I That is the reasoning of the judgment as I read it.

In my opinion, however, the learned judge erred in treating the provision made by this testator as being a disposition of property as described in para. 4 of Part II of Sched. I. Neither para. 3 nor para. 4 can apply or be intended to apply to a disposition of a general or residuary nature, because the operation of the schedule is such that resort is not to be had to the items covered by paras. 3 and 4 until all property of the deceased comprised in a residuary gift has been exhausted. Thus the reason which compelled MAUGHAM, J., to decide as he did, had, as I construe the schedule, no foundation in fact. For these reasons I would allow the appeal. I would add that the appeal

was argued on the assumption that para. 1 of Part II of Sched. I applies to a lapsed share; but this case involves no decision on that particular point, which in this court remains open for decision.

Appeal allowed.

Solicitors: *Holman, Fenwick & Willan*, for *Lean & Lean*, Cardiff; *Guscotte, Wadham, Tickell & Co.*, for *Davies & Prichard*, Cardiff; *Metcalfe, Sharpe & King*, for *H. P. Charles & Son, & C. E. Edwards*, Neath.

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*

Re READE-REVELL. CRELLIN *v.* MELLING

[Chancery Division (Clauson, J.), July 26, 1929]

[Reported [1930] 1 Ch. 52; 99 L.J.Ch. 136; 142 L.T. 177]

Infant—Maintenance—Settled legacy—Contingent life interest—Direction to accumulate income until contingent life interest became vested—Use for maintenance of infant of part of such income before life interest became vested—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31 (3).

A testatrix, who died in 1926, by her will directed that her trustees should set aside £40,000 and that the income thereof should accumulate and capitalise until A. attained the age of twenty-one. The trustees were then to pay the income of the total sum to A. for life and after her death to hold the capital sum in trust for her children. The testatrix further directed that £1,000 a year should be paid out of the income of her estate for the education, maintenance and support of A. until she should attain the age of twenty-one.

Held: on the true construction of the Trustee Act, 1925, s. 31, the trustees had no power to apply the income for the maintenance of A., since A.'s contingent interest did not carry the intermediate income.

Notes. Distinguished: *Re Leng, Dodsworth* v. *Leng*, [1938] 3 All E.R. 181. Followed: *Re Stapelton, Stapelton* v. *Stapelton*, [1946] 1 All E.R. 323.

As to maintenance of an infant, see 21 Halsbury's Laws (3rd Edn.) 168–177, paras. 369–385; and for cases see 28 Digest 249–250, *1056–1062*. For the Trustee Act, 1925, s. 31, see 26 Halsbury's Statutes (2nd Edn.) 94.

Cases referred to:

(1) *Re Dickson, Hill* v. *Grant* (1885), 29 Ch.D. 331; 54 L.J.Ch. 510; 52 L.T. 707; 33 W.R. 511; 1 T.L.R. 331, C.A.; 28 Digest 249, *1059*.

(2) *Re Bowlby, Bowlby* v. *Bowlby*, [1904] 2 Ch. 685; 73 L.J.Ch. 810; 91 L.T. 573; 53 W.R. 270; 48 Sol. Jo. 698, C.A.; 28 Digest 226, *838*.

(3) *Re Raine, Tyerman* v. *Stanfield*, [1929] 1 Ch. 716; 98 L.J.Ch. 244; 141 L.T. 25; 23 Digest (Repl.) 462, *5334*.

(4) *Re Thatcher's Trusts* (1884), 26 Ch.D. 426; 53 L.J.Ch. 1050; 32 W.R. 679; 28 Digest 249, *1057*.

(5) *Re Cooper, Cooper* v. *Cooper*, [1913] 1 Ch. 350; 82 L.J.Ch. 222; 108 L.T. 293; 57 Sol. Jo. 389; 28 Digest 249, *1060*.

Adjourned Summons.

The testatrix Florence E. Reade-Revell, by her will dated July 1, 1926, gave all her residuary estate and appointed certain funds over which she had a general power of

A appointment to her trustees on trust for sale and to appropriate £40,000 out of the proceeds and pay the income thereof to her husband for life, thereafter to accumulate the income thereof and add it to that sum until her adopted daughter Angele should attain the age of twenty-one years, thereafter to pay the income of the resulting capital sum to Angele for life, and thereafter to hold that capital sum on trust for her children and their issue as therein mentioned. If Angele should die before attaining twenty-one years, B or die without leaving issue, the capital sum was to go to certain charities. The testatrix further directed that £1,000 a year should be paid out of the income of her estate for the education, maintenance and support of Angele until she should attain the age of twenty-one. The trustees were directed to hold the residue subject to the above-mentioned appropriation on trust for Angele absolutely to be paid to her on attaining twenty-one years of age, but should she die before attaining that age, then such residue C was to go to the charities. The testatrix died on Nov. 21, 1926, leaving her husband and Angele, then aged nine years, surviving her, and her husband died on June 6, 1928. The total value of the estate was about £59,000, consequently there was only £19,000 left after the appropriation of the £40,000 was made. The income of the £19,000 which was available for Angele's maintenance was less than £1,000 a year.

This summons was taken out by the trustees and it asked for the determination of, D inter alia, the following questions: (i) Whether the direction to pay £1,000 a year for Angele's maintenance took priority over the £40,000 settled legacy, and (ii) whether, in the event which had happened, the trustees had power to apply the income of the £40,000 legacy for the maintenance of Angele until she should attain twenty-one years.

By the Trustee Act, 1925, s. 31 (3): "This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property . . ." E

Jenkins, K.C., and *Andrew Clark* for the plaintiffs.

Archer, K.C., and *McMullan*, for the infant Angele, referred to *Re Dickson* (1), *Re Bowlby* (2), and *Re Raine* (3).

Bennett, K.C., and *L. W. Byrne* for the personal representatives of the deceased husband.

John W. F. Beaumont, for one of the charities, referred to *Re Thatcher's Trusts* (4) F and *Re Cooper* (5).

CLAUSON, J., read the material clauses of the will, stated the facts, and, after deciding that, as the payment of the £1,000 a year was to be made after and subject to the appropriation of the £40,000, the direction for the payment of the £1,000 a year did not take priority over the trust legacy of £40,000, continued: The question I have to decide G is whether the trustees of this will have power to apply the income of the £40,000 legacy towards the maintenance of the infant Angele until she attains the age of twenty-one. The contention of counsel on behalf of the infant is that s. 31 of the Trustee Act, 1925, confers that power on the trustees.

In the present case, the legacy of £40,000 is held in trust to pay the income to the infant for her life contingently on her attaining the age of twenty-one years. By virtue H of s. 31, the trustees may, during the period of the infant's minority, apply towards her maintenance the income of the property, provided the trust carries the intermediate income; see s. 31 (3). Here, there is in the will an express direction to the trustees to accumulate the income during the minority of the contingent life tenant and to add that income to the capital sum. The result of that direction must be that the contingent interest of the infant, being limited to an interest in the income of the fund as it stands I when she attains twenty-one, does not carry the intermediate income of the property. It was contended that, as the £40,000 trust legacy carries interest as from a year after the death of the testatrix, there is here a trust which carries the intermediate income within the meaning of the subsection, namely, the trust of the legacy in favour of the infant and her children and the ultimate remainderman in default of her children. But, in my judgment, on the proper construction of the language of the subsection, the trust therein referred to is, to apply that language to the present case, the trust which creates the contingent life interest in favour of the infant. That is a trust which does not carry the intermediate income on account of the direction for accumulation.

The authorities cited before me relate to corresponding statutory provisions under the older Acts and are not applicable to the present case, as the language used in s. 31 of the new Act differs from the language of the older provisions as to maintenance. Accordingly, there will be a declaration that the trustees have no power to apply the income of the £40,000 trust legacy for the maintenance of the infant defendant.

Solicitors: *James Johnstone*; *Blount, Lynch, Petre & Colley*; *Shepheards, Walters & Bingley*; *F. Freke Palmer.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

MURTON *v.* ALDIS

[King's Bench Division (Lord Hewart, C.J., Avory and Swift, JJ.), April 10, 11, 1929]

[Reported 141 L.T. 168; 93 J.P. 184; 27 L.G.R. 509]

Rent Restriction—Possession—House required by landlord—House let in consequence of employment by former landlord—Termination of employment—Employee remaining in house at a rent—Need to prove existence of alternative accommodation—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5 (1) (*d*), *s.* 5 (1) (i).

Section 5 (1) (d) and (i) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (now Sched. I, para. (g) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933), providing that where a dwelling-house is reasonably required by the landlord for occupation as a residence for some person employed by him the existence of suitable alternative accommodation is unnecessary "where the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment" do not apply to a person who, although previously in the employment of the landlord or a previous landlord, became, on the termination of the employment, a tenant of the house in entirely new circumstances agreed on when the tenancy began.

The appellant worked for one C. at certain gas works from April, 1920, till January, 1921. Adjoining the gas works was a cottage, the property of C., which was let to M. at the commencement and in consequence of his employment. In January, 1921, on the termination of his employment, the appellant received notice to quit the cottage, and was asked to pay a certain sum for rent. He applied to the county court and the rent was settled by the county court judge at 5s. per week. He paid this rent up to Sept. 8, 1928. On June 1, 1928, C., having sold the gas works, including the cottage, to a limited company, conveyed the same to the company. On Sept. 22, 1928, the company served a notice to quit on the appellant who subsequently tendered the rent due from Sept. 8 to 22, which was refused. On Oct. 13, 1928, the statutory notice under the Small Tenements Recovery Act, 1838, was served by the company on the appellant. The cottage was reasonably required by the company as a residence for a man engaged in their whole-time employment at the gas works. The justices found that there was no obligation on the company to prove alternative accommodation, and ordered that a warrant of ejectment should issue.

Held: at the time at which ejectment was sought the cottage was not let to the appellant in consequence of his employment, he then being in possession under the entirely new contract made in January, 1921; there were no materials on which the

justices could find that no such new tenancy had been created; and, therefore, as the respondent had not proved the existence of alternative accommodation, the order that a warrant of ejectment should issue must be quashed.

Bond v. *Pettle* (1) (1921), The Times, Jan. 15 applied.

Observation of BRAY, J., in *Lever Bros., Ltd.* v. *Caton* (2) (1921), 37 T.L.R. 664, criticised.

Notes. Considered: *Read* v. *Gordon*, [1941] 1 All E.R. 222. Distinguished: *Braithwaite & Co.* v. *Elliott*, [1946] 2 All E.R. 537. Referred to: *Mouser* v. *Major*, [1941] 1 All E.R. 180.

As to recovery of possession without proof of alternative accommodation, see 23 HALSBURY'S LAWS (3rd Edn.) 818 et seq.; and for cases see 31 DIGEST 714 et seq. For Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, see 13 HALSBURY'S STATUTES (2nd Edn.) 1044.

Cases referred to:

(1) *Bond* v. *Pettle* (1921) The Times, Jan. 15, D.C.; 31 Digest (Repl.) 715, *8003*.

(2) *Lever Bros., Ltd.* v. *Caton* (1921), 37 T.L.R. 664, D.C.; 31 Digest (Repl.) 715, *8002*.

(3) *Great Northern Rail. Co.* v. *Best* (1921), 55 I.L.T. 57; 31 Digest (Repl.) 720, **2595*.

Case Stated by Norfolk justices.

An application was made under the Small Tenements Recovery Act, 1838, and also under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by the respondent, Frederick Gage Aldis, as agent for the British Gas Light Co., Ltd., for the possession of a cottage adjoining the gas works, Harleston, the property of the said company of which the appellant was the occupier. The application was heard by the justices on Nov. 9, 1928, when they ordered that a warrant of ejectment should issue for giving possession of the premises at the expiration of twenty-eight days from the date of the warrant. The justices, however, agreed to state and sign the following Case.

(i) The appellant worked for a certain George Crick at the gas works, Redenhall Road, Harleston, from April, 1920, till January, 1921. Adjoining the gas works and belonging to the said George Crick were certain cottages, of which one was let to the appellant at the commencement, and in consequence of, his employment. (ii) No details were given as to the rent paid by the appellant while in the employment of George Crick, but the justices concluded on the evidence given that some rent had been paid by him either directly or by deduction from his wages, and the appellant admitted that the cottage was let to him in consequence of his employment. (iii) On the termination of the appellant's employment in January, 1921, the appellant received notice to quit the cottage and was asked to pay a certain sum for rent. He applied to the county court and the rent was settled by the county court judge at 5s. per week. (iv) The appellant continued to pay the rent from that time onwards to Crick until the sale of the gas works, including the cottage in which the appellant was living, to the British Gas Light Co., Ltd., on June 1, 1928, when the whole of the property was conveyed to that company including the cottage, in the case of the cottage subject to and with the benefit of the tenancy of the appellant. (v) The appellant's tenancy was a weekly one, although he paid his rent irregularly. (vi) The rent was collected by the respondent as agent in the first place for Crick and afterwards for the company. (vii) On Sept. 22, 1928, the respondent, as such agent, served a notice to quit the said cottage directed to the appellant by handing the same to the wife of the appellant on the premises. This notice expired on Oct. 6, 1928. (viii) The statutory notice of intended application to the court for an order for ejectment against the appellant by the respondent as such agent as aforesaid was served on Oct. 13, 1928, personally on the appellant. It was then read over and the contents explained to the appellant. The date of the court inserted in that notice was Nov. 9, 1928. (ix) The rent was paid up to Sept. 8, 1928, but at the time when the notice to quit was given and also the notice of intention to apply for an order for ejectment was served, and on Nov. 9, 1928, when the case was heard, the rent was in arrear. After the service of the notice to quit upon the appellant the arrears of rent up to that time was tendered to the respondent as agent for the said company, but were refused by him in accordance with their instructions.

(x) The cottage occupied by the appellant was reasonably required by the company as a residence for a stoker engaged in their whole-time employment at the gas works. It was necessary for the proper working of the gas works that there should be another man residing on the premises in addition to the foreman, who resided in an adjoining cottage. The stoker for whom the cottage was required at the date of the hearing resided four miles from his work.

On the part of the appellant it was contended that a new tenancy was created after the appellant left the employment of George Crick, and that, therefore, it was necessary for the respondent to satisfy the court that alternative accommodation was available; that the existence of alternative accommodation had not been proved by the respondent; and that, therefore, they were not entitled to an order. On the part of the respondent it was contended that there was no such new tenancy. He further contended that the cottage was let to the appellant in consequence of his employment by a former landlord, Crick, that he had ceased to be in that employment since 1921, that he held over as a statutory tenant on receiving notice to quit, and continued as a statutory tenant down to the present time, that his rent was in arrear at the time when the proceedings were commenced, and that the cottage was required for a man in their whole-time employment; and that in those circumstances a warrant for ejectment of the appellant should be issued and that there was no onus upon them to show the existence of alternative accommodation. The justices' attention was called to *Great Northern Rail. Co.* v. *Best* (3), and to s. 5 (1) (d) and (i) and s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The justices were of opinion that on the evidence before them no new tenancy had been created and that there was no obligation upon the company to prove the existence of alternative accommodation. They also expressed the opinion that the dwelling-house was reasonably required by the company as a residence for a person engaged in their whole-time employment, and that generally, having regard to the length of time during which the appellant had been in the cottage, and that he had only tendered the arrears of rent when proceedings were taken, a warrant for ejectment should issue. Accordingly, they made the order referred to. The question for the opinion of the court was whether the justices upon the above statement of facts came to a correct determination in point of law.

C. R. Havers for the appellant.

Cope Morgan for the respondent.

In the course of the argument counsel for the appellant was asked by the court whether he could reconcile the decision in *Lever Bros., Ltd.* v. *Caton* (2) with that in *Bond* v. *Pettle* (1).

Havers.—I am unable to do so, in so far as the judgment of BRAY, J., in the former case is concerned.

LORD HEWART, C.J.—This is a difficult case and I shall preface my judgment with the words of BRAY, J., in *Lever Bros., Ltd.* v. *Caton* (2), where he said (37 T.L.R. at p. 664)

> "This is one of the very difficult problems which have to be decided under the Act, and I do not feel any great confidence that I am right, for I think that this is one of the situations which were not contemplated by those who drafted the Act."

The question arises in the following way. An application was made under the Small Tenements Recovery Act, 1838, and also under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by the respondent as agent for the British Gas Light Co., Ltd., for the possession of a cottage adjoining the Gas Works, Harleston, of which cottage the appellant was the occupier. The application was heard by the justices, who ordered that a warrant of ejectment should issue for giving possession of the premises at the expiration of twenty-eight days from the date of the warrant. The justices at the request of the appellant have stated a Case in which they have set out their findings of fact and the evidence adduced before them. The question before the court is whether the justices came to a correct determination in point of law.

A It is of importance to observe what was the case made in the court below on the part of the respondent. The contention is set out in the Case in these words: "That there was no new tenancy as is referred to in para. 6 hereof. He further contended that the cottage was let to the appellant in consequence of his employment by a former landlord, George Crick; that he had ceased to be in that employment since 1921; that he held over as a statutory tenant on receiving notice to quit and continued as a statutory tenant B down to the present time; that his rent was in arrear at the time when the proceedings were commenced, and that the cottage was required for a man in their whole-time employment; and that in those circumstances a warrant for the ejectment of the appellant should be issued and that there was no onus upon them to show the existence of alternative accommodation." It is obvious that the main contention raised on behalf of the respondent was that based on s. 5 (1) (d) of the Increase of Rent and Mortgage C Interest (Restrictions) Act, 1920, by which:

> "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be made or given unless . . . (d) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself . . . or for some person engaged in his whole-time D employment . . . and (except as otherwise provided by this subsection) the court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available . . . The existence of alternative accommodation shall not be a condition of an order or judgment on any of the grounds specified in para. (d) of this subsection (i) where the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in E consequence of that employment and he has ceased to be in that employment."

In other words, the respondent was contending that there had been no other letting to the appellant than the letting which was made to him in consequence of his employment and that, therefore, the question of alternative accommodation did not arise, the cottage being reasonably required by the landlords for a person engaged in their whole-time employment.

F The crux of the matter is this: Is it true to say that this cottage was let to the appellant in consequence of his employment? What do these words mean? It has been suggested, not very strongly, perhaps, but yet seriously, that the necessity of providing alternative accommodation is dispensed with if at any previous time there was a letting of the house to the tenant in consequence of his employment even if that letting had been entirely put an end to and at the moment when ejectment was sought the tenancy G was held by a tenant under a wholly new contract. But it was strongly urged that here there was no new contract and that is what the justices have found.

The first question then to be considered is whether on these materials it was open to the justices to find that no new tenancy had been created. In dealing with that question one must look at the materials comprised in the Case. The Case finds that the appellant worked for a certain George Crick at the gas works, Redenhall Road, Harleston, H from April, 1920, till January, 1921. Adjoining the gas works and belonging to George Crick were certain cottages of which one was let to the appellant at the commencement and in consequence of his employment. Then, by para. 2: "No details were given as to the rent paid by the appellant while in the employment of George Crick, but the justices concluded on the evidence given that some rent had been paid by him either directly or by deduction from his wages and the appellant distinctly admitted that the I cottage was let to him in consequence of his employment." The Case goes on to find that on the termination of the appellant's employment in January, 1921, "the appellant received notice to quit the cottage and was asked to pay a certain sum for rent." All that is in one sentence. Then follows: "He applied to the county court and the rent was settled by the county court judge at five shillings per week." The Case continues: "The appellant continued to pay the rent from that time onwards to the said George Crick, until the sale of the said gas works, including the cottage in which the appellant was living, to the British Gas Light Co., Ltd. . . . on the 1st June, 1928, when the whole of the property was conveyed to the company including the cottage and in the case of

the cottage subject to and with the benefit of the tenancy of the appellant." Finally, there is the finding that the appellant's tenancy was a weekly one although he paid his rent irregularly.

Hence it was found as a fact that the appellant's employment terminated in January, 1921, and that, though he received notice to quit at that time, he was asked to pay a certain sum for rent. What does that mean? It means that the notice to quit was not operative. It was certainly not intended or desired that the appellant should leave the cottage or the request for rent would be irrelevant. It is said on behalf of the respondent that he was taken to the county court and taken "reluctantly." But the Case does not say so. It says that he—the appellant—applied to the county court and the rent was settled by the county court judge at five shillings per week. In what circumstances and on what assumptions the county court judge was invited to fix the rent one does not know, but it is common ground that the figure so fixed was accepted by both parties and the decision arrived at was acted upon for a period of many years. During all that time the appellant paid his rent and paid it as a weekly tenant. In my opinion, the evidence is all one way, that his occupation of the cottage coming within the definition as a tenancy in consequence of his employment came to an end in January, 1921. No doubt at that time it would have been possible to eject the appellant, but that course was not taken. Notice to quit was served upon him, but there was a request made for rent and the question of the amount of the rent and no other question came before the county court judge. So there were no materials upon which the justices could find, as they did, that no new tenancy had been created.

In my opinion, this case is very similar to that of *Bond* v. *Pettle* (1). And I accept the decision in that case which was followed in an Irish case, that of *Great Northern Rail. Co.* v. *Best* (3), on the true construction of these words in s. 5:

> "Where the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment."

As was said by LORD COLERIDGE in *Bond* v. *Pettle* (1):

> "This case raises a very short point on the Increase of Rent and Mortgage Interest (Restrictions) Act. The cottage was originally let to the appellant as a condition of his employment, and the statutory allowance was deducted from his wages. That employment came to an end nine months before the application to the justices, but the farmer allowed the man to stay on at the same rent, and later he required the house for another man. The question is whether the tenant at the crucial time, not at some other time, was a tenant in consequence of his employment. Clearly he was not; he did not become a tenant until his employment had ceased, and then he became a tenant because he was not in the farmer's employ any longer."

My brother AVORY said in that case:

> "The justices held that the landlord had brought himself within the words of the proviso or exception to s. 5 (1) (d), which connected two things: (i) That there must be a tenant in the employment of the landlord; and (ii) the premises must have been let to him in consequence of that employment. Here, while the appellant was in the employment of the respondent, he was not a tenant; and he became a tenant because he was no longer in that employment."

It is true that there are apparently some discrepancies between the judgments in *Bond* v. *Pettle* (1) and in the judgments delivered upon different facts in *Lever Bros. Ltd.* v. *Caton* (2). It is enough, as it seems to me, to say that it is the decision in the case of *Bond* v. *Pettle* (1) which should guide us in the present case. On these materials, then, the only possible conclusion was that the occupation in consequence of the appellant's employment had come to an end in January, 1921, and that thereafter there was a tenancy created at a weekly rent of 5s., which continued up to the time of the proceedings with which we are now concerned. The justices expressed the view that the dwelling-house was reasonably required by the company as a residence for a person engaged in their whole-time employment. That may well be, but in the circumstances

of this case it is not enough. That finding is supplementary to their other finding that no new tenancy had been created. In my opinion, the appellant has made out his case and the justices in issuing their warrant of ejectment have come to a wrong determination in point of law. The appeal must be allowed and the order of the justices quashed.

AVORY, J.—I am of the same opinion, that the justices have come to an erroneous conclusion in point of law on the question whether a new tenancy had been created in this case, I feel bound though expressing my diffidence to differ from the view taken by Bray, J., in *Lever Bros., Ltd.* v. *Caton* (2) as to the correct construction to be placed upon these words in s. 5 of the Rent and Mortgage Interest (Restrictions) Act, 1920:

> "Where the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment."

I do not consider that those words apply to a man who, though before in the employment of the landlord, subsequently, after leaving that employment, became a tenant of the house in entirely new circumstances, agreed upon when the tenancy was entered upon. The view of Bray, J., was not concurred in by Lush, J., who founded his judgment upon different grounds. Looking at the contentions of the parties and the opinion of the justices set out in the Special Case it is clear that the justices were proceeding upon the ground that this was a case within s. 5 (1) (d) of the Act and the later words of that section, so that in the circumstances there was no obligation on the part of the respondent to prove the existence of alternative accommodation.

SWIFT, J.—I agree.

Appeal allowed.

Solicitors: *Martelli & Co.*, for *J. W. C. Daynes, Son & Keefe*, Norwich; *Hargrove & Co.*, for *Cozens-Hardy & Jewson*, Norwich.

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

PRINCESS OLGA PALEY *v.* WEISZ

[Court of Appeal (Scrutton, Sankey and Russell, L.JJ.), February 28, March 1, 4, 5, 21, 1929]

[Reported [1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; 45 T.L.R. 365; 73 Sol. Jo. 283]

Conflict of Laws—Decrees of foreign government confiscating movables situate within its jurisdiction—Sale by foreign government to purchaser in England—Right of original owner to recover in action for detinue and conversion—Recognition by British government of foreign revolutionary government—Retroactive effect of recognition.

Who is the sovereign de jure or de facto of a foreign territory is a political question, the determination of which by the political departments of the country conclusively binds the courts. When a government which originates in revolution or revolt is recognised by the political department of our government as the de jure government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognised from the commencement of its existence. Every foreign State is bound to respect the independence of every other foreign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own

territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign Powers between themselves. The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court as claims for damages based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency.

Notes. Considered: *Frankfurther* v. *Exner, Ltd.* (1947), 177 L.T. 257. *Re Wagg & Co., Re Prudential Assurance Co.*, [1956] 1 All E.R. 129. Referred to: *First Russian Insurance Co.* v. *London and Lancashire Insurance Co., Ltd.*, [1928] Ch. 922; *Re Russian Bank for Foreign Trade*, [1933] All E.R.Rep. 754; *De Beeché* v. *South American Stores, Ltd., and Chilian Stores, Ltd.*, [1934] All E.R.Rep. 284; *Re Amand*, [1941] 2 K.B. 239; *Re Amand (No. 2)*, [1942] 1 All E.R. 236; *Lorentzen* v. *Lydden & Co.*, [1942] 2 K.B. 202; *De Banque des Marchands de Moscou (Koupetshesky), Royal Exchange Assurance* v. *The Liquidator, Re Banque des Marchands de Moscou (Koupetschesky) Wilenkin* v. *The Liquidator*, [1952] 1 All E.R. 1269; *Anglo-Iranian Oil Co.* v. *Jaffrate*, [1953] 1 W.L.R. 246; *Re Banque des Marchands de Moscou*, [1954] 2 All E.R. 746; *Jabbour* v. *Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145.

As to recognition of foreign confiscatory laws, see 7 HALSBURY'S LAWS (3rd Edn.) 8–10, 43; and for cases see 11 DIGEST (Repl.) 324–326, 611 et seq.

Cases referred to:

(1) *Aksionairoye Obschestvo A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 777; 65 Sol. Jo. 604, C.A.; 11 Digest (Repl.) 611, *418*.

(2) *Oetjen* v. *Central Leather Co.* (1918), 246 U.S. 297.

(3) *Ricaud* v. *American Metal Co.* (1918), 246 U.S. 304.

(4) *Underhill* v. *Hernandez* (1897), 168 U.S. 250.

Appeal from an order of MACKINNON, J.

The plaintiff, Princess Olga Paley, was the widow of the Grand Duke Paul Alexandrovitch of Russia, uncle of the late Tsar. She claimed from the defendants the return of certain furniture, tapestries, pictures, carpets, and other chattels, or, alternatively, damages for their detention or conversion. She alleged that the goods had been illegally seized in her house in Tsarskoe-Selo, near Leningrad, after the Russian revolution, and were still her property.

The goods were purchased by the defendants in the spring of 1928 from the Leningrad Gostorg, a sales agency of the Russian Soviet government, for £48,000. The defendants denied any detention or conversion, and pleaded that the goods were appropriated or confiscated by the Soviet government from whom the goods were bought, and that, therefore, they had a good title to the goods. The Russian Soviet government had been recognised by the British government as the de facto and de jure government of Russia. The Russian Soviet government had described the goods as "nationalised property," and the Russian government claimed, and the defendants alleged, that by the law of Russia the goods claimed were the property of the Russian government. They relied on the decree of Mar. 18, 1923 (No. 245), of the All-Russian Central Executive Commissaries, s. 5 of which provided that works of art, antiques, and articles of historical interest being in museums and depositories, as forming part of the Museum Fund and being safeguarded by State means, were recognised to be State property. From 1918 to the date of sale in Russia the goods in question in this action were in a State museum in Russia, having been, in 1918, taken from the possession of Princess Paley by persons whose acts were subsequently adopted by the Russian government. The defendants also relied on s. 1 of Decree No. 111 of the Council of People's Commissaries, signed by Lenin, whereby was declared the property of the Russian Soviet Federal Socialist Republic all the movable property of citizens fled outside the confines of the republic or hiding themselves up to the present time of whatever consisting and wherever situated. The Princess had escaped from Russia without a passport.

A MACKINNON, J., held that the defendants had proved that by the law of Russia the plaintiff had been deprived of her property, and entered judgment for the defendants with costs. The plaintiff appealed.

Jowitt, K.C., and *Valentine Holmes* for the plaintiff.

Sir Patrick Hastings, K.C., Rowland Thomas, Harold Murphy, and *D. A. S. Cairns* B for the defendants.

Cur. adv. vult.

Mar. 31. The following judgments were read.

SCRUTTON, L.J.—I have carefully considered the documents and evidence in this case, and have arrived at the same result as MACKINNON, J., both for the reasons which he gives and for a further reason which has not found favour with him.

C Princess Olga Paley was married to the Grand Duke Paul of Russia without the consent of the Tsar. The marriage being, therefore, morganatic, she did not become a member of the Romanoff family. The result saved her property from being confiscated under a Russian decree confiscating the property in Russia of members of that family. In 1917 the Princess had, at her house in Tsarskoe-Selo, near St. Petersburg, or Petrograd, afterwards Leningrad, a quantity of valuable furniture and works of art, admittedly her D property. In 1928 she discovered this property in England and claimed it against the persons in possession. They replied that they, or their principals, had bought the property from the Soviet government, which in 1924 had been recognised by the British government as the de jure government of Russia, and in 1918—or the end of 1917—as the de facto government. That Russian government had described the property in the contract of sale as "nationalised property," and the Russian government claimed, E and the defendants alleged, that by the law of Russia the goods claimed were the property of the Russian government. They did so for two reasons which the judge below held to be valid. The first was the decree of Mar. 18, 1923 (No. 245), of the All-Russian Central Executive Committee, and of the Council of People's Commissaries, which, by s. 5, stated:

F > "Works of art, antiques, and articles of historical interest being in museums and depositories, as forming part of the Museum Fund and being safeguarded by State means, are recognised to be State property."

I am quite satisfied on the evidence that from 1918 to the date of sale in Russia, the goods in question in this action were in a State museum in Russia, safeguarded at the expense of the State, having been taken by force in 1918 from the possession of Princess Paley G by persons whose acts were adopted by the Russian government. I agree with and adopt the finding of MACKINNON, J., when he said:

> "I am driven to the conclusion that it is shown that this Paley Palace was a museum which was being safeguarded by State means from funds provided by the Commissariat of Education, and that these articles, which had been put into an inventory, did form part of the Museum Fund."

H The property, being that of the Russian State, was sold by the Russian government; and I can find nothing in the Russian decrees enabling the former owner to complain in these or any courts of the sale by the Russian government.

The second title in that government alleged by the defendants is derived from s. 1 of decree No. 111 of the Council of People's Commissaries, signed by Lenin as chairman of I that body. The section reads: There is declared

> "the property of the Russian Soviet Federal Socialist Republic all the movable property of citizens fled outside the confines of the republic or hiding themselves up to the present time of whatever consisting, and wherever situated."

It is clear on the evidence, and is admitted by the Princess, that she escaped from Russia without a passport; and I am satisfied that this is "fleeing from Russia" within the meaning of the decree, and that thereby her property in Russia became automatically confiscated and became the property of the Russian State without any necessity of further legal proceedings.

It was argued that the decree was made only by the Council of People's Commissaries, and that there was no evidence that it had been confirmed by the executive council. On the other hand, there was no evidence that it had been repealed or suspended by the executive council. It was printed in the official publications of the laws of Russia, and there was evidence which I accept that no Russian court would require evidence that such a decree had been confirmed by the executive council. On the ground of this decree also, I agree with MACKINNON, J., that the plaintiff fails.

There is, however, a third defence which MACKINNON, J., rejected, but which I think should also succeed. Counsel for the defendants put in the front of his argument below and before this court that, if the seizure of the property began without legal justification, or only by revolutionary right, it was ultimately adopted by a government which was recognised by the British government as the lawful government of the territory in which the property was, and that this was an act of State into the validity of which this court would not inquire. Incidentally, counsel referred to the decrees of May, 1922, and subsection or note 1 to the Civil Code of 1923 by which, when by a change of policy the Russian government recognised to some extent private, as opposed to State, property, they yet prevented the original owner from asserting his original right against those who had by force or revolutionary right dispossessed him. The subsection was as follows:

> "Note 1. Former owners whose property was expropriated by revolutionary right or generally passed into possession of toilers before May, 1922, have no right to claim the return of such property."

The learned judge dealt with this matter rather summarily, and said that it was a bad point, and not seriously relied on. As it was based on three decisions of the Supreme Court of the United States, followed in this court in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1), I regret that the learned judge did not indicate more precisely why it was a bad point. I think that it was a good one. It may be that the learned judge was so satisfied that the Russian government had lawfully acquired the property that he thought it waste of time to consider what would happen if they claimed, not by law, but by title of force.

The United States, situated in the neighbourhood of South and Central American republics, where the life of any government is precarious and its death rarely takes place from natural causes, frequently found in its territory property seized by a revolutionary force which ultimately succeeded in establishing itself in power and there sold goods which it had seized to persons who exported them to the United States, where they were claimed by their original owners. In *Oetjen* v. *Central Leather Co.* (2) these facts occurred with reference to a seizure in Mexico of property of a Mexican citizen which, when sold, came into the United States, and in *Ricaud* v. *American Metal Co.* (3) they occurred again with respect to the property of a citizen of the United States. In each case the Supreme Court acted on the principle stated thus in *Oetjen's Case* (246 U.S. at p. 302):

> "It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognised by the political department of our government as the de jure government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognised from the commencement of its existence. . . . To these principles we must add that: 'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign Powers as between themselves."

Two further authorities of the Supreme Court of the United States are cited in support of that proposition. This court acts on the principles laid down in the above cases and in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1). For this reason also the plaintiff's claim fails.

Our government has recognised the present Russian government as the de jure government of Russia, and our courts are bound to give effect to the laws and acts of that government, so far as they relate to property within that jurisdiction, when it was affected by those laws and Acts. The appeal must be dismissed with costs.

SANKEY, L.J.—The plaintiff having established that the articles in question in this case were originally her property, the onus is upon the defendants to prove that the property in the goods had before April, 1928, passed to the Soviet Republic. They seek to do so on several grounds; (i) that the seizure of the goods in 1918 was an act of State which transferred the property from her to the State; (ii) that by a decree of Nov. 19, 1920, No. 111, the property in the goods passed from the plaintiff to the Soviet Republic because she fled the country; (iii) that by a decree of Mar. 18, 1924, No. 245, the property in the goods was nationalised and became the property of the Soviet Republic. The learned judge considered that the defendants had not made out the first of these three pleas, but gave judgment in their favour on the second and third. In my view the defendants made out their case in all three points.

With regard to the first, the act of State, it is clear, from the evidence of the plaintiff herself that, at a date in 1918, which is not precisely fixed, but which was before July 30, the Soviet authority had taken possession of the property in question against the will of the plaintiff; in fact she realised, as she herself says, that her property had been stolen from her.

The American case of *Oetjen* v. *Central Leather Co.* (2), which was mentioned with approval in the Court of Appeal in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1), states the American law, which, in my view, is the same as the English law, in such circumstances. The headnote says (246 U.S. 297):

> "Who is the sovereign de jure or de facto of a foreign territory is a political question, the determination of which by the political departments of the country conclusively binds the judges. When a government which originates in revolution or revolt is recognised by the political department of our government as the de jure government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognised from the commencement of its existence. Every foreign State is bound to respect the independence of every other foreign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign Powers as between themselves. The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court as claims for damages based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency."

That being the headnote, the court held (ibid., at p. 302):

> "It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognised by the political department of our government as the de jure government of the country in which it is established, such recognition is retroactive."

The headnote follows that. Then: "To these principles we must add that: Every sovereign State is bound to respect the independence of every other sovereign State." The words of the headnote which I have read are taken from the judgment of the court itself. The words "from the commencement of its existence" were criticised in the *Luther Case* (1). *Oetjen's Case* (2) is concerned with a revolution in Mexico. A similar decision was reached in *Underhill* v. *Hernandez* (4) in circumstances arising out of a revolution in Venezuela. At the time of the seizure in question the Soviet government had been in power since Nov. 7, 1917, and was recognised by the English government on Mar. 16, 1921, as de facto, and on Feb. 1, 1924, as de jure Government of Russia. In addition to these facts it must be added that the Soviet government kept control of these goods down to the time of their sale, purported to sell them, and describes them

in the agreement of April, 1928, as the nationalised property of the Paley Palace. In these circumstances, in my view, the Princess was dispossessed of this property by an act of State behind which our courts will not go.

Agreeing as I do with the learned judge on the other points, I propose to state my reasons very briefly. Great difficulties have arisen in this and similar cases in ascertaining the exact effect of the Soviet law. The opposing parties cannot agree on a proper translation; their expert witnesses differ as to the Russian meaning of the legislation while the English translation, which in some passages is obviously a literal rendering of the original, is also susceptible of various meanings. Over and above that, the legal principles involved are so different from our own that it is difficult to appreciate and apply them. In the early days of the revolution, the position, as was natural, was vague and uncertain. The local Soviets seem to have been endowed with, or assumed power.

A formal constitution was promulgated on July 10, 1918, under which three bodies were created: (i) The All-Russian Congress; (ii) the Executive Committee; and (iii) the Council of People's Commissaries. The first two had legislative powers, the third mainly administrative powers only, except in emergency, although their decrees were from time to time accepted as legislation. At first an attempt was made to nationalise almost everything; but there were express enactments in favour of the class of toilers, which provided that in cases where they were concerned, the law might be administered to some extent in their favour. After a time it was found that the policy of complete nationalisation could not be maintained, and the beginning of a new economic policy started by a decree of Mar. 16, 1922, followed on May 22 by another decree, and supplemented by the Civil Code of Jan. 1, 1923, which to some extent recognised private property, subject to the provision that certain transfers of property should be recognised and remain undisturbed: see notes 1 and 2 of art. 59 of the Code.

It seems to me that the transfer of property under decree No. 111 was one of these latter. As to the plea under decree No. 111 of Nov. 19, 1920, the decree provides, by cll. 1 and 3—I need not read them—what is to happen with reference to the confiscation of property. In my opinion, this vested in the Soviet government the property of persons who fled, as the Princess unfortunately was compelled to. It was sought to say that that decree was inchoate, because cl. 3 shows that there was to be machinery for carrying it into effect, and none has been created. That clause, however, only regulates the choice of department to which the property is to go when confiscated. I think the enacting clause—cl. 1—does transfer the property. There is evidence that it was acted upon in Russia, and that although the Council of People's Commissaries had only administrative, as distinguishable from legislative, power in many matters, this decree was in fact recorded and published by the Soviet government as having the force of legislation. I agree with the judge who says in his judgment:

> "I am constrained to come to the conclusion that this was an effective law, and that by virtue of it the Russian court, properly applying the law, would hold that the plaintiff had, within its meaning, fled outside the confines of the Republic, and that this property of hers had thereupon, under this decree, become the property of the Soviet Republic."

As to the plea under decree No. 245 of Mar. 18, 1923, the question is: Did the articles come within cl. 5 of that decree? Clause 5 is in the following terms:

> "Works of art, antiques and articles of historical interest, being in museums and depositories as forming part of the Museum Fund, and being safeguarded by State means, are recognised to be State property."

It is not necessary for me to repeat the facts upon which the learned judge came to the conclusion that he did. I agree with what MacKinnon, J., says in his judgment, which is in the following terms:

> "I am driven to the conclusion that it is shown that this Paley Palace was a museum which was being safeguarded by State means from funds provided by the Commissariat of Education; and that these articles which had been put into an inventory did form part of the Museum Fund. I think that the defendants do

A succeed in showing that in consequence, under s. 5 [that is the one I have just read] of this decree they were declared to be State property by this decree."

For these reasons I am of opinion that the appeal should be dismissed.

RUSSELL, L.J.—This appeal must, in my opinion, fail for reasons which I can state shortly.

B The articles, which are the subject of the action, are, to quote the statement of claim, "furniture, tapestries, pictures, carpets, and other chattels of great value." It is common ground that they formed part of the contents of the Paley Palace and that they originally belonged to the plaintiff. They were, in April, 1928, sold and delivered to the defendant, Weisz, by or on behalf of the Russian government; and the question for decision is whether, by that time, the chattels had ceased to be the property of the C plaintiff, and had become the property of the Russian State. On Oct. 5, 1918, the Council of People's Commissaries made a decree (No. 794), concerning the registration, placing on inventory, and safeguarding works of art and antiques. By such decree provision was made, inter alia, for carrying out such registration and making such inventories; for restricting alienation from one owner to another; and for assisting owners of articles or collections in safeguarding them. This decree does not seem to D involve or produce any change in the ownership of the chattels covered by it. It is, however, important to ascertain what had happened to the Paley Palace and its contents at or about the time of that decree. November 7, 1917, is regarded as the date when Soviet rule began. The plaintiff ceased to reside in the palace in January, 1918. On Nov. 4, 1918, Jacobnev went into occupation and took over the management. At that date no one was in control; there was one person there, Borasov, who was employed by E the Minister of Education. Jacobnev employed ten people to look after the palace, all the expenses being paid by the Commissariat of Education. An inventory of all the contents was made under his direction and was completed in 1919. The public was admitted to the palace. Jacobnev remained in control of the palace until August, 1927, when it was handed over to a special liquidation committee. Further, the plaintiff gave evidence to the effect that after she had quitted the palace she read in the news- F papers that the palace had been seized. She went to the palace to see if it was true and found a man of the local Soviet in possession. She was not allowed to go in, but was allowed to take away an ikon and some linen, but nothing else. She realised then that, as she put it, "my property had been stolen from me."

On Mar. 18, 1923, a decree—No. 245—was made jointly by the Central Executive Committee—which possessed legislative power—and the Council of People's Commis- G saries, with a view, as stated, to supplementing the decree of Oct. 5, 1918. As I read that decree, it provided for an overhauling of existing inventories, as the result of which articles having no museum value would be struck off, and would be "placed at the disposal of their owners." That seems to me the result and effect of arts. 1 and 3. The articles remaining on the inventories would be those possessing a museum value. Those articles, at the date of the decree, might be in the possession of private owners or might H be in museums. As to those in the possession of private owners, the private ownership continues, but they are "deemed to have been placed under the control of the State" (art. 4); they are subject to restriction on sale (art. 4); and to the right of the State to utilise them for exhibitions and publication (art. 4); and they will be protected by protection certificates (art. 2). As to those which were in a museum and were being safeguarded by State means, those are "recognised to be State property" (art. 5). In I the English translation of this decree the description of the chattels affected assumes various forms, such as "objects of art and antiquity," "monuments of art," "antiques and articles of people's life," "works of art, antiques, and articles of historical interest." There can, however, be no doubt that the contents of the Paley Palace, having been included in the inventory spoken to by Jacobnev, would come under the purview of this decree. In so far as they were not included in the revised inventories, they would be the plaintiff's property and at her disposal. In so far as they were included in the new inventories, they would, if they were on Mar. 18, 1923, in a museum being safeguarded by State means, be, not the property of the plaintiff, but the property of the

Russian State. Assuming, for the moment, that they were included in the new inventories, were they, on Mar. 18, 1923, in a museum being safeguarded by State means? In my opinion, upon the evidence they were. They were clearly being safeguarded by State means—and Jacobnev in terms says in relation to his taking charge in November, 1918—"Actually the palace at that time was already a museum and was open to the public." It is true that there is no actual evidence as to the chattels being included in the new inventories; but we must, I think, presume that the Russian government would not purport to sell that which their laws pronounced to be at the disposal of the owner, and, accordingly, we must presume that these chattels were not excluded from the new inventories. The result is that these chattels being recognised to be State property, under art. 5 the agreement for sale in April, 1928, correctly described the chattels as "part of the nationalised property of the Paley Palace" and the plaintiff had no ownership therein or title thereto.

This ground is sufficient to dispose of the action. There are, however, two other grounds upon which the defendants are entitled to succeed. The Council of People's Commissaries issued a decree of Mar. 5, 1921—No. 111—relating to the confiscation of the movable property of citizens who had fled outside the confines of the Republic. It is common ground that the plaintiff had so fled before Mar. 5, 1921. By art. 1 of the decree the movable property of such citizens "is declared the property of the Russian Soviet Federal Socialist Republic." Four reasons were urged on behalf of the plaintiff to show that the chattels remained her property, notwithstanding this decree. First, it was said that the decree had no legislative effect. Upon the evidence I cannot accept this view. Moreover, it was published officially as one of the enactments for the year 1921, and is recognised as effective at the date of the decree No. 248 which I mention later. Secondly, it was said that the decree itself did not confiscate the property, but that some decree or finding of a court was necessary to effectuate this; and thirdly, it was said that the decree was inoperative unless and until some instructions had been issued under art. 3 thereof. These two contentions may be conveniently dealt with together.

By the decree—art. 1—all the movable property is declared State property. That appears to be immediate and final; no further proceedings, so far, would seem to be contemplated. Having nationalised all such property, art. 2 then proceeds to divide it into two categories: (i) Objects of art and antiques, which have a special historical or artistic value, are to go to educational institutions under order of the Commissariat of Education; (ii) all the rest is to be placed at the disposal of the Commissariat of Foreign Trade. Obviously, some regulation would be necessary to provide for the division of the confiscated property between those two commissariats, and accordingly art. 3 provides that these two bodies are to issue full instruction for carrying out the decree. This does not mean that the nationalisation of the property does not take effect until these instructions are issued. Nor, in my opinion, does this decree bring about a confiscation, within the meaning of the decrees No. 143 of April 16, 1920, and No. 564 of Oct. 26, 1921. Those decrees must, I think, relate to requisitions and confiscations of goods belonging to people who are within the State and are known to be there—for they provide for a minute with certain information being handed to the owner of the goods within a limited number of days, a procedure obviously impossible of application to the owners of property nationalised under No. 111.

Finally, it was said—and truly—that No. 111 was repealed by a decree—No. 248—of Mar. 28, 1927. That was a joint resolution of the Executive Committee and the Council of People's Commissaries, which confirmed an Act described as a Consolidation Act about the requisition and confiscation of property. By the joint operation of s. 13 (c), and s. 15 of that Act, it seems clear that after it came into operation the property of persons fleeing would only become confiscated by resolution of a law court. There is, however, no reason to suggest that the repeal undoes an existing nationalisation of property or revests it in the original owner until a resolution of a law court has been obtained. For these reasons I am of opinion that the action fails on this second ground.

A third ground upon which the defendants would, in my opinion, be entitled to succeed is the point which was referred to as the act of State point. The evidence—

to which I have already referred—clearly establishes a seizure of the property in 1918, either by a section of revolutionaries, whose act was subsequently adopted by the government, or by a usurping power which subsequently became the government. This court will not inquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory. There remains for consideration one point of general application urged on behalf of the plaintiff. It was said that, assuming that the property had passed to the Russian State, yet the Russian State had no power to sell to the defendant Weisz. For myself, I am not satisfied that the State had not the power—but the point seems immaterial, for the evidence would not justify our holding that an unauthorised sale by the State would operate to re-vest the property in the plaintiff. For these reasons I am of opinion that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Lewis & Lewis*; *Campbell, Hooper & Todd.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

MIDLAND MOTOR SHOWROOMS *v.* NEWMAN

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Sankey, L.JJ.), April 26, 1929]

[Reported [1929] 2 K.B. 256; 98 L.J.K.B. 490; 141 L.T. 230; 45 T.L.R. 499]

Hire-Purchase—Guarantee—Guarantee for performance of agreement by hirer—Time granted by owner to hirer for payment of one instalment of hire—Discharge of surety.

The due performance by the hirer of the conditions of a hire-purchase agreement and the payment of the instalments due thereunder had been guaranteed by a surety. The hirer had fallen into arrears with the instalments and requested the owners to accept a cheque for £20 from a friend of his on account of the arrears, he at the same time promising to pay the balance of the arrears in a short time. The owners accepted this offer.

Held: the hire-purchase agreement was one and indivisible, and, therefore, the time given to the debtor in respect of payments under part of the agreement operated as a discharge of the surety in respect of his guarantee of the sums due under the whole agreement.

Croydon Gas Co. v. *Dickinson* (1) (1876), 2 C.P.D. 46, explained and distinguished.
Eyre v. *Bartrop* (2) (1818), 3 Madd. 221, applied.
Decision of AVORY, J. (141 L.T. 230), affirmed.

Notes. Cf. *Midland Counties Motor Finance Co., Ltd.* v. *Slade*, [1950] 2 All E.R. 821. A hire-purchase agreement may, however, expressly provide that an alteration in the contract between owner and hirer shall not release the surety: *British Motor Trust Co., Ltd.* v. *Hyams* (1934), 50 T.L.R. 230; *Chatterton* v. *Maclean*, [1951] 1 All E.R. 761.

Referred to: *W. R. Simmons, Ltd.* v. *Meek*, [1939] 2 All E.R. 645.

As to discharge of a surety by the conduct of the creditor, see 18 HALSBURY'S LAWS (3rd Edn.) 502–524; and for cases on the subject, see 26 DIGEST 156 et seq.; and as to sureties under hire-purchase agreements, see 19 HALSBURY'S LAWS (3rd Edn.) 525.

Appeal by the plaintiffs, the assignees of the owner of a motor car, from the decision of AVORY, J., reported 141 L.T. 230, dismissing their claim, based on a hire-purchase agreement in respect of the car, against the defendant, the surety under that agreement. The facts, which are summarised in the headnote, are set out in full in the judgment of Lord HANWORTH, M.R.

Cases referred to:

(1) *Croydon Gas Co.* v. *Dickinson* (1876), 2 C.P.D. 46; 46 L.J.Q.B. 157; 36 L.T. 135; 25 W.R. 157, C.A.; 26 Digest 158, *1200*.

(2) *Eyre* v. *Bartrop* (1818), 3 Madd. 221; 56 E.R. 491; 26 Digest 180, *1372*.

(3) *Cumber* v. *Wane* (1721), 1 Stra. 426; 11 Mod. Rep. 342; 93 E.R. 613; 1 Smith, L.C. 390; 12 Digest (Repl.) 516, *3865*.

(4) *Sibree* v. *Tripp* (1846), 15 M. & W. 23; 15 L.J.Ex. 318; 153 E.R. 745; 12 Digest (Repl.) 500, *3752*.

(5) *Goddard* v. *O'Brien* (1882), 9 Q.B.D. 37; 46 L.T. 306; 30 W.R. 549; De Colyar's County Court Cases, 110, D.C.; 12 Digest (Repl.) 528, *3986*.

(6) *Harrison* v. *Seymour* (1866), L.R. 1 C.P. 518; Har. & Ruth. 567; 35 L.J.C.P. 264; 12 Jur. N.S. 924; 26 Digest 158, *1199*.

(7) *Dowden* v. *Levis* (1884), 14 L.R. Ir. 307; 26 Digest 184, *a*.

(8) *Polak* v. *Everitt* (1876), 1 Q.B.D. 669; 46 L.J.Q.B. 218; 35 L.T. 350; 24 W.R. 689, C.A.; 26 Digest 162, *1222*.

(9) *Howell* v. *Jones* (1834), 1 Cr.M. & R. 97; 4 Tyr. 548; 3 L.J. Ex. 255; 149 E.R. 1009; 26 Digest 178, *1343*.

(10) *Orme* v. *Young* (1815), Holt, N.P. 84; 4 Camp. 336; 171 E.R. 107, N.P.; 26 Digest 179, *1357*.

Gallop, for the plaintiffs, referred to *Croydon Commercial Gas Co.* v. *Dickinson*, (1), *Cumber* v. *Wane* (3), *Sibree* v. *Tripp* (4), *Goddard* v. *O'Brien* (5), *Harrison* v. *Seymour* (6), *Dowden* v. *Levis* (7), and *Polak* v. *Everitt* (8).

H. O. O'Hagan, for the surety, was not called upon to argue.

LORD HANWORTH, M.R.—We have had an interesting argument by counsel for the plaintiffs to assist the court, which recognises the value of the argument even though it fails. The point in the case is a short one, but involves certain principles of law. The contract in question was made on July 6, 1927. By it the predecessors of the plaintiffs, the Regent Construction and Finance Company Limited, [the owner] made a hire-purchase agreement with Toye [the hirer] with reference to a Renault car. At the same time, a guarantee was given by Mrs. Newman [the surety]. The plaintiffs now sue Mrs. Newman for sums in respect of payment of which Toye made default, the amount claimed being £79 13s. 4d., arrears of instalments, and £43 for costs of repairs to the car. Mrs. Newman says she is not liable to pay the plaintiffs, the Midland Motor Showrooms Limited, on this guarantee on the ground that she has become released from her guarantee by the principal debtor having been given time to pay instalments by the plaintiffs. The nature of the contract guaranteed has to be considered. The agreement set out undertakings given by the hirer and the owner.

The hirer undertook to pay £22 6s. 8d. as a first payment on Aug. 6, 1927, and thereafter every month £14 3s. 4d., and if default was made in those payments to pay interest at the rate of 10 per cent. from the due date until payment, but that provision was to be without prejudice to the strict rights of the owner under any other clause of the agreement. The hirer undertook to take proper care of and keep in repair the motor car, to insure it, allow the owner to have access to it, to pay rent, rates, and taxes of the premises upon which the car may be stored. The owner on his part agreed that the hirer should have the option of purchasing by paying the owner the agreed price mentioned in the schedule, namely, £277 6s. 5d. less any moneys previously paid by the hirer. Then the owner also agreed that if he retook possession under the terms of the agreement the hirer should have the right to reinstate the agreement on paying arrears of rent up to the time of reinstatement. By cl. 4 (e) of the agreement it was provided that no variation with regard to the payment of the rent should prejudice or affect any other provision thereof. All those provisions in the agreement are interlocked. They are mutual obligations and cl. 4 (e) was intended to show that that was so. Default was made by the hirer in the payment of three of the monthly instalments—November, December, 1927, and January, 1928—in all, £42 10s. On Jan. 7, 1928, the owner wrote to the hirer, stating that they could not extend grace in respect of the arrears,

A and that failing payments of the arrears of instalments due they would take possession of the car. A letter was also sent to the surety.

On Feb. 3, 1928, the hirer wrote to the owner:

> "I regret not having written you before with reference to the over-due instalments, but have refrained from doing so because I was unable to suggest any clearing-up of my difficulty. Now, however, I have met an old friend who, on hearing of my
> B circumstances, offers to help me and is willing to send you a cheque for £20. You know my circumstances too well, and it is useless adding that with ordinary luck I shall be on my feet again very soon, so if you will kindly accept this on account I faithfully promise to find the balance of arrears within a month. . . . I hope you will see your way clear to accept this, and I will at once arrange for my friend to let you have the cheque."

C That is a confession by the hirer that he himself could not clear up the difficulty, but had secured a friend who would let the owner have a cheque. The reply to that letter was:

> "We are in receipt of your letter of yesterday's date and note your remarks. On further consideration of the circumstances I have been instructed to inform you
> D that we are prepared to accept £20 on account, the arrears to be paid within one month of to-day's date. Kindly have cheque forwarded by return of post and send acknowledgment of this letter of acceptance of your terms."

that is an acceptance of the offer in the letter of Feb. 3 with the result that the hirer stands out as he could not clear up arrears, and the cheque of his friend is welcomed. If that was what happened, it was an agreement by the owner that he would accept the
E arrears within one month; so that if the cheque sent was for £20 there was to be a sum of £22 10s. left over to be paid on Mar. 4, 1928, instead of on Jan. 7, 1928.

On Dec. 19, 1928 a writ was issued by the plaintiffs claiming £122 13s. 4d. The defendant surety contends that she was discharged from her guarantee by the agreement to accept the cheque for £20 and to give time for payment of arrears. AVORY, J., decided that she was right. Was there a binding contract to give time? There was, in
F my opinion, a clear agreement that time should be given. Was there any consideration? In my opinion there was, and if any authority for that is required, *Cumber* v. *Wane* (3) supplies it; there the authorities are tabulated and cited (1 Smith L.C. at p. 390). There was consideration in the accepting of the intervention of a third party at a time when the capacity of the hirer to pay was wholly spent. It is not for others than the surety to consider the nature of that intervention and the court will not entertain the consideration
G of the effect of it on the surety. The surety is the person solely to decide whether the intervention had adversely affected her position as surety. What is the effect of the creditor giving the principal debtor time? The surety is thereby deprived of his right to have the securities of the creditor and enforce them in his name, see BULLEN AND LEAKE ON PRECEDENTS OF PLEADING (2nd Edn.), p. 507. The surety has the right to say I can come in if default is made in payments by the debtor and I am interested in the
H due payment of the debt.

In *Howell* v. *Jones* (9), BOLLAND, B., quoting from GIBBS, L.C.J., in *Orme* v. *Young* (10), said (Holt, N.P., at p. 84):

> " 'What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively, refraining; not exacting the money at the
> I time' (by which, of course, he means at the time when due by the contract between the principal and the creditor); 'but it is the act of the creditor depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a court of equity for relief, because, the principal having tied his hands, the surety cannot release them.' "

That puts in the neatest way the fact that it is the surety who has a definite interest in seeing that the obligations of the debtor are fulfilled. These are the principles which we have to apply here. There was, I think, a binding agreement for good consideration to delay the enforcement of the creditor's rights, and therefore the rights of the surety

were impinged upon, and it is not for us to determine whether the surety has been thereby injured. A

As there was that binding agreement by the principal with the debtor the surety is discharged. But it is said that, following the judgment of BRAMWELL, J., in *Croydon Gas Co.* v. *Dickinson* (1), the liability in respect of the repairs to the car, and in respect of what had accrued due at the time of the agreement that time should be given in respect of those arrears, may be severed from the remaining payments due under the hire-purchase agreement, and that there is no release in respect of those remaining payments which can be severed. I have some difficulty in appreciating what BRAMWELL, J., meant in his judgment on p. 50, but those observations were merely dicta. Independently of those observations the *Croydon Gas Co. Case* (1) is wholly different from the present case, as here the liability of the hirer cannot be severed. Therefore, the *Croydon Gas Co. Case* (1) is not applicable, as there it was possible to find that there were separate contracts. The appeal must be dismissed with costs. B C

LAWRENCE, L.J.—This case is not free from difficulty. The question is whether the agreement to give time for the payment of the arrears of the instalments due under the hire-purchase agreement operated to discharge the surety not only from any liability in respect of those instalments, but also from any further liability in respect of the whole contract. In other words, whether this case falls within *Croydon Gas Co.* v. *Dickinson* (1), or whether it comes within the decision of SIR JOHN LEACH, V.-C., in *Eyre* v. *Bartrop* (2). The agreement here is an agreement which is one and indivisible, namely, for the hire of a motor car. The *Croydon Gas Co. Case* (1) is distinguishable from the present case in that the contract there was for the sale and purchase of goods to be delivered and paid for monthly, and it was held that the giving of time for the payment of one month's supply only operated to discharge the surety in respect of the payment for that month's supply, and that as the contract was severable the giving of time did not operate to discharge the surety from liability in respect of the amounts due for the two following months' supply. In *Eyre* v. *Bartrop* (2), on the other hand, it was held that the agreement was indivisible, and that as the arrangement made between the principal creditor and principal debtor had altered the position of the surety, he was wholly discharged. I have come to the conclusion, though not without hesitation, that for the reasons stated by the Master of the Rolls the present case comes within the principle of *Eyre* v. *Bartrop* (2), and that the surety is discharged from any further liability under her guarantee. The appeal, therefore, fails and will be dismissed. D E F

SANKEY, L.J.—I agree, and I should like to begin my judgment by reading the following passage from the judgment of COCKBURN, C.J., in *Croydon Gas Co.* v. *Dickinson* (1) (46 L.J.Q.P., at p. 159): G

> "I have entertained some slight doubt upon the subject, but I willingly stifle that doubt in deference to the decided opinions of other great authorities."

It appears to me that the ratio decidendi of the *Croydon Gas Co. Case* (1) proceeds on a different basis. If I thought that that case was at all like this, or that the dictum of BRAMWELL, J., was material to the decision of that case, it might be more difficult. The contract before us in this case consists of interlocked and indivisible stipulations, but in the *Croydon Gas Co. Case* (1) there were several separate contracts, and that is the distinction. I agree that the appeal must be dismissed. H

Solicitors: *Burton & Ramsden*; *Silkin & Silkin.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*] I

PATTERSON *v.* ROBINSON

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Swift, JJ.), April 9, 1929]

[Reported [1929] 2 K.B. 91; 98 L.J.K.B. 457; 141 L.T. 165; 93 J.P. 165; 27 L.G.R. 422; 28 Cox, C.C. 626; 18 Asp.M.L.C. 35]

Shipping—Seaman—Offence—Offence required to be entered in ship's log-book—No entry of offence—Jurisdiction of magistrates to hear complaint alleging offence—Discretion to refuse to hear complaint—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 228 (a), (d).

On a complaint against seamen for an offence which is required by s. 228 (a) of the Merchant Shipping Act, 1894, to be entered in the official log-book of the vessel, it is not a condition precedent to the hearing of the complaint that the entry shall have been made; if no entry has been made in the log-book the justices have jurisdiction to hear the case, but, by virtue of s. 228 (d), they have a discretion to refuse to do so.

Notes. Referred to: *Robinson* v. *Robson*, [1943] 1 All E.R. 511

As to entry of seamen's offences in the ship's log, see 30 HALSBURY'S LAWS (2nd Edn.) 237; for the Merchant Shipping Act, 1894, s. 225 (1) (e), s. 228, s. 239, s. 240, see 23 HALSBURY'S STATUTES (2nd Edn.) 513, 515, 520, 521.

Case Stated by justices for the county borough of South Shields. The master of the British ship *Gretavale* appealed against the dismissal by the justices of his complaint against the respondent seamen alleging an unlawful combination to neglect duty contrary to s. 225 (1) (c) of the Merchant Shipping Act, 1894. The facts, and the relevant parts of the Act, are set out in the judgment of LORD HEWART, C.J.

W. L. McNair for the appellant.

The respondents did not appear.

LORD HEWART, C.J.—This is a Case Stated by justices for the borough of South Shields. A complaint was preferred by the present appellant under the Merchant Shipping Act, 1894, against the respondents "for that they the respondents" between certain dates "being duly engaged to serve on board such vessel," a British ship named the *Gretavale*, "unlawfully did combine together to neglect duty contrary to s. 225 (1) (c)" of the Statute. When the case came on, the point was taken by the solicitor to the respondents that a condition precedent was not fulfilled, namely, that no entry of the alleged offence had been made in the official log-book of the vessel. The making of such entry, it was said, was a condition precedent to any proceedings against the respondents for the alleged offence. It was argued, accordingly, that the court had no jurisdiction to hear the complaint, and that the complaint should be dismissed. That objection having been taken, the justices considered the matter, and came to the conclusion that the objection was good, and that they had no jurisdiction to hear the complaint. The question raised by this case for us is whether in so holding the justices came to a correct decision in point of law.

Undoubtedly the provisions in this statute for the making of entries in the official log, and in particular entries as to the commission of offences, are provisions not merely in the interest of shipowners or employers, but also in the interests of the accused person, and I should be very sorry to give any decision which might diminish, however slightly, the protection which a statute had given to a person accused of committing an offence. But when one looks at these provisions as a whole, in my opinion it is not correct to say that the production of the entry in the log is a condition precedent. By s. 225 it is provided: "If a seaman lawfully engaged or an apprentice to the sea service" commits any of a series of offences referred to in the Act as offences against discipline, he shall be liable to be punished summarily. One of those offences is the offence which it was proposed to deal with in this case

> "if he combines with any of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the ship or the progress of the voyage."

Then by s. 228 it is provided: A

"If any offence, within the meaning of this Act, of desertion or absence without leave or against discipline is committed or if any act of misconduct is committed for which the offender's agreement imposes a fine and it is intended to enforce the fine,"

then

"an entry of the offence (not "may be made," but) shall be made in the official B log-book and signed by the master and also the mate or one of the crew; and (*b*) the offender, if still in the ship, shall before the next subsequent arrival of the ship at any port, or if she is at the time in port before her departure therefrom, either be furnished with a copy of the entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit";

and (*c*) C

"a statement or a copy of the entry having been so furnished, or of the entry having been so read over, and, in either case, the reply (if any) made by the offender, shall likewise be entered and signed in manner aforesaid."

Section 239 contains a series of stringent provisions as to the keeping of an official log. The section is as strict as it could be. Subsection (4), for example, provides as follows: D

"An entry required by this Act in an official log-book shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as that occurrence shall be made and dated so as to show the date of the occurrence and of the entry respecting it; and if made in respect of an occurrence happening before the arrival of the ship at her final port of discharge shall not be made more than twenty-four hours after that arrival." E

It is not necessary to cite further passages to show the importance which the Act attaches to the making of entries in the official log. But the question whether where an offence is sought to be proved the production of that log is a condition precedent is another question. By s. 241 it is provided:

"If an official log-book is not kept in the manner required by this Act or if an entry F directed by this Act to be made therein is not made at the time and in the manner directed by this Act, the master shall for each offence be liable to the specific fine in this Act mentioned."

So far as evidence is concerned, the statute provides, in s. 239 (6), that "every entry made in an official log-book in manner provided by this Act shall be admissible in evidence." G

Then one comes to para. (d), in s. 228:

"In any subsequent legal proceedings the entries by this section required shall, if practicable, be produced or proved, and in default of that production or proof the court hearing the case may, in their discretion, refuse to receive evidence of the offence or act of misconduct." H

I am bound to say that for a time it did not appear to me that those words were apt words to cover a case where ex hypothesi no entry had been made. There seems to be something slightly humorous in saying, for example, that it is not practicable to produce or to prove the entry in the log when in truth and in fact the log contains no entry. But I have come to the conclusion that these words are sufficiently wide to cover the case where it is not practicable to produce or to prove the entry for the reason that it I was never made at all, and I am helped in coming to that conclusion by the form of this part of the enactment. That which the justices are by these words empowered to do is not to receive evidence which otherwise they might have received. They are empowered to refuse to receive evidence. What does that mean? Does it not mean this, that apart from this statutory power to refuse to receive such evidence, they were expected to receive and would naturally receive it; in other words, while the Act goes out of its way, so to say, to make an entry in the official log-book admissible in evidence, it does not make it the only evidence, and it expressly provides that where

A that evidence, the best evidence, perhaps, is not capable of being produced, the justices, if they think fit, may refuse to receive any other evidence. That form and that scheme seem to me to be inconsistent with the proposition that the production of the entry in the log-book, or the making of the entry in the log-book, which is a different thing, is a condition precedent. In my opinion, the proper conclusion for these justices in these circumstances was not to say "we cannot hear other evidence in this case," but they B might well in the exercise of their discretion have said "we will not hear other evidence in this case," and that course is still open to them.

AVORY, J.—I agree that the justices were wrong in this case in holding that they had no jurisdiction to hear the complaint. The real question in the case is whether an entry of the alleged offence in the official log-book was a condition precedent to any proceed- C ings being taken against the respondents in this case for the alleged offence. In my view, it would require much plainer words to take away from a court, otherwise having jurisdiction over an offence, the jurisdiction to deal with a particular offence because no entry had been made in the log-book. In my view, s. 228, para. (d), means that in the absence of what the legislature may have conceived to be the best evidence of the alleged offence, the magistrates might, in their discretion, refuse to hear other evidence D than that which is ordinarily to be found in the log-book. If this were not so, if this were not the true view, it would lead to the absurd result which I suggested during the argument, that if a seaman or a number of seamen assaulted the master and the other officers and rendered them incapable of making an entry in the log-book, they would thereby save themselves from ever being proceeded against or punished for the offence; in other words, it would be a premium on their assaulting him so grievously as to make E it impossible for him to make an entry in the log-book himself. I cannot believe that that was ever intended by this provision in the Act. I think that the only intention was that the entry in the log-book should, whenever practicable, be receivable as the best evidence, and that in the absence of it, the magistrates in their discretion may proceed to hear any other evidence that is available. Therefore I agree that the case should be remitted to the justices with that opinion of this court.

F **SWIFT, J.**—I agree.

Solicitors: *Botterell & Roche*, for *Botterell, Roche & Temperley*, Newcastle.

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

A

DUDLEY AND DISTRICT BENEFIT BUILDING SOCIETY *v.* GORDON

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Swift, JJ.), April 17, 1929]

[Reported [1929] 2 K.B. 105; 98 L.J.K.B. 486; 141 L.T. 583; 93 J.P. 186; 45 T.L.R. 424; 27 L.G.R. 448] B

Landlord and Tenant—Small tenement—Possession—Termination of term by notice "or otherwise"—Mortgagees entitled to possession on mortgagor's default—Default by mortgagor—Jurisdiction of justices—Question of title—Small Tenements Recovery Act, 1838 (1 *& 2 Vict., c.* 74), *s.* 1.

Section 1 of the Small Tenements Recovery Act, 1838, provides: "When and C so soon as the term or interest of the tenant of any house . . . held by him . . . at a rent not exceeding £20 a year . . . shall have . . . been duly determined by a legal notice to quit *or otherwise*, and such tenant . . . shall neglect or refuse to quit . . . it shall be lawful for the landlord . . ." to cause a notice under the Act to be served on the tenant and then, if the tenant does not appear before the justices and show "reasonable cause why possession should not be given . . . it shall be lawful for such D landlord . . . to give to such justices proof of the holding and of the end or other determination of the tenancy . . . and upon proof of service of the notice, and of the neglect or refusal of the tenant . . . it shall be lawful for the justices . . . to issue a warrant" for possession of the premises.

Held: (i) the effect of the word "or otherwise" (which are printed above in italics) is that the justices have jurisdiction not only where the tenancy has been determined E by a notice which attaches by operation of law to a particular tenancy, but also where it has been determined by a notice expressly agreed between the parties, e.g., where a mortgagor has attorned tenant to mortgagees who are entitled under the mortgage deed to possession in the event of the mortgagor defaulting in his payments under the deed: *Kemp* v. *Lester*, (5) [1896] 2 Q.B. 162, applied; (ii) the justices have jurisdiction under the Act even though a question of title is involved: F *Friend* v. *Shaw* (1) (1887), 20 Q.B.D. 374 and *Arden* v. *Boyce* (2), [1894] 1 Q.B. 796, distinguished.

Notes. As to recovery of possession by a landlord in the magistrates' court, see 23 HALSBURY'S LAWS (3rd Edn.) 710; and for cases see 31 DIGEST (Repl.) 615 et seq. For the Small Tenements Recovery Act, 1838, s. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 855. G

Cases referred to:

(1) *Friend* v. *Shaw* (1887), 20 Q.B.D. 374; 57 L.J.Q.B. 225; 58 L.T. 89; 52 J.P. 438; 36 W.R. 236, D.C.; 13 Digest (Repl.) 389, *170.*

(2) *Arden* v. *Boyce*, [1894] 1 Q.B. 796; 63 L.J.Q.B. 338; 70 L.T. 480; 42 W.R. 354; 10 T.L.R. 253; 38 Sol. Jo. 324; 9 R. 372, C.A.; 38 Digest 773, *1064.*

(3) *Daubuz* v. *Lavington* (1884), 13 Q.B.D. 347; 53 L.J.Q.B. 283; 51 L.T. 206; 32 W.R. 772; Bitt. Rep. in Ch. 211, D.C.; 35 Digest 330, *733.* H

(4) *Hall* v. *Comfort* (1886), 18 Q.B.D. 11; 56 L.J.Q.B. 185; 55 L.T. 550; 35 W.R. 48; 35 Digest 330, *734.*

(5) *Kemp* v. *Lester*, [1896] 2 Q.B. 162; 65 L.J.Q.B. 532; 74 L.T. 268; 44 W.R. 453; 12 T.L.R. 292; 40 Sol. Jo. 371, C.A.; 35 Digest 330, *737.* I

Case Stated by Staffordshire justices.

The appellants, the Dudley and District Benefit Building Society, preferred a complaint under s. 1 of the Small Tenements Recovery Act, 1838, against the respondent, William Gordon, alleging that he had neglected to give up possession of a house and premises, situated at Wallow Street, Round Oak, Staffordshire, which he held of the appellants under a tenancy from year to year, which had been duly determined by notice to quit. The justices were asked to issue a warrant directing the constables of the division to enter into the premises and give possession of them to the appellants.

The Small Tenements Recovery Act, 1838, provides:—

"Section 1. When and so soon as the term or interest of the tenant of any house, land or other corporeal hereditaments held by him at will or for any term not exceeding seven years, either without being liable to the payment of any rent or at a rent not exceeding the rate of £20 a year, and upon which no fine shall have been reserved or made payable, shall have ended or shall have been duly determined by a legal notice to quit or otherwise, and such tenant . . . shall neglect or refuse to quit and deliver up possession of the premises . . . it shall be lawful for the landlord of the said premises or his agent to cause the person so neglecting or refusing to quit and deliver up possession to be served . . . with a written notice in the form set forth in the schedule to this Act signed by the said landlord or his agent of his intention to proceed to recover possession under the authority and according to the mode prescribed in this Act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices . . . reasonable cause why possession should not be given under the provisions of this Act, and shall still neglect or refuse to deliver up possession of the premises . . . it shall be lawful for such landlord or his agent to give to such justices proof of the holding and of the end or other determination of the tenancy . . . and upon proof of service of the notice, and of the neglect or refusal of the tenant . . . it shall be lawful for the justices . . . to issue a warrant . . . to the constables . . . commanding them . . . to enter . . . into the premises and give possession of the same to such landlord or agent. . . ."

The following facts were proved or admitted at the hearing. The respondent, then being the owner in fee simple and occupier of 94, Wallows Street, by a mortgage dated May 4, 1927, made between himself of the one part and the appellants of the other part, charged the property by way of legal mortgage to the appellants as security for the sum of £180 advanced by the appellants to him, and interest upon that sum. By the mortgage deed powers were reserved to the appellants to let or sell the property and also "to enter into possession or receipt of the rents of the said property, or any part thereof," but it was provided that the appellants should not exercise these powers "unless and until the mortgagor shall have made default for three lunar months in payment of some instalment, subscription, fine, or other moneys as hereinbefore referred to or some part thereof." By cl. 9 of the deed:

"(i) The mortgagor hereby attorns and becomes tenant from year to year to the Society [i.e., the appellants] of the said property or of such part thereof as is in the occupation of the mortgagor at the yearly rent of 10s. (ii) If the Society shall at any time, by virtue of these presents or of the rules for the time being of the Society, become entitled to enter into possession or receipt of the rents of the said property, then the Society may at any time thereafter on giving to the mortgagor seven days' notice in writing in that behalf determine the tenancy hereby created. . . ."

On Oct. 29, 1928, the respondent was in default far more than three lunar months in paying to the appellant the subscriptions due from him to them under the mortgage deed. And on that date the tenancy of the respondent created by cl. 9 (1) of the deed was determined by a notice to quit served upon him on that date requiring him to vacate the premises on or before Nov. 7, 1928. On Nov. 23, 1928, the statutory notice under s. 1 of the Small Tenement Recovery Act, 1838, required by that section to be served on the respondent of the application to be made to the justices, was served upon him. The justices having found that the annual value of the premises 94, Wallows Street, was £13 10s. or thereabouts and the rental as fixed by the mortgage deed was 10s. a year (see cl. 9) and that the respondent had not shown any reasonable cause for not giving up possession of the premises, and that he still neglected and refused to give up possession thereof, concluded that it was a fit and proper case to order the issue of a warrant of ejectment had they jurisdiction to do so. But the justices stated that in their opinion the Small Tenements Recovery Act, 1838, did not give to courts of summary jurisdiction power to deal with a case where a question of title was involved, and

did not apply to a case where an attornment as tenant by a mortgagor to his mortgagee only came into operation when the mortgagor had made default in payments under the mortgage deed. Accordingly they dismissed the complaint but agreed to state and sign this case.

Ralph Thomas, for the appellants, referred to the cases mentioned in the headnote, and also to *Daubuz* v. *Lavington* (3) and *Hall* v. *Comfort* (4).

The respondent did not appear.

LORD HEWART, C.J.—This was a Case Stated by justices, and the point on which it turns may be very shortly stated. The complaint was made by the appellants under s. 1 of the Small Tenements Recovery Act, 1838, against the respondent alleging that he had neglected to deliver up possession of a certain house and premises which he held of the appellants from year to year, that tenancy having been determined by notice to quit. The justices were asked to issue a warrant of ejectment. The justices came to the conclusion on all the facts that the respondent did not show any reasonable cause for not giving up possession. They thought it a fit and proper case for the issue of a warrant, if they had jurisdiction to act, but they thought that they had not such jurisdiction and so they declined to issue a warrant. The question for the court is whether their decision was right in point of law.

It is not necessary to restate the facts of the case. There existed between the appellants and the respondent the twofold relation of mortgagees and mortgagor and of landlords and tenant. Under the mortgage deed the respondent attorned and became a tenant from year to year of the appellants at a rent of 10s. a year.

[His Lordship read the provisions of the mortgage deed as to the powers of the appellants to let or sell the property and "to enter into possession or receipt of the rents" and that the appellants should not exercise those powers unless the mortgagor had made default for three lunar months in payment. He also read cl. 9 of the deed. He continued:] The effect of cl. 9 (1) of the mortgage deed was that although the tenancy was one from year to year, there was a stipulation between the parties that a seven days' notice in writing should suffice to determine the tenancy, and in fact that notice was given on Oct. 29, 1928. The question here arises because it is said that under the decision in *Friend* v. *Shaw* (1) the notice to quit in seven days given in this case was not a legal notice to quit, whatever else it was—legal notice to quit being one which attaches by mere operation of law to a particular tenancy, as distinguished from a notice expressly agreed on by the parties. But the words in s. 1 of the Small Tenements Recovery Act, 1838, are "determined by a legal notice to quit or otherwise" and not "determined . . . by a legal notice to quit," as in *Friend* v. *Shaw* (1), or "determined by notice to quit," as in *Arden* v. *Boyce* (2) "or otherwise." Some meaning must be given to these words in s. 1 of the Act of 1838. Because of these words I do not think that the decisions in *Friend* v. *Shaw* (1) and *Arden* v. *Boyce* (2) apply to the present case, and I also think that these words entitle the appellants to succeed. In *Kemp* v. *Lester* (5), where the question was whether a writ might be specially endorsed under Ord. 3, r. 6, LORD ESHER, M.R., said:

> "In the present case there is a clause in the deed which creates a tenancy from year to year; but there is a subsequent clause which gives the landlord liberty to enter and take possession at any time without giving any notice. That right does not depend upon forfeiture, and therefore, there is nothing to prevent an application to sign judgment under Order 14."

In my opinion, the cases cited where the words of the Statute or Order under consideration compelled the court to refuse jurisdiction do not apply. On the facts of this case, where there was agreement between the parties that seven days' notice in writing should suffice to determine the tenancy, the words in s. 1 of the Act of 1838 "or otherwise" enable the appellants to succeed. The justices had jurisdiction to deal with the matter, and as on the facts they thought it a fit and proper case for the issue of a warrant of ejectment, if they had jurisdiction to issue it, the warrant ought to issue. The appeal should be allowed.

AVORY, J.—I am of the same opinion. The view of the justices appears to have been that the Small Tenements Recovery Act, 1838, did not give to courts of summary jurisdiction power to deal with a case where a question of title is involved. It is obvious that justices cannot decide a case under this Act without deciding some question of title, i.e., whether there is a landlord or a tenant, and whether the term of the tenancy has come to an end, either by a legal notice to quit or otherwise. I agree that in principle the decision in *Kemp* v. *Lester* (5) appears to be an authority for the justices having jurisdiction in such a case as this. If in such circumstances as are present here, the High Court has jurisdiction to enter summary judgment under Ord. 14 on a specially endorsed writ under Ord. 3, r. 6 (f), there seems to be no reason why justices should not have a similar power to give possession of premises under these words in s. 1 of the Small Tenements Recovery Act, 1838.

SWIFT, J.—I agree.

Solicitors: *Marcy & Robinson*, for *Hooper & Fairbairn*, Dudley.

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

PHŒNIX INSURANCE CO. OF HARTFORD *v.* DE MONCHY

[HOUSE OF LORDS (Lord Hailsham, L.C., Viscount Dunedin, Viscount Sumner, Lord Buckmaster and Lord Atkin), April 16, 18, June 14, 1929]

[Reported 141 L.T. 439; 45 T.L.R. 543; 18 Asp.M.L.C. 7; 35 Com. Cas. 67]

Insurance—Marine Insurance—Policy—"Certificate of insurance" representing and taking the place of the policy and conveying all the rights of the original policy holder to its holder—Many, but not all, necessary terms of insurance contained in "certificate" —Limitation of time for action contained in policy, but not referred to in certificate.

Insurers issued to shippers of a cargo of turpentine a document entitled "certificate of insurance," which certified that the cargo was insured with them under a named policy for a stated voyage and a stated sum, against stated risks, on stated provisions, and at a stated premium. The "certificate" further provided that it "represents and takes the place of the policy, and conveys all the rights of the original policy holder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy, direct to the holder of this certificate." The "certificate" did not mention the ordinary perils of the sea, and was also deficient in many other ways as a policy of marine insurance. These deficiencies were supplied by the policy named in the certificate, which also provided "that no suit or action for the recovery of any claim arising under this policy shall be maintainable in any court unless . . . commenced within one year from the date of the happening of the loss out of which the said claim arose." The "certificate" gave no express right to the insured to see the policy. In an action by an indorsee of the certificate against the insurers in respect of a loss which had occurred more than one year before action brought,

Held: only clauses of the policy which were essential to the contract of marine insurance were to be read into the certificate, the condition as to limitation of action was merely a collateral stipulation and not an ordinary insurance clause, and was an obligation and not one of "the rights of the original policy holder," and so did not bind the holder of the certificate.

Insurance—Marine insurance—Risks insured against—"Leakage from any cause in excess of one per cent. on each invoice"—Provision for ascertainment of leakage by weighing cargo—Effect—Burden of proof of loss.

The certificate imposed on the insurers liability "to pay leakage from any cause, in excess of one per cent. on each invoice," and provided for ascertainment of leakage by comparison of the weights of the cargo on shipment and on delivery. Such a comparison was made and showed a deficiency of more than one per cent. On a claim by the insured the insurers advanced various explanations, other than leakage, which might explain the deficiency, and contended that leakage was, therefore, not proved.

Held: the loss was proved.

Notes. As to liability of underwriters for ordinary leakage and breakage, see 22 HALSBURY'S LAWS (3rd Edn.) 88; and as to their liability for loss due to inherent vice, see ibid., 89. For cases see 29 DIGEST 202. As to the construction of marine insurance policies generally, see 22 HALSBURY'S LAWS (3rd Edn.) 15–18.

Case referred to:

(1) *Thomas & Co.* v. *Portsea Steamship Co., Ltd.*, [1912] A.C. 1; 12 Asp.M.L.C. 23, H.L.; 2 Digest (Repl.) 442, *155*.

Appeal from an order of the Court of Appeal (SCRUTTON, SANKEY and RUSSELL, L.JJ.), affirming a judgment of MACKINNON, J., in favour of the respondents, the plaintiffs, who claimed as holders of a "certificate of insurance" of a cargo of barrels of turpentine against the appellant insurers for a loss due to leakage. The appellants contended that the loss, if any, was due to the inherent vice of the barrels of turpentine in that the same, being a volatile oil, volatilised or alternatively contracted without any injury to the barrels, and that "leakage" within the meaning of the clause meant a physical loss in transit by an escape of the liquid. They further contended that the policies of insurance referred to in the "certificate" formed part of the contract sued on and contained a clause that the appellants were not to be liable unless the action was brought within one year from the happening of the alleged loss, and that the action was not so brought. The certificate contained no reference to the limitation clause. MACKINNON, J., held that the respondents were entitled to recover on the grounds (i) that leakage in the certificate meant any loss of weight or bulk during the course of the voyage, whichever measure be taken; (ii) that the loss was proved by credible evidence of the kind contemplated by the certificate; and (iii) that the appellants had failed to make out that the certificate incorporated the limitation clause from the policy. The Court of Appeal affirmed the learned judge's judgment. The insurers appealed.

W. A. Jowitt, K.C., and *Van den Berg* for the appellants.

S. L. Porter, K.C., and *W. Lennox McNair* for the respondents.

The House took time for consideration.

June 14.—**LORD BUCKMASTER.**—I have had the opportunity of reading the opinion of my noble friend VISCOUNT DUNEDIN which he has committed to writing and with it I agree.

The following opinions were then read.

VISCOUNT DUNEDIN.—On July 27, 1923, the agents in Rotterdam for an American company, the Columbia Naval Stores Co., sold by cable authority to Messrs. De Monchy, the respondents in this appeal, 100 barrels of spirits of turpentine at a certain price. The contract was a c.i.f. contract; it need not be quoted in full. It contained (inter alia) the following clauses: under the heading "Reduction of freight" it provided for the rate of exchange between pounds sterling, dollars, gilders, and reichsmarks, and then follows "Reduction of weight," American net weight to be reduced by 1 gallon = 3·25 kilos. It also contained the following clause:—"Insurance documents to include risk of leakage in excess of 1 per cent. upon the basis of the above reduction of weight." The turpentine was shipped on Aug. 25, 1923, at Jacksonville, Florida, on board the

Cape Town Maru. The ship remained on the Florida coast till Sept. 19. It then left for London, encountering some heavy weather on the passage. It left London on Oct. 9, and went to Rotterdam, where it discharged the turpentine on Oct. 22 and 23. An invoice and bill of lading were sent to the respondents in ordinary form. A document entitled certificate of insurance was also sent to them. Cases were cited by learned counsel which show that it has been more than once decided in the courts of this country that such a certificate of insurance is not a good tender of an insurance policy under a c.i.f. contract. No question, however, as to that was raised by the respondents. They were content to hold that the document as it stands was a good fulfilment of the insurance part of their c.i.f. contract. I shall shortly revert to the document, on the construction of which the present case depends, but in the meantime I continue the narrative of facts. The barrels of turpentine on being discharged had their contents weighed, in the ordinary manner in which such weighing is conducted, at Rotterdam by a sworn weigher. He found the weight of the turpentine to be 16,225 kilos. Now the intake quantity had been gauged at Jacksonville as 5,107 gallons. Converting this at the conversion figure of 1 gallon = 3·25 kilos, we get 16,597·75 kilos. Comparing this with the output quantity there is a deficiency in the output of 372·75 kilos. Deducting 1 per cent. on the total which equals 166, this leaves a deficiency of 206·75 kilos, and the value of that is the claim made in this action. It only amounts to £17 in money, but we are told that this is a test case, and that large sums of money are really dependent on its decision. The case was brought against the two insurance companies who issued the certificate and depended before MACKINNON, J., who decided in favour of the plaintiffs. On appeal the appeal was dismissed by a unanimous judgment of SCRUTTON, SANKEY and RUSSELL, L.JJ. Appeal is now taken to your Lordships.

I now revert to the certificate of insurance on which the case depends. It is, from the point of view of the practice in this country, a peculiar document. I cannot do better than quote what SCRUTTON, L.J., says about it:

> "This document must be seen to be believed. There is, apparently, a blank form of certificate of insurance which the companies issue to persons who have a contract of insurance with them somewhat similar to an open cover. Someone has filled in a blank certificate with the subject-matter of the insurance, '100 barrels pure gum turpentine,' the voyage 'per steamer, *Cape Town Maru*, from Jacksonville to Rotterdam,' and the value insured '14,925 florins,' and then someone has stamped on the front of the document a clause which is almost completely illegible, and which is stamped over what can be discovered from other sources to have been originally a warehouse to warehouse clause. Someone has stamped on the back two or three clauses which are again on the original almost completely illegible and which also obliterate the names of the agents to whom claims should be made."

Read by the light of a legible copy of another certificate it is possible to consider its terms. It need not be quoted in full, but the material parts are as follows. First comes the opening:—

> "William H. McGee & Co., General Agents Marine Department, 15, William Street, New York.
>
> Fl. 14925·00
>
> This is to Certify, that on the Twenty seventh day of August 1923, there was insured under Policies 924 of the Phoenix Insurance Co. of Hartford (50% interest) No. 387 of the Great American Insurance Co. of New York (50% interest) in the name of the Columbia Naval Stores Co. of Delaware the sum of fourteen thousand nine hundred, twenty five and 00/100 Florine on 100 bbls, pure gum turpentine.
>
> Valued at sum insured.
>
> Per Steamer *Cape Town Maru* at and from Jacksonville, Florida, to Rotterdam, Holland.
>
> loss, if any, payable to the order of the Assured Indorsed hereon upon surrender of this Certificate. This Certificate represents and takes the place of the Policy, and conveys all the rights of the Original Policy Holder (for the purpose of collecting

any loss or claims) as fully as if the property was covered by a Special Policy, direct to the Holder of this Certificate, and free from any liability for unpaid premiums. A

Then follow the signatures of the two companies, and then, "The clauses stamped or written on back hereof are made a part of the certificate." Then comes a set of held covered clauses and clauses dealing with breakage, etc. Then under the heading of conditions:—

B

"It is agreed that this insurance covers also the risk of capture, seizure, destruction, or damage by men of war, by letters of mart, by takings at sea, arrest, restraints, detainments, and acts of kings, princes, and people, authorised by and in prosecution of hostilities between belligerent nations, but excluding claims for delay, deterioration, etc."

Then there is stamped on back "Provisions as to notice of claims," and there are more clauses as to "War risks," and then at last there is the clause on which the first point of this case turns. C

"To pay leakage from any cause, in excess of one per cent. (1 per cent.) on each invoice, or whole leakage without deduction if vessel or craft be stranded, sunk, burnt, on fire, or in collision, or there be any forced discharge of cargo at a port of distress. D

Where barrels with contents are weighed at a port of shipment and destination, loss, if any, due to leakage shall be ascertained by a comparison of the gross shipped and gross landed weights. Where barrels with contents are weighed at port of shipment and contents of barrels only weighed at destination, loss, if any due to leakage, shall be ascertained by a comparison of the gross shipped weight, after deducting 80 lb. tare for each barrel, and the net landed weight. E

Conversion of pounds or kilograms into the American gallon shall be made on the basis of:

3·25 kilograms to the gallon.

7·2 lb. to the gallon."

Under the claim made up as above mentioned as first put forward the answer of the underwriters was simple. They said that no leakage could be held as proved which did not leave signs of it on the cask. That at once raises the question "What is the meaning of leakage?" Leakage I take to mean any stealthy escape either through a small hole which might be discernible or through the pores of the material of which the cask is composed. Turpentine has a very great power of penetration. It even penetrates through metal containers, but it evaporates rapidly, and having penetrated it leaves no sign or external mark. It is clear, therefore, that if the underwriters' view were right, there would be no leakage except when an actual hole was shown in the cask. The provision as to an average leakage and the elaborate provision as to comparing the contents of the cask on arrival with what they had been at starting, all point clearly to the inadmissibility of such a construction. It is not, therefore, surprising that when the case came into court little or nothing was heard of this defence. Another line of defence, however, was formulated, and it was as follows. Turpentine is a liquid which under varying conditions of temperature expands or contracts in bulk to a very marked degree. The temperature at Jacksonville in August is pretty certain to be higher than the temperature at Rotterdam in October. Therefore, argue the appellants, the shrinkage that was found in Rotterdam as compared with Jacksonville is only due to atmospheric conditions and one has not proved any loss or leakage. This argument is ingenious and lost nothing in its treatment by learned counsel, but in my view it is straight in the teeth of the conditions of the contract. After all, the problem is simply this. Was all the stuff which was put into the cask at Jacksonville turned out of the cask at Rotterdam, or had some of it escaped quocunque modo during the voyage? It is perfectly clear that if there was found to be less, it must be held to be leakage in terms of the bargain. In an expansive liquid one cannot compare gallons, but one can compare weight with weight, for weight is not affected by atmospheric conditions, and that the deficiency in weight was treated as leakage is abundantly plain. Two cases are specifically dealt F G H I

with in the clauses quoted above: (i) when barrels and contents are weighed together at both ends; (ii) when barrels with contents are weighed at port of shipment, but contents only at port of discharge. It suffices to repeat the terms of the first clause where barrels with contents are weighed at a port of shipment and discharge, "Loss, if any, due to leakage shall be ascertained by a comparison of the gross shipping and gross landing weights," and the same is said in the second case, the only difference being an allowance for the tare of the barrel. So far then as weight at each end is concerned the comparison is perfect, but there was one other case to be dealt with, namely, where there was measurement of volume at one end and measurement of weight at the other. These had to be correlated, and that is done by the conversion clause, "Conversion of pounds or kilograms into the American gallon shall be made on the basis of 7·2 pounds to the gallon, 3·25 kilograms to the gallon." Now this is exactly what has been done. The number of gallons taken in at Jacksonville has been converted according to the correct formula into kilograms, and that number of kilograms has been compared with the kilograms found by actual weighing at Rotterdam, the deficiency being leakage. That leakage was expected is perfectly clear from the provision that leakage to the extent of 1 per cent. is not to be paid for, and it is not unworthy of notice that for a lower premium no leakage is paid for unless above 4 per cent., but for the higher premium here paid leakage above 1 per cent. has to be paid for. Of course, the absolute accuracy of the conversion figure depends on the temperature. As it happens Dr. Goldsmith has proved that at a temperature of 80 deg. Fahrenheit the correct figure of correlation is 3·25 kilograms to one gallon, and 80 deg. Fahrenheit has all along been said to have been the temperature at Jacksonville, so that in the circumstances of the present case it is obvious that no injustice has been done to the appellants. But this is a test case, and in other cases the turpentine may not have come from Jacksonville in August. We are here dealing with a commercial matter. It would be a practical impossibility to find correctly the temperature at the moment when each parcel had to be shipped and then calculate the proper conversion figure. Therefore the parties to avoid a practically impossible inquiry agreed on a conventional figure, and by that figure they must be bound. No doubt 3·25 was fixed on because it represented the proper figure for a very likely temperature at the places from which turpentine is shipped, and as shown here it is exact. But the appellants lose their case, not because, as it happens, the figure is an exact one, but because the figure of conversion as taken is the conventional figure agreed on between them, and in any such case they will be bound by the conventional figure, no matter whether the actual temperature would make that figure favourable or unfavourable to them. This concludes the first point.

The appellants have raised another and a very formidable point. It will have been noticed in the summary I gave of this certificate that it is deficient in many particulars as a contract of marine insurance. In particular it does not mention the ordinary perils of the sea. Therefore, although in the opening words of the certificate, after mentioning the policy, a copy of which was not sent along with the certificate, it says that it is to represent and go in place of the policy, yet unless the policy be looked at the contract would not be a true contract of marine insurance at all. It would be an insurance against leakage, but not against the ordinary perils of the sea. The policy, when looked at, is, according to experience of such instruments, almost as extraordinary a document as the certificate. It is blank as regards the particular thing assured, blank as to premium, and blank as to duration. It begins with the ordinary sea perils clause and then goes on with pages of various clauses, war risk clauses, addenda, and superaddenda. Then comes a clause in these terms:

> "A supply of blank certificates will be furnished to the assured to be used only for shipments under this policy and only in accordance with the terms thereof."

Among the manifold clauses of the policy is one in these terms:

> "It is agreed that no suit or action for the recovery of any claim arising under this policy shall be maintainable in any court unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which the said claim arose."

Therefore, say the appellants, one must after all look at the policy, and, if one does, one will find this clause which provides that no suit or action for the recovery of any claim arising under this policy shall be maintained in any court unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which the said claim arises. This suit was admittedly not brought till after the expiry of a year from the loss. I think that to a certain extent the appellants are right; it is necessary to look at both the policy and the certificate. One cannot get the full terms of a contract of marine insurance without looking at both, but when one does look at the policy one finds a host of straggling clauses, many of them contradictory, and one also finds in the policy a great lacuna, as no premium is mentioned and no particular "risk" is mentioned. The certificate is what I may call the determinative of the two instruments. It is the certificate that clinches the bargain as to a particular shipment and gives a premium. That is shown clearly enough by its own terms and by the clause that it represents and takes the place of the policy. It follows, I think, that all clauses of the policy which are essential to the contract of marine insurance must be read into the certificate, but beyond that there is no necessity to go. The condition in question is a collateral stipulation imposing a condition precedent. It has nothing to do with insurance particularly, but might be applied to any contract. Common sense and fairness revolt against the idea of this being enforced against the holder or indorsee of the certificate. Neither the holder, as here, nor a possible indorsee could ever have seen the policy. There is not even expressed in the certificate a right to ask for exhibition of the policy. Against them it may be fair to assume ordinary insurance clauses, but not to assume a collateral agreement of this sort. I therefore think that on this point also learned judges below were right. I move that the appeal be dismissed with costs.
LORD HAILSHAM desires me to state that he concurs in this opinion.

VISCOUNT SUMNER.—The respondents, in my opinion, duly proved their loss, to the amount claimed, under the words "to pay leakage from any cause in excess of 1 per cent. on each invoice," which admittedly formed part of a contract of insurance subsisting between themselves and the appellants. Unless the appellants can establish their affirmative defence that the action was out of time this appeal must fail.

In common speech there is leakage from a barrel if it lets its contents escape, and there was evidence that some of the contents of these barrels did escape. True the word is "leakage" not "wastage" or "shortage," and we are told that turpentine has such a propensity to vaporise and its vapour is so insidious and so penetrating that under favourable circumstances it will even disappear through the material of sound and tight receptacles, and this may not so obviously be a "leakage." Still it would be affectation if I were to profess to know nothing about barrels, and I think that the judgment at the trial may be well supported on the ground that the missing turpentine simply escaped through the ordinary joints between the staves of the barrels, since the contrary is not proved and in a sound wooden barrel that is the readiest way of escape. For this at any rate "leakage" is a perfectly appropriate word. It is not really to the point to say that a sound barrel, as good as they make them, cannot be a leaky barrel; for the word here is "leakage," without imputation upon the barrels. The appellants again argued that they were only liable when barrels showed signs of transit damage or where stains or other marks proved that turpentine had passed that way. As a defence on the contract this failed, for there are no contractual words to make it a condition of liability for leakage that such signs should be visible, and as mere evidence that the turpentine had not escaped at all the absence of such signs was one for the trial judge, who was justified by the affirmative evidence in holding the contrary.

The evidence of gauging at Jacksonville, Florida, and of weighing at Rotterdam was admissible and sufficient. That the mode of gauging was inexact and inconclusive is not a valid criticism. It was the usual mode in the turpentine shipment business, to which this insurance was directed, and was not shown to result in substantial errors. The weighing at Rotterdam was indeed proved by affidavit of information and belief, but it does not appear that the appellants sought to exercise their right to cross-examine or required any formal order for the admission of the affidavit, or appealed against such

order, if any was made. There was jurisdiction to admit and act on such evidence and it is too late now to object to it. The conversion of kilograms into American gallons is decided by a formula prescribed by the contract itself, and, as this formula is applicable in its terms not only to turpentine but to other fluids, there can be no doubt that it is adopted because in business exact conversion would be troublesome and expensive and, in spite of some known inaccuracy, this rough and ready conversion is agreed to be good enough for practical purposes. It is said, and no doubt truly, that with turpentine shipped and discharged at different temperatures and atmospheric pressures and at substantial intervals of time, some loss is inevitable, and that the insurance is against casualties that may happen, not against loss that must happen. This is all very well, but again the words "in excess of 1 per cent." are clearly used in order to discriminate by rule of thumb between these two kinds of loss, and, rough as it is, when a percentage of normal waste is agreed to, it binds. These words, coupled with the words "from any cause", appear to me to have been carefully and judiciously selected to protect the goods owner from this very kind of loss, arising in such a voyage as this and measured by the processes which are normally adopted at the two ports. The loss insured and proved I take to be an actual escape of turpentine, not a mere change in bulk owing to reduction of temperature.

The affirmative defence that the action was out of time (as it was in fact, if the clause relied on applies) is more difficult. It is hardly necessary to consider whether the certificate could be treated as a policy against leakage by itself. The respondents claimed and recovered judgment for some small percentage additions, which the certificate itself does not provide for, and this judgment has never been varied or abandoned. It is reasonably certain that the insurance, which was included in the c.i.f. price, was not confined to leakage, and when the respondents accepted this certificate as one of the documents to be tendered, no doubt they took it to be a cover in accordance with their contract. No question as to the certificate being a valid tender arises. The respondents' substantial case was that although some other parts of the policy were sufficiently incorporated with the certificate by reference, the clause of limitations was not. On the other hand I understood the appellants to contend that the certificate was only a certificate, and was not a contract to be sued on at all, or alternatively that, if it was a contract of insurance, it incorporated the whole of the policy, which was to be read as one with it, or, in the further alternative, that it sufficiently incorporated the clause in question, which was general and explicit in its terms and gave a reasonable time within which to sue for the loss. The first contention clearly will not do. The certificate is not a certificate in the sense of a document stating that certain facts exist and verifying them but not saying any more. In that case its operation would be by estoppel against any denial of those facts. The certificate is clearly contractual. It is brought into existence in order that "the holders of certificates of insurance issued hereunder" may receive payment of losses, though they are not parties directly liable to pay premiums on the original "policy." Instead of leaving c.i.f. buyers from the original policy-holders to aver interest in themselves and to sue on the original policy, which of course they do not see, the certificate, after naming the policies by serial number, the cargo covered, the carrying ship, and the sum insured, says:

> "The certificate represents and takes the place of the policy and conveys all the rights of the original policy-holder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy direct to the holder of this certificate and free from any liability as to premiums,"

and later on it speaks of "claims under this certificate" and of "loss under this certificate" and it concludes with this

> "Notice.—To conform with the revenue laws of Great Britain, in order to collect the claims under this certificate it must be stamped within ten days after its receipt in the United Kingdom."

Now our laws require that such an action should be launched upon a stamped policy and the object of stamping the certificate is to make it such a policy.

To contend that the certificate is not any part of the bargain, which has arisen between the appellants and the respondents, is untenable and it really amounts to saying that, when a claim comes to be collected, whatever the certificate may have been used for previously, the policy represents and takes the place of the certificate. Nor is it true that the whole of the policy is incorporated in the certificate or that both instruments in their entirety are to be read together. The language of the certificate is against this. Though it "conveys all the rights" of the original policy-holder, it expressly states that his liability as to premiums is not transferred, and there are two passages which expressly specify conditions of the policy that are incorporated and so by implication negative the incorporation at any rate of all others, if not of any others, viz., claims are "to be adjusted according to the usage of Lloyds, but subject to the conditions of the policy and contract of insurance" and "this certificate is subject to the full terms of the policy in respect of being warranted free of capture, seizure and detention. . . ." On the other hand there is much in the policy, with its addenda, that is clearly personal to the original policy-holder, such as the agreement and payment of premiums, the option to have leakage covered on either of two alternative sets of terms, the option to have war risks included in the cover, and the warranty, in that event, to place with the appellant companies the corresponding marine insurance as well, the right to report other risks to the insurers with a view to their inclusion in the insurance, the right to give notice cancelling the policy, the right to issue certificates of insurance and the warranties as to the expression and limitation of their terms, and the limitation on the total amount to be accepted under the policy at any one time. It is worth remark that, while the original assured warrant that they will not issue certificates which "vary from" the conditions of the policy, they are not called on to warrant that the certificates issued shall incorporate all or any of these conditions. These citations, which may not be exhaustive, show that any tacit incorporation into the certificate of terms contained in the policy is a selective incorporation only. The question then arises: what is the test of the selective process, bearing in mind that it is the appellants who frame and put forward these documents, and the respondents who, as a matter of business, must accept them blindly or refuse to accept them at all? One test would be to say, affirmatively, that only so much is incorporated as is necessary to give business efficacy to the transaction, for which purpose this clause of limitations is certainly not necessary. Another is to say, negatively, that the incorporation only extends to such clauses as a reasonable c.i.f. buyer would assent to as part of the terms of his purchase. If such a buyer were told, when the document was tendered to him, that notwithstanding prolongation of voyage or delay in examining and establishing the condition of cargo beyond his control, notwithstanding the necessity for taking advice as to United States law and procuring documents for that purpose from distant parts of the world, notwithstanding his own ill-health or disablement, he must issue his process in some tribunal, to whose jurisdiction these companies are amenable, within twelve months of the loss, or drop his undefended claim, I am sure that he would have none of it, and under these circumstances I think the courts below rightly refused to countenance for the insurers' sole benefit an incorporation so ambiguous and so one-sided.

When the documents, the aggregate of which forms the policy, come to be examined in the facsimile which has been supplied to your Lordships, it will be seen that they begin with a regular form of policy, which is supplemented by separate memoranda of various additional sets of terms, one to give an option to cover war risks from which the policy form is warranted free; another to cover turpentine and some other merchandise against leakage, which the form of policy did not cover; a third, which for the first time introduces and makes special provision for certificates of insurance to be issued by the original assured; and a fourth, called an "addendum," which provides for the terms as to leakage and conversion of volume into weight which are actually embodied in the certificate in question. This is the order in which these documents are printed in the record, but they are pinned together in a different order in the facsimile of the whole fasciculus, which is annexed to it. The original policy is dated Sept. 21, 1921, but there is nothing to show how long ago the form was first adopted. The first addition as to war risks is not dated, nor is the second which relates to the issue of certificates, though this is

A followed by an "addendum," ancillary to and possibly part of it, which is dated Oct. 10, 1921. The last document, also called an "addendum," is dated June 15, 1923. It is, at any rate, clear that the first document—the parent policy—is the oldest and the others have come into existence to enlarge or supplement it, but while the limitation of time clause occurs in the parent policy and nowhere else, either by repetition or by reference, the document which introduces the certificate system into this insurance is B a separate one, which contains a full code for that system, and the parent policy contains no reference to it. This document, however, does not enumerate the usual perils insured against or mention any sue and labour clause, but no doubt an insurance under the terms and liberties which the third document gives would be subject to perils insured against and to suing and labouring, as set out in the original policy. I infer from this structure that the limitation clause, which is a liability upon, not a right of, the C original assured, was no part of the certificate scheme, which is directed to transferring rights in globo, but imposes liabilities only when they are mentioned. The language of this clause bears out this view. It begins thus: "It is agreed that no suit or action for the recovery of any claim arising under this policy . . ." The claim here is one for leakage, from which this "policy," in the sense in which it is used in the clause, was free. It was a claim arising only under what I have called the second and fourth documents. D Further, the great majority of the provisions of these documents do not use the expression "it is agreed," and in those few which do use it, all, unless I have overlooked something, are provisions where the parties agreeing are the insurance companies and the original assured only. It appears to me that, in the absence of any language calculated to do so expressly, this personal agreement, to which the plaintiffs were not parties, and which, even between the original parties, is so incomplete that it may be E doubtful if an action could be brought on it, is not introduced into the document on which their rights arise by any recognisable mode of reference, and I am of opinion that the decision of the Court of Appeal was right and that it should be affirmed. Both the trial judge and the lords justices refer in their judgments to the difficulties produced by the unsystematic accumulation of clauses and provisions in these numerous instruments, and to the difficulty of deciphering the clauses, caused by the mode of printing and also F of superimposing extra clauses upon the print. Perhaps I may be permitted to add, lest a use should hereafter be made of their Lordships' words which they of course did not intend, that the questions here are only—what is the contract and what does it mean? Microscopic type and blurred imprints, like crabbed handwriting, present evidentiary difficulties in establishing the text of a contract, but they do not prejudice its construction. Similarly emphasis was laid on the fact that the respondents, traders G in Holland, had no access to the original policy, which remained in the United States, and no notice of the limitation clause in question. Notice, however, of the contents of a contract is not necessary, when the contract is proved, apart from fraud and mistake or things of that kind. If a party has contracted, he is bound, whether or not he has read or understood his contract or has pursued any references to their ultimate hiding place. If the respondents had had notice that, in issuing the certificate their vendors H had exceeded the authority given them by their policy and had broken its warranties, they would have been affected and restrained by such notice, but if they take a contract, whose terms they do not or cannot make out, they must abide by them as truly construed by a court.

LORD ATKIN.—It is a popular belief, especially prevalent amongst lawyers, that the I efficient business man requires that obligations incurred in business should be expressed in writing in simple, intelligible and unambiguous language. It is a belief encouraged by the sayings of business men themselves. But in practice nothing appears to be further from the truth. Business men habitually adventure large sums of money on contracts which, for the purpose of defining legal obligations, are a mere jumble of words. They trust to luck or the good faith of the opposite party, with the comfortable assurance that any adverse result of litigation may be attributed to the hairsplitting of lawyers and the uncertainty of the law. Some day the ideal business man will appear, on whose advent the legal advisers of many contracting parties, including in particular

shipowners and underwriters, will get busy. I do not make any further reflection on the documents in this case, except to say that they offer an excellent illustration of the proposition advanced above. To ascertain the legal effect of them is difficult, but in the result I think that the contract of insurance to which the assignee becomes a party is expressed in the certificate of insurance, which becomes in his hands a policy. But the terms of the contract so expressed are to be ascertained partly from the certificate and partly from the original policy, some of whose terms are incorporated by reference in the certificate. The so-called policy is in fact misnamed. It does not insure anything, it neither defines the subject-matter insured, except that it is to be merchandise, principally rosin turpentines and other naval stores, nor the voyage insured, nor the sum insured. It is a promise during a certain time to issue policies to the named assured against named risks, but the completed policies expressed in the certificates are to be capable of varying the conditions of the policy in accordance with written instructions given from time to time by the insurers.

One of the questions in the case is whether the holder of the certificate is bound by a clause in the policy which begins: "It is agreed that no suit or action for the recovery of any claims arising under this policy shall be maintained" except within one year from the happening of the loss. I myself have considerable doubt whether any claim could arise under the policy, and in any case whether a claim made under the certificate is a claim made under the policy. The parties are different and the insurance terms are varied. But without deciding the case on this ground I am of opinion that the clause is not one which binds the certificate holder. In my opinion "the rights of the original policy holder," which are conveyed to the certificate holder, comprise the rights given by the policy, i.e., the rights to the promised indemnity, qualified by all the conditions and warranties which affect the nature and extent of the insurance granted. The words are not apt to impose upon the certificate holder, not a right, but an obligation affecting only a limitation of time within which the rights so given are to be enforced. A useful analogy is found in the decisions dealing with claims on bills of lading purporting to incorporate all the conditions of the charter-party as the result of which it is clear that an arbitration clause in the charter is not incorporated: (*Thomas & Co., Ltd.* v. *Portsea Steamship Co.* (1)). It deserves attention that the certificate expressly repeats with variations the clauses in the policy dealing with notices of claims, and this in itself leads me to suppose that the insurers intended that the certificate contained the full provisions of the contract as to requirements when once a loss had been incurred. Certainly I think a certificate holder would reasonably so suppose. For these reasons, therefore, I think that the appellants cannot avail themselves of this defence.

The main point in the case is whether the respondents proved a loss under the certificate. The appellants have under the claim "to pay leakage from any cause in excess of 1 per cent. on each invoice, or whole leakage without deduction" if vessel stranded, &c. The clause proceeds,

> "where barrels with contents are weighed at a port of shipment and destination, loss, if any, due to leakage, shall be ascertained by a comparison of the gross shipped and gross landed weights."

The appellants' contention originally was that they were not liable to pay unless the cask or other receptacle in which the turpentine insured was carried showed signs of leakage having taken place. This seems to me quite untenable. Turpentine is very volatile, and substantial leakage may take place without any external sign. I think, on the true construction of the clause, the parties intended that if there were any gradual escape of the turpentine from the receptacle from any other cause than wilful damage the insurers were to pay. This seems to me to be the meaning of the words in this clause, which appear to lay down that if there is an actual weighing at port of shipment and at port of discharge, the difference in weight, i.e., the actual physical loss, should determine the amount of leakage. Loss "if any" due to leakage meets the possible case of loss by pilfering or other wilful damage. In this case, however, the turpentine was not weighed at the port of shipment. The express words of the clause, therefore, do not apply. There is a table of conversion of weight into gallons which is necessary if only for the

purpose of valuing the loss in weight where there has been a weighing on shipment and discharge. I do not think that the effect of the table is to make a gauging of the contents at the port of shipment equivalent upon the application of the reduction table to a weighing at port of shipment. The reason for the distinction is obvious. Volume varies with the temperature, and a difference of 20 degrees in the temperature will make a difference in bulk of about 1 per cent. It was suggested by the assured that the 1 per cent. deduction was intended to provide for this contingency. I cannot accept this. Leakage in excess of 1 per cent. means in excess of 1 per cent. leakage; and loss which is merely notional, arising from a conventional table of reduction, cannot in my opinion be described as leakage. Nor do I believe that the American insurers ever intended in this 1 per cent. deduction to include anything which was not physically lost at all. They were insuring against casualties, but not of arithmetic. This seems borne out by the clause, for even where there has been an actual weighing at both ends and an ascertained physical loss, yet it is only the physical loss over 1 per cent. which is covered. I think, therefore, that it is open to the insurers, to meet a claim for loss based upon a calculation founded on the reduction table, to point out the difference in volume caused by temperature and to require this element to be taken into account by the assured before they can be said to prove their loss. If, however, the effect of temperature or volume is duly taken into account, and there still appears to be a physical loss upon comparison of weights now accurately adjusted, it appears to me that such physical loss is, on a proper construction of the policy, to be taken to be the result of leakage, and for any amount over 1 per cent. the assured will recover. In the present case it appears from the evidence that the scale adopted of 3·25 kilograms to the gallon was the appropriate scale for turpentine at the temperature at the port of shipment, and did give the actual weights of shipment comparable with the actual weight of discharge. There was, therefore, proved an actual physical loss, and the respondents, the plaintiffs, in the action have recovered the excess over 1 per cent. of that actual physical loss. There is no ground for imputing that loss to any cause other than leakage, and I think, therefore, that the judgment in favour of the respondents is correct, and that this appeal should be dismissed with costs.

Solicitors: *Windybank, Samuell & Lawrence*; *William A. Crump & Son.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

Re BINNS. PUBLIC TRUSTEE *v.* INGLE

[CHANCERY DIVISION (Clauson, J.), February 20, 1929]

[Reported [1929] 1 Ch. 677; 98 L.J.Ch. 307; 141 L.T. 91]

B

Administration of Estates—Gift to debtor of share of residue—Debtor's children entitled to debtor's share—Liability of children to account for debt.

A testator by his will left a settled share of residue in trust for his children or their issue "but so that the child or children collectively of any deceased child shall take only such share as his, her or their parent would have taken if living." Subsequently a son of the testator, who predeceased him leaving issue, became a debtor of the testator, and he still owed the debt at the testator's death.

C

Held: the children of the debtor were entitled to be paid in full their share which was not affected by the fact that, as against their father, the trustees of the testator's will would have been entitled to deduct the debt before paying him his share.

Re Scott (1), [1903] 1 Ch. 1, distinguished.

D

Notes. As to legacies to debtors, see 16 HALSBURY'S LAWS (3rd Edn.) 321, 322; and for cases see 23 DIGEST (Repl.) 444 et seq.

Cases referred to:

(1) *Re Scott, Langton* v. *Scott*, [1903] 1 Ch. 1; 72 L.J.Ch. 20; 87 L.T. 574; 51 W.R. 182; 47 Sol. Jo. 70, C.A.; 20 Digest 459, *1840*.

(2) *Re Lacon, Lacon* v. *Lacon*, [1891] 2 Ch. 482; 60 L.J.Ch. 403; 64 L.T. 429; 39 W.R. 514; 7 T.L.R. 457, C.A.; 20 Digest 453, *1770*.

E

(3) *Cherry* v. *Boultbee* (1839), 2 Keen, 319; 4 My. & Cr. 442; 9 L.J.Ch. 118; 3 Jur. 1116; 41 E.R. 171, L.C.; 4 Digest 418, *3769*.

(4) *Courtnay* v. *Williams* (1846), 15 L.J.Ch. 204; 6 L.T.O.S. 517; 4 Digest 419, *3777*.

(5) *Re Akerman, Akerman* v. *Akerman*, [1891] 3 Ch. 212; 61 L.J.Ch. 34; 65 L.T. 194; 40 W.R. 12; 23 Digest (Repl.) 448, *5163*.

F

(6) *Pym* v. *Lockyer* (1841), 5 My. & Cr. 29; 10 L.J.Ch. 153; 5 Jur. 620; 41 E.R. 283, L.C.; 20 Digest 453, *1769*.

(7) *Fowkes* v. *Pascoe* (1875), 10 Ch. App. 343; 44 L.J.Ch. 367; 32 L.T. 545; 23 W.R. 538, C.A.; 20 Digest 462, *1878*.

Adjourned Summons as to the construction of a will.

Charles Binns, by his will dated April 13, 1875, gave his residuary estate on trust for such child or children of his as should attain the age of twenty-one years or marry, and G declared that the share of any daughter should be held on trust to pay the income thereof to the daughter for life, and after her death on trust for such child or children of the daughter as should be living at her death and attain the age of twenty-one years or marry, and such child or children of any child or children of such daughter dead at her death as should be living at her death and attain the age of twenty-one years or marry, if more than one in equal shares as between brothers and sisters, but so that the child or children H collectively of any deceased child should take only such share as his, her, or their parent would have taken if living, but in default of any such child or grandchild of such daughter, then in trust for the testator's other child or children or the issue of such other child or children respectively who should be living and should attain the age of twenty-one years or marry as aforesaid, if more than one, in equal shares as between brothers and sisters, but so that the child or children collectively of any deceased child should take I only such share as his, her, or their parent would have taken if living. And it was provided that the share or respective shares so accruing to the other or remaining object or objects of the trusts thereinbefore contained so far as the same should be then subsisting and capable of taking effect, should be subject to all the trusts, directions, and provisions in the will contained concerning the original share or shares of such object or objects respectively as fully and effectually as if the same were repeated. In 1894 the testator placed on deposit with a bank £2,400 as a continuing security for any moneys owing to the bank by the firm of his two sons, John and Frederick Binns. Subsequently

A the whole of the £2,400 was appropriated by the bank towards the discharge of an overdraft of the firm which became bankrupt in 1895. The testator died in 1895, leaving six children, namely, Martha, Mary, Albert, Charles, John, and Frederick. On Nov. 8, 1927, Martha died a spinster, leaving her only sister, Mary Ingle, and her brother John surviving her. Frederick had previously died, leaving children who survived both.

This summons is reported only on the question whether Frederick's children were B liable to bring into account one-half or some other, and what, part of the £2,400, against the share which their parent, Frederick, would have taken in Martha's settled share if he had survived her.

Beebee for the trustees of the will.

G. E. Timins, for Mrs. Mary Ingle, referred to *Re Scott* (1).

C *H. B. L. Braund*, for the children of Frederick Binns, referred to *Re Lacon* (2), *Cherry* v. *Boultbee* (3), *Courtnay* v. *Williams* (4), *Re Akerman* (5).

Harold A. H. Christie, *A. C. Edgar*, and *Stafford Crossman* for other parties interested.

CLAUSON, J.—In order to make intelligible the point which now arises for my decision, it will be sufficient to say that a share of the testator's residue was left by him on trust for a daughter for life and after her death on certain trusts for her children and D her grandchildren. The daughter died, recently, a spinster, and, accordingly, the provisions which I am about to read take effect:

> "In case there shall be no such child or grandchild [that is the event which happened —her share is to be held] in trust for my other child or children or the issue of such my other child or children respectively who shall be living and shall attain the age of twenty-one years or marry as aforesaid if more than one in equal shares as between E brothers and sisters, but so that the child or children collectively of any deceased child shall take only such share as his, her or their parent would have taken if living."

There was one son of the testator, Frederick, who died in the year 1924 in the lifetime of the daughter whose death has given rise to the present question. He has left children who claim, under the clause which I have just read, a share in the fund which is now F available for distribution. If their parent Frederick had been living at this moment and had, accordingly, come forward to claim a share in this fund, the trustees would, first of all, have said to him: You went bankrupt some years ago, and it is your trustees in bankruptcy who must make the claim. They would then have said to the trustee in bankruptcy: The estate which you represent has in fact received a certain sum on account of this share, in this sense, that your estate still owes the estate of the testator G something, and that something we, the trustees, are entitled to deduct from the sum which would otherwise be payable to you out of the fund now available for division. However, Frederick is dead. Having regard to the construction I have already placed on the terms of this will, neither he nor his trustee in bankruptcy can come forward and claim any part of his share; but his children do come forward and claim the share which Frederick would have taken if living. The trustees seek to say: You the children of H Frederick are entitled to take only such share in the fund at present in course of distribution as Frederick would have received if living. If Frederick had been living and had come forward and claimed this share, we should have been entitled to retain it to make good a sum which he is to be treated as having in his pocket forming part of the estate, because his estate owes something to his father's estate. You, his children, can receive no more under this will than your father Frederick would in fact have received had he I now been living and had it been he who was claiming his share and you his children.

The principle on which the trustee would be entitled to set up a cross-claim against Frederick or his trustee in bankruptcy is stated by LORD COTTENHAM, L.C., in *Cherry* v. *Boultbee* (3) (4 My. & Cr. at p. 447). He is there referring to a case where the trustees of a will are in effect saying to a legatee: Since you owe our testator something we are entitled to set off that claim against your legacy, and he says:

> "It must be observed that the term 'set-off' is very inaccurately used in cases of this kind. In its proper use, it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy

given by the creditor to the debtor to pay a debt due from him to the creditors' estate, is rather a right to pay out of the fund in hand than a right of set-off. Such right of payment, therefore, can only arise where there is a right to receive the debt so to be paid; and the legacy or fund, so to be applied in payment of the debt, must be payable by the person entitled to receive the debt."

The right of the trustees as against Frederick or his trustee in bankruptcy would be to say to him: True we have a fund, part of which we have to pay to you, but out of that fund we propose to retain that which you owe to the estate; we shall take the fund and apply it in payment of the debt which you owe to the estate. But that right cannot, in my judgment, be set up as against the children of Frederick, because his children are entitled to say you have to pay us the amount of the share. It is perfectly true that if it were our father who was claiming you would have the right to apply his share in paying the debt he owed; but that is not a right which you can set up against us. What is given to us by the will is not the right to receive that which in the circumstances our father would ultimately have received after you had exercised your right to pay the debt out of the share; our right is to make you account to us for the share which he our father would have taken if he were here to take it. He would in the first instance have taken the share. True he would only have received the share after you had exercised your right to apply that which he takes in paying the debt which he owed. That seems to me to be the answer to the trustees' claim to set up as against the children of Frederick the right which they would have been entitled to set up against the father.

It is suggested that I am precluded from arriving at that conclusion by reason of a dictum of the Court of Appeal in *Re Scott* (1), which, though a dictum, embodies, if I may most respectfully venture to say so, well-settled law. The point, however, is that the dictum does not, in my judgment, apply to the case with which I have to deal. The question in *Re Scott* (1) was whether a certain sum of £5,000 had or had not been received from the testator by his son John under such circumstances that it had to be treated as an advancement on account of John's portion of the estate, and the Appeal Court decided that it was not to be so treated. But at a stage of the case in which that question was still undecided the court indicated the view that if in fact the £5,000 had to be treated as an advancement which the son, had he been living, would have had to bring into hotchpot, the son's daughter taking her parent's share would not have been entitled to take that share except on the same footing of bringing into hotchpot the £5,000 which her father had on this hypothesis received as an advancement. VAUGHAN WILLIAMS, L.J., says:

"I may as well say, although I do not think it is material for the decision of this appeal, that we cannot agree with the conclusion of the learned judge as to the position of John's daughter. We think it is plain that she could only take that which her father would have taken, and it is impossible to arrive at the conclusion that in the case of the father the result would have been different from that in the case of the daughter, who was to take an interest in the event of his death before the testator."

I agree entirely that if in the case now before me there had been an advancement to the testator's son Frederick and it had been necessary to ascertain what was the share of Frederick given, by reason of his death, to his children, his children would have had to treat that advancement as being something already paid on account of the share which they were entitled to claim. I am, however, of opinion that the case of an advancement differs fundamentally from the case of a debt or liability of the legatee to the testator's estate. The principle on which an advancement is brought into hotchpot may be most conveniently stated by referring to what LORD COTTENHAM says in *Pym* v. *Lockyer* (6) (5 My. & Cr. at p. 46):

"A father who makes his will dividing his property amongst his children must be supposed to have decided what under the then existing circumstances ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole, which with reference to the wants of all each ought to

possess. If, subsequently upon the marriage of any one of them, it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precluded the child advanced from claiming the sum given by the will as well as the sum advanced."

JAMES, J., in *Fowkes* v. *Pascoe* (7) (10 Ch. App. at p. 350) puts it in this way:

"The principle is that the will shows the distribution which the father thinks just and expedient for his children, and if, after having made such a scheme for distribution, he advances one of his children on marriage, on going out to establish himself in the world, or the like, it is to be presumed as a presumptio juris et de jure that the advancement is an anticipation of the testamentary provision, just as under the Statute of Distributions an advancement is to be brought into hotchpot."

Accordingly, in the case of an advancement the share which the son takes under the will is the share which, had the advancement remained in the father's possession, the son would have been entitled to receive, less the advancement which has been transferred from the father's possession to the son's. The advancement is simply a bit of his share which he happens to have received before the testator dies, and the share of his father's estate which he takes on the father's death is therefore his proper distributive share of the whole of the father's estate taken for this purpose as including the advancement which he received before his father died; the amount which he has in fact received in advance being allocated and treated as received on account of his distributive share in the totality; and, accordingly, if under such words as I have to consider, the child of a deceased son is to take the share which his or her parent would have taken if living, it seems to follow necessarily that, where the case is one of advancement, that child can only take the amount which the parent would have taken, namely, the share of the totality of the estate (including the advance) less the advance which the parent had already had in pocket; in other words, the share which passes under this will from the testator to the parent is diminished, and is a smaller thing than it would have been had the advancement not been made. Now compare that with the case where the legatee owes a debt to the estate which the trustees are entitled to pay out of that which they would otherwise pay to the legatee on account of his legacy. The legacy or share of residue has not in any way been diminished. The legatee takes his full legacy. He is only told that, before he receives it, the trustees are entitled to apply it as against him in a particular way, that is, in paying off the debt which he owes. In my judgment, for the reasons I have endeavoured to express, the analogy between advancement and the case where the legatee is a debtor does not hold good, and the law as laid down in the dictum in *Re Scott* (1) as applying to the case of advancement is perfectly reconcilable with the view which I venture to take of the legal position as applied to a case such as this, where it is a case merely of a right to apply a legatee's legacy in payment of his liability. When I have to find out what is the share that the parent would have taken if living, I have to find out not what would have actually reached the parent, but what the amount is which the trustees would have had in their hands and which they would have had to pay to the parent subject only to their right to apply it in payment of the debt due to the estate. The practical result of that is that the share which Frederick's children take in the fund now distributable is a share which is not affected by the fact that, as against their father, the trustees would have been entitled to make certain deductions before paying him his share.

Solicitors: *Robbins & Co.*, for *Morgan, Wright & Ward*, Bradford; *Peter Thomas & Clarke*; *Solicitor to the Board of Trade.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

A

Re SILVA. SILVA *v.* SILVA

[CHANCERY DIVISION (Romer, J.), April 24, 25, 1929]

[Reported [1929] 2 Ch. 198; 98 L.J.Ch. 459; 141 L.T. 452]

B

Person of Unsound Mind—Purchase of real property with personal estate under court order—Order silent whether real property to be regarded as personal estate—Conversion—Devolution on intestacy—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 51 (2)—*Lunacy Act,* 1890 (53 *& 54 Vict., c.* 5), *s.* 123 (1).

Where a court order directing the personal estate of a lunatic to be laid out in the purchase of real estate is silent as to whether or not the real estate so purchased is to be regarded in equity as real or personal estate of the lunatic, such real estate must be treated as real estate, and so, in the present case, **held,** that, on the death of the lunatic intestate, the real estate, or the investments representing it, passed to the lunatic's heir-at-law and did not devolve on his next-of-kin. *A.-G.* v. *Marquis of Ailesbury* (1) (1887), 12 App. Cas. 672, considered and distinguished. *Re Searle* (2), [1912] 2 Ch. 365, applied.

C

D

Notes. The order for purchase of the real estate was made under the Lunacy Act, 1870, s. 123 (1). The jurisdiction vested at the time of this decision in the Lords Justices in Lunacy has now been transferred to the judges of the Chancery Division: see Practice Note, [1956] 2 All E.R. 248.

As to sale and conversion by the court of property of a person of unsound mind, see 21 HALSBURY'S LAWS (2nd Edn.) 348–350; and 14 HALSBURY'S LAWS (3rd Edn.) 585, note (l); and for cases see 20 DIGEST 362–363, *1004–1008.* For the Lunacy Act, 1890, and the Administration of Estates Act, 1725, see 9 HALSBURY'S STATUTES (2nd Edn.) 718.

E

Cases referred to:

(1) *A.-G.* v. *Marquis of Ailesbury* (1887), 12 App. Cas. 672; 57 L.J.Q.B. 83; 58 L.T. 192; 36 W.R. 737; 3 T.L.R. 830, H.L.; 20 Digest 362, *1006.*

(2) *Re Searle, Ryder* v. *Bond,* [1912] 2 Ch. 365; 81 L.J.Ch. 751; 106 L.T. 1005; 56 Sol. Jo. 613; 20 Digest 363, *1008.*

F

(3) *Witter* v. *Witter* (1730), 3 P. Wms. 99; 24 E.R. 985, L.C.; 28 Digest 199, *575.*

(4) *Bridges* v. *Bridges* (1752), unreported; cited in 6 Ves. 7.

(5) *Lord Ashburton* v. *Lady Ashburton* (1801), 6 Ves. 6; 31 E.R. 910, L.C.; 28 Digest 185, *438.*

(6) *Heir* v. *Administrator* (1690), Freem. Ch. 114; 22 E.R. 1094; sub nom. *Awdley* v. *Awdley,* 2 Vern. 192; 20 Digest 361, *992.*

G

(7) *Ware* v. *Polhill* (1805), 11 Ves. 257; 32 E.R. 1087, L.C.; 20 Digest 511, *2395.*

Adjourned Summons as to the devolution of the estate of a lunatic intestate.

In September, 1923, A. M. Silva, the wife of E. J. Silva, a person of unsound mind not so found, purchased a freehold house as a residence for her husband and herself for the sum of £975, which amount she borrowed. By an order of the Chancery Division, dated Jan. 16, 1924, the purchase was approved, and the premises were declared to be held by A. M. Silva as trustee for E. J. Silva, and part of the funds that had already been paid into court to the credit of E. J. Silva were directed to be applied for the said purchase money, and on April 9, 1924, a memorandum was endorsed on the conveyance of the premises whereby A. M. Silva declared that she stood seised thereof in trust for E. J. Silva, his heirs and assigns, and she agreed to convey the hereditaments at the request and cost of E. J. Silva to such person or persons at such time or times and in such manner as E. J. Silva should direct or appoint. A. M. Silva died on Oct. 19, 1926.

H

I

By an order dated Sept. 8, 1927, the plaintiff, who had been appointed receiver, was ordered to sell the freehold house, and on Oct. 13, 1927, the house was sold for the sum of £800, and the net proceeds of sale were lodged in court to the credit of E. J. Silva and invested in the purchase of £963 12s. 4d. 3½ per cent. conversion stock. On Aug. 17, 1928, E. J. Silva died intestate, a widower, without issue.

A This summons was to determine whether the sum of £963 12s. 4d. 3½ per cent. conversion stock was at the date of the death of E. J. Silva his real estate and devolved on his heir-at-law by virtue of s. 51 (2) of the Administration of Estates Act, 1925, or whether it formed part of and devolved as his personal estate on his next-of-kin.

C. R. R. Romer, for the heir-at-law, referred to *Re Searle, Ryder* v. *Bond* (2).

B *F. E. Farrer* for the next-of-kin.

ROMER, J.—The question which I have to determine is whether, as a result of the order of Jan. 16, 1924, the amount raised out of the fund in court, which was personal estate, became, by virtue of the order, converted into real estate in the eyes of the Court of Equity, as, of course, it was in fact in law, or whether the house so purchased ought to be regarded by a Court of Equity as still remaining part of the personal estate of the C person of unsound mind. If the court had desired that the house should still form part of the personal estate there is a well-known form of declaration which could have been inserted in the order, and which would have effected that result.

It will be observed, however, that the order is entirely silent on the point. Notwithstanding this, counsel for the next-of-kin contended that the house was still to be regarded as part of the personal estate of the patient. He said that in all cases where D the personal estate of a lunatic is laid out by the direction of the court, whether by the Court of Chancery, by the Lord Justices in Lunacy, or otherwise, the real estate so purchased is to be regarded as the personal estate of the lunatic, and that the onus is on the persons who assert that land so purchased is real estate to show positively from some expression in the order, or from the surrounding circumstances, that it was the intention of the court that that result should follow. If that contention were sound, one would E expect the law to be so laid down in *A.-G.* v. *Marquis of Ailesbury* (1), which is the leading case on the subject. In that case the money of a lunatic was invested by his committees by order of the Lords Justices, in purchase of lands, which, under their Lordships' direction, were conveyed to the committees, "their heirs and assigns upon trust for" the lunatic, "his executors, administrators and assigns," with a declaration that the lands so conveyed should "to all intents and purposes be considered as part of F the personal estate of" the lunatic. The House of Lords held that the lands were part of the personal estate of the lunatic. It was therefore a case in which the order contained the well-known declaration to which I have referred. When the speeches are looked at it will be found that it was merely owing to the fact that the order contained that declaration that the conclusion was reached that the property was personal estate G of the lunatic, and that, if the order had not contained the declaration in question, the decision would have been the other way.

It is interesting to glance at the arguments of the learned counsel engaged in that case. Towards the conclusion of his argument on behalf of the appellant, Mr. Vaughan Hawkins says: "The declaration that the property is to be considered as personalty is sufficient without an express trust for sale; it is equivalent to a direction that the land H shall be sold at some other time." For the respondents it was contended that: "The declaration could not effect a conversion without a trust to sell. The opinion of the editor of JARMAN ON WILLS, that the declaration implies such a trust, is not supported by the authorities cited." Each of the learned counsel was therefore directing the attention of the House to the express declaration—one urging that it had the same effect as a trust for sale, the other that it had not.

I LORD SELBORNE said this:

"And although I do not think it is open to dispute that the Lords Justices, in the due course of the administration of his estate in lunacy, might have done any act which they judged to be for his benefit, it is, to me, clear that in this case, they did not judge it necessary, or for his benefit, to do any act which would have the effect of converting his personal right to the money thus invested into a real right to land with the incidents belonging to realty; but that, on the contrary, they intended to prevent the investment which they authorised from having any such consequence, and introduced both into their own order and into the conveyance which followed

thereon declarations which they considered proper and sufficient to effectuate that intention." A

He also said:

"The Lord Chancellor and the Lords Justices in Lunacy, high as are their functions, and regulated as those functions are by statute, act not as proprietors, but only as guardians and administrators of the lunatic's property; and, whatever power they B may have to convert any part of it from realty into personalty, or from personalty into realty, when judging this to be for his benefit, and deliberately intending to do so, it is, in my opinion, neither necessary nor right to ascribe that effect to an investment which they have authorised on the terms, and with the declared intention, that it should not have that consequence. If an investment, de facto, in land may leave the original personal right to the money invested unchanged in equity, C for want of authority in the persons making that investment to change it, so (in my judgment) may a similar investment, made under the direction of a court, which declares both in the order and in the conveyance, that it intends the personal right to remain unchanged, and does not mean to exercise any authority which it may possess to change it."

Then, after referring to certain authorities relating to lunatics and infants, including D *Witter* v. *Witter* (3), a decision of LORD KING'S, he said:

"LORD KING there pointed out, as proper to preserve the personal character of the right during infancy, the same form which was afterward used by the court in the case of *Bridges* v. *Bridges* (4) in 1752 (SETON ON DECREES (2nd Edn.) p. 345); and which was followed with approval by LORD ELDON in 1801 in *Lord Ashburton* v. E *Lady Ashburton* (5), expressly to prevent the court from 'changing the nature of the property.' That form was for a long period of time, and under very great judges, sanctioned by the general course of the Court of Chancery in such cases. I do not see how your Lordships could now hold a trust, declared in such terms, to be ineffectual for the preservation of the personal right, with its proper incidents (of which the devolution of the equitable title to executors or administrators was F certainly not the least important, nor the least distinctly in view), without practically declaring that all those judges were mistaken, and that the course of the Court of Chancery in those cases proceeded upon a misconception of the powers of the court, and of the effect in equity of what it authorised to be done."

I read that passage as indicating that just as a Court of Equity, in cases where an express trust for sale is imposed on the land, treats it as personal estate so a court of G equity treated land purchased under its direction as also possessing the character of personal estate where there was to be found such a declaration or direction as LORD SELBORNE was referring to. In such a case it was not necessary to have an express trust for sale, for the same effect was produced by the property being directed to be held in trust for the lunatic, his executors, administrators and assigns. I cannot find in LORD SELBORNE'S speech anything whatsoever to suggest that where an order approving a sale is silent H on the matter the same result follows. On the contrary, it appears to me that LORD SELBORNE entertained precisely the opposite opinion. LORD MACNAGHTEN took the same view. He said:

"The principles on which the court acts in dealing with the property of lunatics under its care are not open to question. The leading principle, the paramount I consideration, is the interest of the lunatic. Consistently with the principle it is settled that in the ordinary course of managing a lunatic's estate, the court pays no regard to the interests or expectations of those who may come after, but it is equally well settled that in matters outside the ordinary course of management, it is the duty of the court so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession."

There LORD MACNAGHTEN points out that when land is required in the ordinary course of the management of the lunatic's estate for the lunatic's benefit, the court pays no

attention to the interests or expectations of those who come after the lunatic, and does not trouble to provide that real estate so purchased shall be treated as personal estate; but that when, on the other hand, real estate is purchased out of personal estate, otherwise than in the ordinary course of management, it is the duty of the court not to disturb its character. Then LORD MACNAGHTEN said:

"Now let me invite your Lordships' attention to what occurred on the occasion of the purchase. It appears that in 1866 the Wootton Bassett Estate was for sale. It was considered a very desirable property. The price was over £200,000, but there were ample funds resulting from the accumulation of income from the brewery business standing to the credit of the lunatic. Under these circumstances the committee of the lunatic's estate presented a petition asking for leave to buy the property on behalf of the lunatic. It was not disputed at your Lordships' bar that the court had power to sanction the purchase. Whatever the origin of the power may have been it is too late to dispute its existence. But unquestionably such a purchase was altogether outside the ordinary course of administration of a lunatic's estate, and therefore, as it seems to me, if the court thought fit to sanction the purchase, it was bound to take care that the character of the lunatic's property was not altered."

Thus LORD MACNAGHTEN is pointing out that in the case before him the purchase was outside the ordinary course of management, and that one would therefore have expected to find some direction preserving or treating the real estate so purchased as personal estate of the lunatic. The case was, therefore, one in which, in construing the order one could more readily come to the conclusion that the real estate was to be treated as personal estate than would have been the position if the purchase had been made in the ordinary course of management.

In the present case the purchase was made in the ordinary course of management. It was essential for the well-being of the patient that a house should be provided in which he could live, and the court need not be expected to have had any regard for the interests of those coming after him any more than he himself, when buying such a house, would consider whether, if he died intestate, the house would devolve on his heir-at-law or his next-of-kin. LORD MACNAGHTEN then proceeded to consider the terms of the order before him. He said:

"KNIGHT BRUCE and TURNER, L.JJ., sitting in lunacy, approved the purchase and declared it to be for the benefit of the lunatic, proceeding, I presume, upon the footing that the proposed expenditure was an outlay which a person of sound mind in the pecuniary position of Sir Henry Meux might not unnaturally consider desirable in the interests of his family. At the same time, they laid down the conditions on which the purchase was sanctioned, and they prescribed the form of the conveyance. The property was to be conveyed to trustees 'upon trust for Sir Henry Meux, his executors, administrators, and assigns,' with a declaration that the estate was 'to be considered as part of the personal estate of Sir Henry Meux.' If it had not been for the judgment of the Court of Appeal, I should have thought the meaning and effect of the transaction clear. The committees had no power of themselves to lay out the lunatic's personal estate in land. 'It was not in the power of any committee,' as the decree in *Awdley* v. *Awdley* (6) expressly declared, 'to alter the nature of a lunatic's estate.' The purchase could only be made with the sanction of the court. In giving its sanction it was surely competent for the court to impose such terms, not inconsistent with law, as it thought right. Terms so imposed are, I think, to be treated as binding and effectual. I read the order as authorising the proposed purchase on the terms, that the money to be laid out in the purchase was to retain its character, and that the property was to be conveyed to trustees upon trust to be held and applied as part of the lunatic's personal estate, which the court then and there declared it to be. The language of the order seems to me to be framed for the purpose of impressing upon the property to be purchased the character of personal estate from the moment of the purchase, during the lunatic's lifetime, as well as after his death. The conveyance carries out the order of the court in

terms. It recites the order. It conveys the property precisely as the court directed it to be conveyed. It repeats the declaration which the court prescribed and which is none the less the declaration of the court because it is embodied in the conveyance. A trust for sale would have made the conveyance no better and no worse. Practical effect under the circumstances it could have none. I do not see why a sort of magical effect should be attributed to it."

It is impossible to suppose that a judge who used that language was of opinion that if the order had been silent the same result would follow.

It is not only from the decision of the House of Lords that it is to be inferred that counsel for the next-of-kin's contention is not sound. There is actual authority to the contrary. In *Re Searle* (2), JOYCE, J., had to deal with a case in which a lunatic was possessed of some leasehold property. By the direction of the Master a receiver of the lunatic's estate had been given permission, on behalf of the lunatic, to purchase a reversion in fee of the leasehold hereditaments in consideration of a yearly rentcharge, and the result of the purchase and conveyance of the reversion in fee was that the leasehold became merged into the freehold. In those circumstances JOYCE, J., was asked, on the death of the lunatic, to decide whether the leasehold property was converted into real estate or devolved on the next-of-kin, the order being silent as to preserving the rights of the next-of-kin. JOYCE, J., decided against the contention of the next-of-kin. He says this:

"I find in HEYWOOD AND MASSEY'S LUNACY PRACTICE (4th Edn.), pp. 184, 185, under the head 'as to the purchase of real estate on behalf of a lunatic,' this statement: 'The Masters have jurisdiction, under the sections of the Lunacy Act, 1890, dealing with management and administration, to sanction the purchase of real estate on behalf of a lunatic. But such sanction will only be granted under special circumstances, e.g., when it is desirable to purchase a house for the lunatic's residence, or a piece of land required to round off an estate'—the present case seems to me to be analogous to that—'and complete a series of transactions commenced by the patient when sane.' A satisfactory title to the real estate must be shown. There is no conveyancing counsel to the Lunacy Office; but the Masters generally direct that counsel shall advise both on the contract for purchase and the abstract of title.

The order for purchase is drawn so as to protect the interests of persons who may be entitled on the death of the patient to share in his estate, and to preclude any advantage to the heir-at-law at the expense of the next-of-kin. The conveyance will be to the committee or receiver in trust for the lunatic, his heirs, executors, administrators or assigns, regard being had to the source from which the purchase-money was derived. Although that is the rule it is within the power of the Court of Lunacy to alter the nature and consequent devolution of the estate of the lunatic. In the present case the order says nothing as to preserving the rights of the next-of-kin, the reason of which may very probably be that it was not considered worth while to preserve them. It was thought to be for the benefit of the lunatic's estate that the lease should be surrendered in exchange for a conveyance of the premises in fee subject to the payment of a perpetual rentcharge. The court had power to make such an order, and I do not propose to say that the order in this case was not properly made. The Master who made the order knew what he was doing, and I think I must give effect to it. I do not say that the leasehold was "converted"—which is the word used in the summons—but I hold that the lease merged in the freehold reversion, and the premises, 33, Union Street, which were in fact freehold at the death of the lunatic, passed as such to her heir."

It was pointed out by counsel for the next-of-kin in his argument that in that case the Master, when settling the order, had expressly sanctioned a conveyance containing a provision that the hereditaments purchased should stand limited

"subject to the lease and the term thereby created, but to the intent that the same and the unexpired residue of the term might merge and be extinguished,"

and counsel for the next-of-kin asked me to come to the conclusion that in consequence of that direction that case was no authority for the general proposition that where the order is silent it is impossible to treat the property as not being real estate. But all that the Master directed was that the conveyance should be in the form that was appropriate for carrying out the transaction, which would necessarily involve extinguishment and merger in freehold, and in so directing he was expressing no intention whether the real estate so acquired should or should not be regarded as real or personal any more than, when a Master in Lunacy directs personal estate to be laid out in the purchase of real estate, he thereby expresses any opinion as to whether the real estate so purchased is to be regarded in equity as real or personal estate of the lunatic. In both cases he merely directs that what was previously personal estate of the lunatic shall henceforth be represented by what is real estate in law. The order in the present case was silent, and being silent, it seems to me to follow that the real estate must be treated as what it is in fact—namely, real estate and not personal estate.

The only other case to which it is necessary to refer is *Ware* v. *Polhill* (7), in which there is a dictum of LORD ELDON'S on which counsel for the next-of-kin relied. But it was a dictum relating to the then practice of the court in relation to the management of an infant's property. It was dealing with the management of an infant's property, before the passing of the Wills Act, at which time the practice relating to infants was different from that relating to lunatics. Since the Wills Act the practice appears to be precisely the same in the two cases, and in my opinion that practice is the one laid down in *A.-G.* v. *Marquis of Ailesbury* (1).

For these reasons I have come to the conclusion that the freehold house became real estate of the person of unsound mind as at the date of its acquisition, and it is not disputed that in that event the proceeds of the subsequent sale retain the character of real estate, and pass to the heir-at-law.

Solicitors: *Haines & Wedlake*; *Bell, Broderick & Gray.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re KIDNER. KIDNER *v.* KIDNER

[CHANCERY DIVISION (Eve, J.), February 20, 1929]

[Reported [1929] 2 Ch. 121; 98 L.J.Ch. 247; 141 L.T. 195]

Company—Shares—Sale—Dividend declared before sale—Instalments thereof payable after sale—Right to dividend.

A purchaser of shares is not entitled, in the absence of any stipulation to the contrary, to dividends declared on such shares before the date of the contract of purchase, even though such dividend, or instalments thereof, is not payable until after the transfer of the shares.

Company—Debenture—Sale—Fixed interest payable by instalments on fixed dates—Sale between such dates—Right to accrued interest.

A contract gave an option to purchase certain fixed interest debentures at par on any date the purchaser might elect. The option was exercised on July 30, on which date there was four months' interest accrued, but not paid, on the debentures.

Held: the purchaser was entitled to the whole of the next interest payment, and so did not have to account to the vendor for the accrued interest.

Notes. As to rights of a buyer of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 34, and 31 HALSBURY'S LAWS (2nd Edn.) 619, para. 890; and for cases see 9 DIGEST (Repl.) 363–364.

Case referred to: A

(1) *Black* v. *Homersham* (1878), 4 Ex.D. 24; 48 L.J.Q.B. 79; 39 L.T. 671; 27 W.R. 171; 9 Digest (Repl.) 363, *2326*.

Adjourned Summons as to the right to accrued interest on sale of debentures and dividends on sale of shares.

By an agreement of family arrangement made April 29, 1922, between E. E. Kidner B of the first part, E. M. Kidner of the second part, E. J. Kidner of the third part, and J. H. Terry and F. Kidner of the fourth part, after reciting the will of G. A. Kidner, who died on Aug. 25, 1919, of which the said J. H. Terry and F. Kidner were appointed trustees, it was witnessed that the business of jobmaster and motor proprietor should be converted into a private company in return for £30,000 paid to Terry and F. Kidner, as to £10,000 in fully paid-up shares and as to £20,000 in 7½ per cent. debentures, as C such trustees, the said F. Kidner to be the manager of the company. By cl. 7 he, as long as he continued a trustee and also manager of the company, should have an option to purchase the said £20,000 debentures at par in such proportions, multiples of £500, as he should think fit, and subsequently when such purchase was completed to have the further option of purchasing the £10,000 shares at par. The company was in due course formed and the shares and debentures allotted. In June, 1928, a final dividend of D 57½ per cent. was declared for the year ending on Mar. 31. This dividend was payable in three instalments—on July 1, Nov. 1, 1928, and Feb. 1, 1929. The instalment due on July 1 was paid to the executors of the said E. E. Kidner as tenant for life, she having died in the previous April. The said F. Kidner duly exercised his option on July 30. 1928, at which date there was four months' interest accrued on the debentures. The purchase was completed on Nov. 5, and the shares and debentures transferred. Pay- E ment was deferred pending the decision of this summons which asked whether, on the true construction of the agreement, the said F. Kidner was entitled to receive the remaining instalments, or whether they were payable to the trustees, and (2) whether the interest on the said debentures had to be apportioned between F. Kidner and his father's estate from the date of the last payment to that of the exercise of the option.

Gavin Simonds, K.C., and *Church*, for the testator's daughters, referred to *Black* v. F *Homersham* (1).

Archer, K.C., and *Cecil Turner* for F. Kidner, the purchaser.

E. F. Ball for the co-trustee Terry.

EVE, J.—By the agreement of April 29, 1922, arrangements were come to for the transfer of the business in which the testator's estate was largely interested, as were also G his widow and two daughters as beneficiaries under his will, to a private company in exchange for the issue to the trustees of 10,000 fully paid shares of £1 and of debentures to the value of £20,000; and provisions were made for securing the services as manager of the company of a nephew of the testator who had been concerned in the management in the testator's lifetime, and the retention of whose services was obviously a matter of great importance to the estate and those interested therein. His remuneration was H on a liberal scale, and there was reserved to him a right, so long as he fulfilled the dual capacity of a trustee of the testator's will and manager of the business, to acquire the whole of the shares and the whole of the debentures so issued to the trustees. That right is conferred on him by para. 7 of the document, and circumstances have arisen in which Mr. Frank Kidner, the nephew in question, has seen right to exercise his option. He, in fact, exercised it on July 30, 1928, and was admittedly then ready and willing to I pay the £30,000, the full price at which, under cl. 7, the debentures and shares were to be transferred to him. But a question arose, whether the assignment of the debentures and the transfer of the shares were respectively to include the interest, some four months of it, at 7½ per cent. on the debentures, and any, and if any, what part of a very substantial dividend on the shares declared by the company at a date antecedent to the contract but payable by instalments, of which two remained unpaid at the date thereof. Unfortunately the parties have not been able to come to terms on these two points, and the purchase was completed at a much later date than July 30, namely, on Nov. 5,

by payment of the £30,000, and assignment and transfer of the debentures and shares, without prejudice to the questions which I am now called upon to determine.

It is obvious that Mr. Kidner was not to pay more than £30,000, and in consideration of that payment he was to obtain the assignment of the debentures and the transfer of the shares, but that does not dispose of the questions. The real question is what passed to the purchaser by the assignment and transfer made pursuant to that contract. In my opinion, so far as the debentures are concerned, the four months' accrued interest passed to the purchaser under the assignment, unless the Apportionment Act, 1870, could be held to apply, and I do not think that it can. The contract is a contract to sell on any date the purchaser may elect for the exercise of his option, and the sale is to be at par, so that whatever advantages had accrued on the debentures down to the date of completion, appear to me to have passed to the purchaser by the assignment in consideration of the £20,000.

With regard to the shares, the company's business year expired on Mar. 31; and on June 13, 1928, a resolution was passed declaring a dividend of 57½ per cent. for the year ending on the previous Mar. 31 and payable in three instalments, one on July 1, a second on Nov. 12, and the third on Feb. 1, 1929. It is not suggested that so much of that dividend as was payable and was in fact paid prior to the date of the contract passed to the purchaser; but the purchaser contends that the right to the two subsequent payments passed by the transfer of the shares to him. I think that turns entirely on the determination of the question, what is the effect of the declaration of the dividend. It is to be remarked that under cl. 6 of the agreement Mr. Frank Kidner was to receive as part of his remuneration the dividends declared in respect of 4,900 shares so long as he remained the manager, and that immediately on his ceasing to be the manager he was to lose any right to the shares or any dividends thereon. Assuming that the question had arisen under that clause and that Mr. Kidner had ceased to be manager after a dividend had been declared but before it was paid, it is clear that he would have been entitled to the dividend, his remuneration being all dividends declared, not declared and paid, in respect of the 4,900 shares during his management. I think, although the point is not expressly dealt with in cl. 7, the same rule ought to be applied in the case of these shares. The declaration of the dividend on June 13, 1928, created a debt owing by the company to the trustees as the registered shareholders. It is true that no steps could have been successfully taken to enforce payment until the due date for payment of each instalment arrived, but none the less the title to that dividend was, in my opinion, determined by the declaration, and the mere fact that the payment was postponed does not operate to deprive those who were the holders of the shares at the date of the declaration of their right to each instalment of that debt. I come to the conclusion, therefore, that the transfer did not vest in the purchaser the right to claim and retain payment of the two last instalments of that dividend. That dividend remains where it was when it was declared, and belongs to the estate.

The result is that so far as the debentures are concerned he takes those without any further payment. So far as the shares are concerned, the vendors are entitled to the two further instalments of the dividend.

Solicitors: *Church, Rackham & Co.*; *Cooper, Bake, Fettes, Roche & Wade.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

HORWOOD *v.* STATESMAN PUBLISHING CO., LTD. AND OTHERS. CHILDS *v.* SAME

[COURT OF APPEAL (Scrutton and Sankey, L.JJ.), January 29, 1929]

[Reported 98 L.J.K.B. 450; 141 L.T. 54; 45 T.L.R. 237]

B

Practice—Consolidation of actions—Exercise of discretion—Matters to be considered—Libel—Actions by two plaintiffs against same defendants in respect of same libel—Interpretation of R.S.C., Ord. 49, *r.* 8.

Order 49, r. 8, of the Rules of the Supreme Court, which provides: "Causes or matters pending in the same Division may be consolidated by order of the court or a judge in the manner in use immediately before Nov. 1, 1875, in the superior courts of common law," must be given a liberal meaning and interpreted in view of the changes made since the Judicature Acts in Ord. 16, r. 1, which provides: "All persons may be joined in one action as plaintiffs, in whom any right to relief [in respect of or arising out of the same transaction or series of transactions] is alleged to exist, whether jointly, severally, or in the alternative, [where if such persons brought separate actions any common question of law or fact would arise] . . .," the said changes being the addition in 1896 of the words printed in square brackets. The consolidation of actions is a matter of discretion, not of right, but, no doubt, one of the matters which the court will take into consideration will be whether, after consolidation, the plaintiffs and the causes of action would properly be included in the same writ under Ord. 16, r. 1.

C

D

Per SANKEY, L.J.: I think that an order to consolidate may be made when two or more actions are pending (i) between the same plaintiff and the same defendant; (ii) between the same plaintiff and different defendants; (ii) between different plaintiffs and the same defendants; and (iv) between different plaintiffs and different defendants. The only limitation which can be placed on Ord. 49, r. 8, is that there must be some common measure of fact in the two or more cases which it is desired to consolidate.

E

F

The plaintiffs each brought a separate action against the defendants, the publishers, the editor, and the printers of a newspaper, claiming damages for libel. The two actions were brought in respect of the same words. The plaintiffs appeared by the same counsel and solicitors, and the statements of claim in the actions were nearly identical. On an application by the printers to consolidate the actions,

Held: there was no doubt that, if the plaintiffs had issued one writ and put their claims for libel against the defendants on that writ, the court would not have interfered, and, therefore, there was no reason why the court should not exercise its power under Ord. 49, r. 8, to consolidate the actions.

G

Notes. An order can be made for consolidation up to determination of the issue of liability, any issue peculiar to one plaintiff to be separately dealt with, separate particulars of damage to be delivered and the issues of damages separately dealt with if the plaintiffs are successful: see *Healey* v. *A. Waddington & Sons, Ltd.*, [1954] 1 All E.R. 861.

H

Approved: *Marchant* v. *Ford, Peter Davies, Ltd., Guernsey Star and Gazette Co., Ltd., and McLegan and Cumming*, [1936] 3 All E.R. 104. Applied: *Norton* v. *Norton and Smith, Norton* v. *Norton*, [1945] 2 All E.R. 122.

As to consolidation of actions, see 26 HALSBURY'S LAWS (2nd Edn.) 57, 58; and for cases see DIGEST, Practice, 658–660.

I

Cases referred to:

(1) *Payne* v. *British Time Recorder Co., Ltd., and Curtis, Ltd.*, [1921] 2 K.B. 1; 90 L.J.K.B. 445; 124 L.T. 719; 37 T.L.R. 295, C.A.; Digest Practice 408, *1084*.

(2) *Hannay & Co.* v. *Smurthwaite*, [1893] 2 Q.B. 412; 63 L.J.Q.B. 41; 69 L.T. 677; 42 W.R. 133, C.A.; reversed sub nom. *Smurthwaite* v. *Hannay*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp.M.L.C. 485; 6 R. 299, H.L.; Digest Practice 399, *1013*.

(3) *Thomas* v. *Moore*, [1918] 1 K.B. 555; 87 L.J.K.B. 577; 118 L.T. 298, C.A.; Digest Practice 400, *1018.*

(4) *Re Beck, Attia* v. *Seed* (1918), 87 L.J.Ch. 335; 118 L.T. 629; 34 T.L.R. 286, C.A.; Digest Practice 407, *1079.*

(5) *Peek* v. *Derry* (1887), 37 Ch.D. 541; 57 L.J.Ch. 347; 59 L.T. 78; 36 W.R. 899; 4 T.L.R. 84, C.A.; reversed sub nom. *Derry* v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 38 W.R. 33; 54 J.P. 148; 1 Meg. 292, H.L.; 9 Digest (Repl.) 128, *703.*

(6) *Drincqbier* v. *Wood*, [1899] 1 Ch. 393; 68 L.J.Ch.181; 79 L.T. 548; 47 W.R. 252; 15 T.L.R. 18; 43 Sol. Jo. 29; 6 Mans. 76; Digest Practice 402, *1024.*

(7) *Compañia Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ltd.*, [1910] 2 K.B. 354; 79 L.J.K.B. 1094; 103 L.T. 333; 11 Asp.M.L.C. 525, C.A.; Digest Practice 400, *1015.*

(8) *Martin* v. *Martin & Co.* (No. 1), [1897] 1 Q.B. 429; 66 L.J.Q.B. 241; 76 L.T. 44; 45 W.R. 260; 41 Sol. Jo. 240, C.A.; Digest Practice 658, *2786.*

(9) *Forbes-Smith* v. *Forbes-Smith*, [1901] P. 258; 70 L.J.P. 61; 84 L.T. 789; 50 W.R. 6; 17 T.L.R. 587; 45 Sol. Jo. 595, C.A.; 27 Digest (Repl.) 572, *5285.*

(10) *Lee* v. *Arthur* (1908), 100 L.T. 61, C.A.; Digest Practice 658, *2787.*

Appeal from an order of MACNAGHTEN, J., at chambers, setting aside an order made by MASTER MOSELEY consolidating two actions for libel.

The plaintiff, Sir William Thomson Francis Horwood, who was the Commissioner of Police for the Metropolis, brought an action against the defendants, the Statesman Publishing Co., Ltd., the publishers, W. Speaight & Sons, Ltd., the printers, and Clifford D. Sharp, the editor, of a newspaper known as the "New Statesman," claiming damages for matter printed and published in that newspaper which he alleged to be libellous. Another action was brought by the plaintiff, Sir Borlase Edward Wyndham Childs, who was Assistant-Commissioner of Police for the Metropolis, against the same defendants, claiming damages in respect of the same words. The plaintiffs in each action complained of the following words printed and published in the "New Statesman":

> "If Lord Lee is not prepared to go into the question of the supervision of Hyde Park, with all the blackmail and sensation which it involves, he will find it quite impossible to restore the confidence of the public in the police. . . . Such an inquiry might be of great value if it put an end to the Horwood-Childs-Bodkin methods—an end, that is to say, to the 'Hyde Park Scandals,' to the creation of crime where there is no crime, and to the attempted enforcement by the police of moral standards which have nothing whatever to do with the preservation of public order. But we do not see the use of any inquiry at all if its main purpose, as Lord Lee suggests, is to prevent the police being discredited."

The statements of claim in both actions were almost identical, and both plaintiffs were represented by the same counsel instructed by the same solicitors. The defence of the publishers as well as that of the editor was fair comment on a matter of public interest, but the printers pleaded an apology with a payment into court. The printers applied to the Master under R.S.C., Ord. 49, r. 8, to have the two actions consolidated. MASTER MOSELEY made an order that the two actions should be consolidated. On appeal, the judge in chambers, MACNAGHTEN, J., set aside the Master's order on the ground that the court had no jurisdiction to consolidate actions in such a case. The printers appealed.

By Ord. 49, r. 8:

> "Causes or matters pending in the same Division may be consolidated by order of the court or a judge in the manner in use before November 1, 1875, in the superior courts of common law."

Sir T. Willes Chitty, K.C., and *Wallington* for the printers.
Frampton for the Statesman Publishing Co., Ltd.
St. John Hutchinson and *C. L. Burgess* for the editor.
Birkett, K.C., and *Theobald Mathew* for the plaintiffs.

SCRUTTON, L.J.—This case raises a point of some importance on the question of consolidation of actions and parties to actions, but a question on which, in my view, the recent decisions of the court show the course that we should pursue in this case. A paper called the "New Statesman," at the time when public interest was excited by certain matters which had happened in Hyde Park and certain proceedings arising out of those matters, published an article in which, commenting on the suggestion that there should be a limitation of an inquiry presided over by Lord Lee, it said:

> "Such an inquiry might be of great value if it put an end to the Horwood-Childs-Bodkin methods—an end, that is to say, to the 'Hyde Park Scandals,' to the creation of crime where there is no crime,"

and other matters. "Horwood-Childs-Bodkin." Horwood was the Commissioner of the Metropolitan Police; Childs was the Assistant-Commissioner of the Metropolitan Police, and head of the Criminal Investigation Department, and Bodkin was Sir Archibald Bodkin, the Public Prosecutor, and it was certainly not an impossible view to take that when the Horwood-Childs-Bodkin methods are said to be the Hyde Park scandals and the creation of crime where there is no crime a jury might possibly think that passage defamatory. Sir William Horwood was sufficiently annoyed with the "New Statesman" to bring an action for libel against them. Sir Borlase Childs was also sufficiently annoyed with the "New Statesman" to bring an action against them. Sir Archibald Bodkin did not think the "New Statesman" worth taking any notice of, and it is quite possible that other people may think that he was the wisest man of the three. But there they were, two actions for libel, one by Sir William Horwood and one by Sir Borlase Childs about the same libel in the same paper; the two plaintiffs are appearing by the same solicitors, are employing the same junior counsel, and are represented to-day by the same leading counsel.

The statements of claim in the two actions, so far as I can discover, are identical, except that para. 1 in each statement of claim is different, in that it sets out various distinguished orders which the plaintiffs hold and the more practical point that one of them is the Commissioner and the other is Assistant-Commissioner in the Metropolitan Police, and that in the innuendo of about twenty-five lines, five words are different in one innuendo from the other. Three defendants are sued: the proprietors of the "New Statesman," the Statesman Publishing Co., Ltd.; the printers, W. Speaight & Sons, Ltd.; and Mr. Clifford Dyce Sharp, said to be the editor of the "New Statesman." The printers' defence was a most comprehensive apology and a payment into court. The proprietor and the editor pleaded fair comment. The printers, after issue joined, took out a summons to consolidate the two actions, desiring to save legal expenses. The Master did consolidate the two actions. The learned judge before whom the matter came on appeal, according to his note on the summons, set aside the Master's order on the ground that there was no jurisdiction to consolidate two separate actions brought by two different plaintiffs, without their consent, and he ordered as a substitution, also being desirous of saving expense—one plaintiff, Sir William Horwood, consenting to a stay—that the Horwood action be stayed until the trial of the action brought by Childs. The printers objected to that order. The printers now appeal to this court and ask us to say that the reason given by the judge for not making the order—that he had no jurisdiction—is erroneous and that the original order of the Master should be restored.

There is no doubt that the practice of the court has varied very much in the last fifty years and that the cases decided by the court are very difficult to reconcile. I am only saying what LORD STERNDALE, M.R., said in *Payne* v. *British Time Recorder Co., Ltd., and Curtis, Ltd.* (1). But the matter stands in this way. Originally, the view was taken by the court that one could not put into a writ separate causes of action by separate plaintiffs, and in 1896 there was a series of cases which brought very prominently before the public and the courts the question whether that limitation was right in view of the complexity of present-day procedure and the desirability of limiting the expenses of actions. *Smurthwaite* v. *Hannay & Co.* (2) brought the matter to the front. That was a case where, a number of goods' owners having goods in a ship, certain perils washed away the marks so that it was not clear to whom any particular goods belonged out of

A the numerous owners who originally had put goods into the ship. An action was brought by eight shippers of different bales of cotton against the shipowner on the same writ to have determined their rights to the mixed mass of unidentified cotton which was in the ship. The Court of Appeal differed in opinion. The majority (LORD ESHER giving the leading judgment) held that such claims could be put on the same writ. BOWEN, L.J., in giving a dissenting judgment, used the illustration which has lived in B the memory of those who heard it ([1893] 2 Q.B. at p. 422):

> "I do not think that it was the intention of [R.S.C., Ord. 16, r. 1] to allow writs to be issued under which any number of plaintiffs might join any number of causes of action, or that a writ should be like an omnibus travelling on a certain route into which any number of persons may get as passengers for the journey."

C The case went to the House of Lords, who adopted the view of BOWEN, L.J., applying the old rules with regard to joinders of actions. A similar case occurred at the same time of a number of passengers suing the Peninsular and Oriental Co. on the same writ, and there was a third case, and the attention which was called to this difficulty about a number of people having substantially the same cause of action involving one common question of law or fact led to an alteration in Ord. 16, r. 1, which related to the persons D who might be in the writ. It now reads:

> "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may E embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such order as may be expedient. . . ."

But while the Rules Committee, whose decisions have the force of law, altered r. 1 as to plaintiffs, they did not alter r. 4 as to defendants. For some time there was a state of great confusion in the decisions. A series of decisions was given, which have now been held by this court to be erroneous and not to be followed, by courts which did F not apparently appreciate that the alteration in Ord. 16, r. 1, had made a difference. There were other decisions which proceeded on the fact that, while r. 1 as to plaintiffs had been altered, r. 4 as to defendants had not been altered. In my view, the later decisions of the court have made certain things clear. One thing which I think is now clear on the decisions of the court is what was stated by LORD STERNDALE, M.R., in two or three of the recent decisions—that joinder is not now a matter of right, but a G matter of discretion.

In *Thomas* v. *Moore* (3), the first of the three cases which I propose to refer to, PICKFORD, L.J., said ([1918] 1 K.B. at p. 565):

> "Whatever the law may have been at the time when *Smurthwaite* v. *Hannay & Co.* (2) was decided, joinder of parties and joinder of causes of action are discretionary H in this sense that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the court to do so if it thinks right."

That was decided in this court in two cases which he cites, and he refers to FRASER ON LIBEL (5th Edn.) 82–89, as stating the results correctly. *Thomas* v. *Moore* (3) was a case which would have horrified PARKE, B. Six plaintiffs sued eight defendants (i) for conspiracy which, of course, would bring in the eight defendants, and (ii) for eight separate I slanders, spoken by eight separate defendants, on eight different occasions. The jury found that four of the defendants had conspired and not the other four, but that each of the eight defendants had separately slandered, and assessed the damages for those separate slanders. An attempt was made to say that this was improper joinder and this court held—PICKFORD, L.J., giving the principal judgment—that the joinder was correct and that there was no absolute right to have the various defendants struck out. A very similar judgment was given by SWINFEN EADY, L.J., in *Re Beck, Attia* v. *Seed* (4), in the same year in which he adopted a passage of KENNEDY, L.J., and repeated it, that Ord. 16, r. 1, and Ord. 16, r. 4, must now be construed liberally.

A third judgment was given by this court in *Payne* v. *British Time Recorder Co., Ltd., and Curtis, Ltd.* (1), in which LORD STERNDALE, M.R., repeated what he had said in *Thomas* v. *Moore* (3), and I, after going through the decisions, said ([1921] 2 K.B. at p. 16):

> "The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing, to strike out one or more of the parties. It is impossible to lay down any rule as to how the discretion of the court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact, bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."

This being the way in which the court approaches these rules, the rule about consolidation is Ord. 49, r. 8:

> "Causes or matters pending in the same division may be consolidated by order of the court or a judge in the manner in use immediately before the 1st Nov., 1875, in the superior courts of common law."

In my view, "in the manner in use immediately before the 1st Nov., 1875," certainly does not refer to the subject-matter, because the rules have all been altered since Nov. 1, 1875, and matters may now be included in the same writ which could not have been included before Nov. 1, 1875. The rule, so far as it relates to subject-matter, must be interpreted in my view, in view of the change of rules with regard to parties and causes of action in Ord. 16. Bearing in mind LORD STERNDALE'S reported view that there is no absolute right to have a plaintiff, defendant, or cause of action struck out of a writ, but that it is always in the discretion of the court, it appears to me that r. 8 should be applied in the same way. No doubt, one of the matters that the court would take into consideration is whether, when it has consolidated, the plaintiffs and the causes of action would properly be in the same writ under Ord. 16, r. 1. I have no doubt in this case that if the two plaintiffs, appearing by the same counsel and the same solicitors, and complaining of the same libel, in which they are bracketed together as the Horwood-Childs-Bodkin methods, had, in the first instance, issued only one writ, the court would not have interfered with the joinder. A very similar sort of thing has happened in connection with matters which used to afford, and still no doubt afford, much occupation for the Chancery Division and that is actions by shareholders who desire to get out of the responsibilities attaching to their shares on the ground of misstatements in the prospectus. It used to be the case that 78 or 178 or 1078 writs were issued by the individual shareholders who claimed relief and there was a different question in each case, because in each case the particular plaintiff had to prove that he relied on the statements in the prospectus, a matter which sometimes very nearly brought the most promising action to grief in that Division. It is common knowledge that the well-known case of *Peek* v. *Derry* (5) very nearly never got beyond the court of first instance, because Sir Henry Peek could not be induced to say that he relied on the statements in the prospectus. It was only by the most skilful management of counsel that he was ultimately got to say that he took the shares relying on the statements in the prospectus. At that time one could not consolidate the actions; one did not consolidate the actions if one had any number of writs. Now, and I merely cite one case for example—*Drincqbier* v. *Wood* (6)—any number of plaintiffs claiming for damages on one prospectus may join their claims in the same action.

If, as I say, there is no doubt that, if these two plaintiffs had issued one writ and put their two claims for libel against the same defendants in respect of the same publication on that writ, the court would not have interfered, I can see no reason why the court should not exercise its powers under Ord. 49, r. 8, to consolidate. It appears to me that

A there is ample jurisdiction, and on the question of discretion, in the first place, I should not interfere with the view which the Master took and which the judge, we are told, would have taken but for the fact that he thought he had no jurisdiction, because of what is, without disrespect to counsel for the plaintiffs, the possibility which he has suggested, that the distinguished clients may be dissatisfied with their counsel or their counsel with each other, and may sever—a severance of which at present I see no signs—before B the case comes on for trial. It appears to me that it is far better that these proceedings, arising out of one libel against people who are bracketed together as responsible for the methods by the alleged libeller, should be tried in one action and I personally am unable to see any of the difficulties which at present occur to the momentarily timorous mind of counsel for the plaintiffs as things which are likely to happen at the trial. If the disaster should happen that Sir William Horwood quarrels with Sir Borlase Childs or C the plaintiffs' leading counsel quarrels with his junior, I hope that an application to the court on the ground that those quarrels are embarrassing to the respective plaintiffs and their legal advisers might lead to an order for separate trials, but I see no reason to contemplate these disastrous belligerent results. In these circumstances the court sets aside the order of the learned judge on the ground that he had jurisdiction to make the order, which he thought he had not, and adopts the view of the Master and the judge D with regard to the course which should be pursued with regard to consolidation, namely, that the actions should be consolidated. The costs must be the costs of the defendants in the cause in any event.

SANKEY, L.J.—I agree, but I think the matter under discussion is not very difficult. I start my judgment by referring to *Payne* v. *British Time Recorder Co., Ltd., and* E *Curtis, Ltd.* (1). That was a decision under a different order and rule, namely, Ord. 16, r. 4, but in the course of his judgment, LORD STERNDALE, M.R., said this ([1921] 2 K.B. at p. 10):

> "I think what FLETCHER MOULTON, L.J., said with regard to those decisions in *Compañia Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ltd.* (7) ([1910] 2 K.B. at p. 366) is correct:
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> F
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> > 'A number of decisions of the Court of Appeal have also been cited to us. I confess that I find it difficult to reconcile all those decisions, and so I am driven back upon the plain meaning of the words of r. 4, which, as I have said, appear to me clearly to contemplate such a case as the present.'"

Adopting those words, I, too, feel that I am driven back upon the plain meaning of the G words in Ord. 49, r. 8. They are as follows:

> "Causes or matters pending in the same division may be consolidated by order of the court or a judge in the manner in use immediately before the 1st Nov., 1875, in the superior courts of common law."

Those words appear to me to be not only very plain words, but very wide words, and I H should have thought, apart from any authority, that as those causes or matters under discussion were causes or matters pending in the same Division, there was power in the court, if it used its discretion properly, to consolidate them by a consolidation order. With regard to the cases immediately concerned, the words "may be consolidated in the manner in use immediately before the 1st Nov., 1875," have been dealt with in *Martin* v. *Martin & Co.* (8), where LORD ESHER, M.R., said ([1897] 1 Q.B. at p. 431):

I "But then it is said that the rule provides for the making of such an order 'in the manner in use before the commencement of the principal Act,' and that this means that the practice in force before the Judicature Acts is to be continued. In my opinion that is not so, and what is required is that if an order is made it should be treated in the same manner as before."

Dealing with one other case, *Forbes-Smith v. Forbes-Smith* (9), I think counsel for the appellants was right in saying that the report in 70 L.J.P. 61 probably is more accurate than the report in [1901] P. 258, in that passage in COLLINS, L.J.'s judgment which is at the bottom of p. 270 of the LAW REPORTS report. I should feel disposed to give the

largest possible meaning to the words "causes or matters pending in the same Division may be consolidated by order of the court or a judge," in Ord. 49, r. 8, and I think that an order to consolidate may be made when two or more actions are pending (i) between the same plaintiff and the same defendant; (ii) between the same plaintiff and different defendants; (iii) between different plaintiffs and the same defendants; and finally, (iv) between different plaintiffs and different defendants. That is stated in the current edition of the YEARLY PRACTICE, but it is said that the remainder of the note goes too far when it says "and whatever may be the nature of the claims involved in the actions." If one has to place some limitation on Ord. 49, r. 8, I think that the only limitation that can be placed upon it is to say that one can consolidate in the cases I have referred to, with regard to parties, and in cases where there is some common measure of fact in the two or more cases which it is desired to consolidate. Personally, I should have preferred to leave the whole matter to the discretion of the court, and the court would have had then no difficulty in dealing with the rather embarrassing cases suggested by counsel for the plaintiffs where there was a dispute between the parties with regard to the solicitor or counsel who ought to be employed, although in the present case I can conceive that there will be no dispute between the parties with regard to the counsel and solicitor to whom they have entrusted the conduct of their case.

That brings me to what I consider is the difficulty in the present case, and that is, the decision in *Lee* v. *Arthur* (10). With all deference to the reporter I cannot agree with the headnote in that case. The headnote says this (100 L.T. 61):

> "Rule 8 of Order 49 does not authorise actions commenced by the same plaintiff against different defendants and pending in the same Division to be consolidated at the instance of the plaintiff without the consent of all parties, unless the issues to be tried are precisely similar."

I do not think that the case is an authority for saying that the issues to be tried must be precisely similar. The judgment of COZENS-HARDY, M.R., gives rather meagre reasons, if I may be permitted to say so, for that decision. He asks (100 L.T. at p. 61): "Has the court in any case before this made an order for the consolidation of actions under similar circumstances?" and then adds, "I know of no principle to justify and no authority to support such an order as has been made here." It is true that that case may be distinguished by saying that the order applied for there was an order at the instance of the plaintiff. There may be some difference between an application, although I confess I do not see much, made by a plaintiff and made by a defendant when you consider that after all the plaintiff is the master of the litigation. He initiates it and the defendant is brought to the court at his instance. At any rate, speaking personally, I should not be prepared to extend the decision in *Lee* v. *Arthur* (10) to any further point than that for which it is an authority. Dealing with the circumstances of the present case, it seems to me that they are entirely different. The application here is made at the instance of defendants. There is no embarrassment with regard to the plaintiffs desiring to employ different solicitors or different counsel, either junior or leader, and, indeed, if you look at the two statements of claim, the actions are in respect of, I was going to say, one and the same libel. But it appears to me, at any rate, that this is exactly one of the cases contemplated by Ord. 49, r. 8, and I am confirmed in that opinion when I consider the very experienced master who made the order and that the learned judge to whom the appeal was made was anxious to make the order and would have made it had it not been that he thought that he had no jurisdiction to do so. Without laying down any definite rule with regard to what cases should or should not come within Ord. 49, r. 8, I, at any rate, say that in this case there seems to me to be every reason why the order should have been made, and the order seems to me to be one which is expressly provided for by the rule and order in question. For these reasons I agree with my Lord that the appeal should be allowed.

Appeal allowed.

Solicitors: *Winter & Plowman*; *Langton & Passmore*; *Theodore Goddard & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re HOPE'S WILL TRUST. HOPE *v.* THORP

[CHANCERY DIVISION (Eve, J.), March 8, 1929]

[Reported [1929] 2 Ch. 136; 98 L.J.Ch. 249; 141 L.T. 509]

Settlement—Entailed interest in personalty—Attempted creation by will of testator dying before 1926—*Power of court to authorise sale of settled chattels—Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 57 (1)—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 130.

By his will made in 1902 the testator gave all his real and personal estate to trustees as to silver and silver plate, certain letters and autographs and family portraits and prints and engravings, a mull formed of a ram's horn, and war medals, so far as the rules of law and equity would permit, on the like trusts as corresponded with the limitations of freehold, namely, to the use of the eldest son for life, with remainder to his first and other sons in tail male and remainders over in strict settlement, and as to residue on trust for conversion. He died in 1912, leaving three sons and four daughters. There was no real estate settled on the trusts expressed to be applicable to the above-mentioned chattels. On a summons asking whether the trustees could sell the chattels or might be authorised to do so, it was contended that the chattels were settled without reference to settled land on trusts creating entailed interests therein, and might be sold by the trustees with the consent of the tenant for life by virtue of s. 130 (5) of the Law of Property Act, 1925.

Held: as the testator died before 1926 there was no entailed interest created in the chattels and so s. 130 (5) did not apply, but, as a sale would be beneficial to all parties interested, the court had power to, and would, order a sale under s. 57 (1) of the Trustee Act, 1925.

Notes. As to the effect of pre-1926 testamentary dispositions of personal estate showing an intention to give an inheritable estate therein, see 34 HALSBURY'S LAWS (2nd Edn.) 345, para. 391; and for cases on the subject, see 44 DIGEST 939–951, *7952–8039*; as to post-1926 trusts of personalty to follow settled land and as to sale of chattels so settled, see 25 HALSBURY'S LAWS (2nd Edn.) 226–227, paras. 383, 384; as to the power of trustees to effect otherwise unauthorised transactions under a Court order, see 29 ibid., 769, para. 1072, and 33 ibid., 298, para. 521. For the Trustee Act, 1925, s. 57 (1), and the Law of Property Act, 1925, s. 130, see 26 and 20 HALSBURY'S STATUTES (2nd Edn.) 138 and 704 respectively.

Adjourned Summons by a trustee asking whether he and his fellow trustees of a will had power to sell certain family portraits settled by the will by virtue of the Law of Property Act, 1925, s. 130 (5), or otherwise, and if not, whether the court would authorise a sale under the Trustee Act, 1925, s. 57 (1).

By his will in 1902 the above-named testator appointed the plaintiff and two other executors and trustees thereof. He devised and bequeathed all his realty and personalty to them upon trust as to the following articles, namely, all silver and silver plate, a collection of letters and autographs, three family portraits, all family prints and engravings, a mull formed of a ram's horn, and a case of war medals, as nearly as the rules of law and equity would permit, to correspond with the limitations of freehold estate, namely, to the use of his eldest son, the plaintiff, for life, with remainder to the use of his first and other sons successively in tail male, with remainders over in strict settlement. All the residue was upon trust for sale, and, after payment of debts, funeral and testamentary expenses, duties, and legacies, the net residue was to be held upon the trusts therein mentioned, none of which were trusts similar to those above set out. The testator died in 1912, leaving three sons and four daughters. The plaintiff's eldest son, who would have been tenant in tail in case of there being such an interest in the chattels, was under the age of twenty-one years. The portraits by Hoppner, Raeburn, and Angelica Kauffmann were valued at about £2,250, and the remainder at about £800. The trustees wished to sell the portraits with the consent of the tenant for life, and accordingly took out this summons.

E. Beaumont for the tenant for life of the chattels and a trustee.
Peck for the other trustees and the beneficiaries.

By the Law of Property Act, 1925, s. 130:

"(1) An interest in tail or in tail male or in tail female or in tail special (in this Act referred to as 'an entailed interest') may be created by way of trust in any property, real or personal, but only by the like expressions as those by which before the commencement of this Act a similar estate tail could have been created by deed (not being an executory instrument) in freehold land, and with the like results, including the right to bar the entail either absolutely or so as to create an interest equivalent to a base fee, and accordingly all statutory provisions relating to estates tail in real property shall apply to entailed interests in personal property. Personal estate so entailed (not being chattels settled as heirlooms) may be invested, applied, and otherwise dealt with as if the same were capital money or securities representing capital money arising under the Settled Land Act, 1925, from land settled on the like trusts. (2) Expressions contained in an instrument coming into operation after the commencement of this Act, which in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act. . . . (5) Where personal chattels are settled without reference to settled land on trusts creating entailed interests therein, the trustees, with the consent of the usufructuary for the time being if of full age, may sell the chattels or any of them, and the net proceeds of any such sale shall be held in trust for and shall go to the same persons successively, in the same manner and for the same interests as the chattels sold would have been held and gone if they had not been sold, and the income of investments representing such proceeds of sale shall be applied accordingly. (6) An entailed interest shall only be capable of being created by a settlement of real or personal property or the proceeds of sale thereof (including the will of a person dying after the commencement of this Act) or by an agreement for a settlement in which the trusts to affect the property are sufficiently declared."

By the Trustee Act, 1925, s. 57:

"(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income. (2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order. (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust. (4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925."

EVE, J.—The summons raises a question whether the trustees of the testator's will have power to sell chattels settled by the will, and assuming that they have not such a power it asks that they may be empowered so to do by virtue of s. 57 of the Trustee Act. Having come to the clear conclusion that the sale is one which will be beneficial to all parties interested, and indeed is almost unavoidable, I find no difficulty in authorising

A the trustees to carry it out under s. 57, but inasmuch as counsel have been good enough to argue the question whether or not in the circumstances of this case, and in the events which have happened, there is a power under s. 130 of the Law of Property Act vested in the trustees to effect the sale, I think I ought to express my opinion thereon.

By s. 130 it is provided that an interest may be created by way of trust in any property real or personal, but only by the like expressions as those by which, before the commence-
B ment of the Act, a similar estate tail could be created by deed in freehold land, and so on. No one can read the testator's will, which is very elaborate, without seeing that he has in fact attempted to create an estate tail in certain chattels, but there is no settled real estate. It is an attempt to create an estate tail in chattels by appropriate language, but the result is not what the testator intended. The chattels in the event which has happened, his death before the coming into operation of the Act, would be
C vested absolutely in the person who he contemplated would be the first tenant in tail. It is suggested, however, that under this section the powers which the trustees would undoubtedly have possessed, had the testator died subsequent to the Act, are available with respect to these chattels. The subsection of s. 130 relied upon is sub-s. (5):

> "Where personal chattels are settled without reference to settled land [that is the
D case here] on trusts creating entailed interests therein, the trustees, with the consent of the usufructuary for the time being if of full age, may sell the chattels or any of them,"

and then it goes on to deal with what is to be done with the proceeds. The suggestion is that these chattels are settled without reference to settled land on trusts creating entailed interests therein and would seem to fall within that subsection. But one
E must go on and read sub-s. (6):

> "An entailed interest shall only be capable of being created by a settlement of real or personal property or the proceeds of sale thereof (including the will of a person dying after the commencement of this Act)."

But the fact is that there was no entailed interest created in the chattels. Had the
F testator died after Jan. 1, 1926, the result would have been different, but, in the event which happened, his attempt to create an entailed interest is not effectual.

In these circumstances, I do not think the trustees have any power under this section to sell the chattels. The order will be, according to the minutes as drawn, that the trustees, other than the plaintiff, not being less than two in number, may, with the consent of the plaintiff, sell the three portraits mentioned in the summons for a sum to
G be mentioned in a document to be initialled and retained by the master, with liberty to apply. The costs of all parties as between solicitor and client will be paid out of the proceeds of the property sold.

Solicitors: *Saxton & Morgan* for *Dickson, Archer & Thorp*, Alnwick.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

Re SULLIVAN. DUNKLEY *v.* SULLIVAN

[CHANCERY DIVISION (Maugham, J.), July 5, 1929]

[Reported [1930] 1 Ch. 84; 99 L.J.Ch. 42; 142 L.T. 187; 45 T.L.R. 590]

B

Administration of Estates—Distribution on intestacy—Rights of widow—Life interest in residue to widow with remainder to children—Testator dying without children—Disclaimer by widow of life interest—Direction to treat royalties as capital—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 33 (5), *s.* 49.

The testator, after making various bequests, bequeathed all his residuary personal estate, including royalties from certain musical copyrights (the whole being referred to in the will as "my trust fund"), to his trustees on trust to pay the income thereof to his wife for life and after her death for his children or remoter issue. He died in 1928 without having had children and was survived by his widow. On the question whether, if the widow disclaimed her life interest under the will, she would be entitled, as on an intestacy, to a life interest, and, in that event, whether the royalties received in respect of the copyrights would be income or capital,

C

D

Held: the words "subject to the provisions contained in the will" in the Administration of Estates Act, 1925, s. 49, were intended to show that the provisions of the Act relating to property not disposed of by will must take effect subject to all the provisions of the will, which remained operative and effective, and, therefore, the widow was entitled to a life interest in the residue including royalties receivable by the trustees.

E

Notes. As respects a person dying intestate after Jan. 1, 1953, s. 49 of the Administration of Estates Act, 1925, has been amended by the Intestates' Estates Act, 1952, s. 3.

Considered: *Re Thornber, Crabtree* v. *Thornber*, [1936] 2 All E.R. 1594. Referred to: *Re Fisher, Harris* v. *Fisher*, [1943] 2 All E.R. 615.

As to partial intestacy, see 16 HALSBURY'S LAWS (3rd Edn.) 407–409, paras. 783–784; F as to the residuary estate on intestacy, see ibid., 390–392, paras. 755–758; and for cases see 24 DIGEST (Repl.) 966–967, *9750–9752*.

For the Administration of Estates Act, 1925, s. 33 and s. 49, see 9 HALSBURY'S STATUTES (2nd Edn.) 734, 757.

Case referred to:

(1) *Howe* v. *Earl of Dartmouth, Howe* v. *Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, G L.C.; 44 Digest 197, *265*.

Adjourned summons.

The testator on the death of Sir Arthur Sullivan became entitled to certain musical copyrights. The testator married the defendant, E. M. Sullivan, on April 11, 1923, and on the same day made his will appointing the plaintiffs, E. G. Dunkley and G. H Russell, executors and trustees. Clause 4, cl. 6, and cl. 7 of his will provided as follows:

"4. I give devise and bequeath all my real and the residue of my personal property unto my trustees, upon trust, so long as any royalties shall be payable to me, to receive and invest the same in any securities hereinafter authorised, it being my wish that such royalties shall be treated as capital moneys.

I

6. My trustees shall invest the residue of the said moneys (which, with the royalties payable to me and the investments thereof respectively, are hereinafter called 'my trust fund') in their names or in or upon any of the investments hereinafter authorised.

7. My trustees shall pay the income of my trust fund to my wife during her life without power of anticipation during any coverture."

By cl. 8 there were ultimate trusts in favour of his children or remoter issue. The testator died on Nov. 26, 1928, without having had children. His net estate was

£35,405 6s. 5d. His next-of-kin were two sisters and a brother, all resident in the United States of America. This summons by the plaintiffs raised the question whether in the event of a disclaimer by the testator's widow of her life interest under cl. 7 of the will, she would be entitled, as on an intestacy, to a life interest in the residuary estate, receiving the royalties as income, contrary to cl. 4 of the will.

The Administration of Estates Act, 1925, provides:

"33 (5). The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman.

"49. Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications:—(a) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons; (b) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially."

Wilfrid Hunt for the plaintiffs.
Farwell, K.C., and *C. R. R. Romer* for the testator's widow.
Topham, K.C., and *Stamp* for the next-of-kin.

MAUGHAM, J., stated the facts and continued: As the testator died without having had children the ultimate gift fails, and, accordingly, there is an intestacy in respect of the capital of the residue. Also, as he died after the Administration of Estates Act, 1925, had come into force, the property, save in so far as effectively disposed of by the will, falls to be dealt with in the way directed by that Act. The question raised is whether the widow, if she disclaims her life interest under the will, will be entitled, on intestacy in respect of the residue, to a life interest in the residue, with the consequence that she will receive the royalties as income and that the special clause in the will directing that the royalties be treated as capital will not apply.

Royalties are primâ facie in the nature of wasting property, to which the rule in *Howe* v. *Earl of Dartmouth* (1) applies. Where there is a complete intestacy the provisions of s. 33 (5) of the Administration of Estates Act, 1925, will apply, with the result, in the present case, that the widow, having, if she disclaims, the interest of a tenant for life, will be entitled, assuming that cl. 6 and cl. 7 become inoperative, to the whole of the royalties, as that subsection excludes the rule in *Howe* v. *Earl of Dartmouth* (1). The only question is whether the disclaimer will render inoperative for all purposes that part of the will which it affects. In the present case, the provision as to royalties was inserted in the will in order to diminish the widow's life interest for the benefit of children who, in the event, do not exist. It was clearly not inserted in order to determine the nature of interests to be taken in property in respect of which he died, or might die, intestate. It is true that s. 49 of the Administration of Estates Act, 1925, might be construed to mean that the provisions of that Part of the Act shall have effect subject to the whole of the provisions in the will, including any provisions which become inoperative by virtue of disclaimer, lapse or other event. I am satisfied that that is not the true construction of the section. The phrase "subject to the provisions contained in the will" is intended to show that the provisions of the Act relating to property not

disposed of by will must take effect subject to all the provisions of the will which remain operative and effective. In my view, therefore, the widow, on executing a disclaimer, will be entitled to a life interest in the residue of the testator's estate, including royalties receivable by the trustees.

Solicitors: *Charles Russell & Co.*; *Piesse & Sons.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

JOHNSTONE *v.* JOHNSTONE

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Greer, L.JJ.), January 11, 1929]

[Reported [1929] P. 165; 98 L.J.P. 76; 140 L.T. 451]

Divorce—Costs—Security for wife's costs—Wife's petition for divorce—Husband's appearance under protest—Issue as to jurisdiction—Interlocutory proceeding—Other good cause for not ordering security—Inherent jurisdiction of court—Matrimonial Causes Rules, 1924 (*S.R. & O.* 1924 *No.* 126), *r.* 91.

On a petition for divorce by the wife, the husband entered an appearance under protest and an issue was directed to be tried as to the domicil of the parties. The wife thereupon took proceedings to determine what amount should be secured for costs to enable her to fight the issue, and for that purpose sought to have her bill of costs up to the setting down of the issue taxed and security for her costs attendant on the issue and down to the close of the pleadings. The registrar, after considering an affidavit by the husband on the question of domicil, refused to tax the bill or order security on the ground that the husband's affidavit showed good cause within the meaning of the Matrimonial Causes Rules, 1924, r. 91. On appeal to the judge, the registrar was directed to proceed with the taxation. On appeal to the Court of Appeal,

Held: the husband would be ordered to pay the wife's costs up to the setting down of the issue and to give security for her costs attendant on the issue and down to the close of the pleadings on the ground (i) (per Lord Hanworth, M.R., and Lawrence, L.J.) that the court had jurisdiction to make the order under r. 91; (ii) (per Greer, L.J.) that the court had inherent jurisdiction to make the order derived from the practice of the old ecclesiastical courts.

Smith v. *Smith* (1), [1923] P. 128, approved.

Notes. Rule 91 of the Matrimonial Causes Rules, 1924, has been replaced by r. 67 of the Matrimonial Causes Rules, 1957.

Considered: *Gower* v. *Gower*, [1950] 1 All E.R. 27. Referred to: *King* v. *King*, [1943] 2 All E.R. 253; *Roman* v. *Roman*, [1947] 1 All E.R. 434; *Brightstein* v. *Brightstein*, [1947] 2 All E.R. 121.

As to security for costs, see 12 Halsbury's Laws (3rd Edn.) 357–361, and for cases see 27 Digest (Repl.) 504–510. For the Matrimonial Causes Rules, 1957, r. 67, see 10 Halsbury's Statutory Instruments.

Cases referred to:

(1) *Smith* v. *Smith*, [1923] P. 128; 92 L.J.P. 107; 129 L.T. 187; 39 T.L.R. 294; 27 Digest (Repl.) 476, *4130*.

(2) *Gran* v. *Gran* (1921), The Times, Feb. 15, Mar. 1 and Mar. 19.

(3) *Williams* v. *Williams*, [1929] P. 114; 98 L.J.P. 40; 140 L.T. 383; 45 T.L.R. 157; 73 Sol. Jo. 77; 27 Digest (Repl.) 505, *4484*.

(4) *Graham* v. *Graham*, [1923] P. 31; 92 L.J.P. 26; 128 L.T. 639; 39 T.L.R. 139; 67 Sol. Jo. 316; 27 Digest (Repl.) 468, *4032*.

(5) *Beevor* v. *Beevor* (1809), 3 Phillim. 261; 161 E.R. 1319; 27 Digest (Repl.) 567, *5211.*

Appeal by the husband against an order by HILL, J., that the registrar proceed with the taxation of the wife's costs of the issue as to domicil.

The facts are stated in the judgment of the Master of the Rolls.

W. O. Willis, K.C., and *T. F. Davis*, for the husband, referred to *Gran* v. *Gran* (2), *Williams* v. *Williams* (3), *Graham* v. *Graham* (4), and *Smith* v. *Smith* (1).

H. D. Grazebrook for the wife.

LORD HANWORTH, M.R.—This appeal, which raises a point of interest and importance with regard to the provisions that refer to a wife's costs in divorce proceedings, fails.

The petitioner is Stella Ethel Johnstone, the wife, and the respondent Clarence Nathaniel Johnstone, the husband. In her petition, the wife charges her husband with adultery. We are told that both the parties are nationals of the United States of America, and were married in the States. After their marriage they lived over here, the husband being a music hall entertainer and engaged here in that capacity. The wife has gone back to New York. The husband, who is a foreigner, has obtained the leave of the government to reside over here under licence, and his present licence will not expire until Dec. 31 of the present year. The marriage took place in New York on June 25, 1914, the husband is alleged by the wife to have been unfaithful, and the wife claims divorce. The husband has protested against the jurisdiction of this English court, and has entered an appearance under protest. This he is enabled to do by r. 16 (B) of the Matrimonial Causes Rules, 1924, which provides:

> "The appearance may be under protest or limited to any proceeding in the cause in respect of which the party shall have received notice to appear. Provided that (a) any appearance under protest shall state concisely the grounds of protest, and (b) the party appearing under protest shall forthwith proceed by summons to obtain directions as to the determination of the question or questions arising by reason of such limited appearance, and in default of so proceeding shall be deemed to have entered an unconditional appearance. Directions to be given upon an appearance under protest may provide for the trial of a preliminary issue with or without stay of proceedings in the cause or for determination of the matters in question at the hearing of the cause."

An appearance having been entered under that rule, steps were taken by the husband to determine whether his objection was a valid one, and, on Mar. 27, 1928, pursuant to an order of the registrar dated Feb. 7, 1928, an issue was directed to be tried which was in these words:

> "Whereas Clarence Nathaniel Johnstone claims that he was not domiciled in England at the date of the institution of this suit, and whereas the defendant alleges that he was so domiciled, and whereas it was ordered on the 7th day of February, 1928, that an issue be tried as to the domicil of the parties, therefore let the same be tried."

It is to be noted that, in that issue, the husband is made the plaintiff although the petition was presented by the wife. That was no doubt done in consequence of the terms of r. 16. The husband has now become the moving spirit in the issue as to domicil, and the question as to the costs which have been raised in that issue is now the subject of this appeal.

On April 4, the issue was set down for trial. The wife then took proceedings to have it determined what amount should be secured for costs to enable her to fight the issue. The matter came before the registrar on Oct. 30, 1928, and on the defendant's bill of costs to be taxed up to the date of setting down the issue the registrar made the following endorsement:

> "Solicitors for both parties. Solicitor for respondent asked me not to tax bill or give security in order that he might appeal to the judge as to jurisdiction. I feel

bound by the cases of *Gran* v. *Gran* (2), *Graham* v. *Graham* (4), *Smith* v. *Smith* (1), and said that I was ready to tax bill and order security, but allowed an appeal before doing so." A

The matter went before the judge, and, on Nov. 26, he dismissed the appeal with costs. Further proceedings took place, and, on Dec. 5, a further endorsement was made by the registrar which took into account an affidavit which had been filed by the husband which went to the merits of the case in which he stated that he was born in New York in 1885, and by birth and parentage was an American citizen; that he was married to the defendant in New York in 1914, and lived in America with her until May, 1924, when he came to England never having previously been out of the United States. He further stated that he came to England to fulfil theatrical and music hall engagements; that in July, 1924, his wife joined him in England, but that owing to differences she returned to New York in October, 1924, where she had since resided in a flat. Except for a short visit to America in June, 1927, he had been in England and France since June, 1924. He had never applied for naturalisation in England, where he had been subject to all restrictions applicable to aliens. His permit expired in December, 1929. He had no intention permanently to remain in England. Since October, 1926, he had allowed his wife £10 per week. His wife could continue the divorce proceedings which a short time ago she had commenced against him in New York. The registrar was impressed by the facts so stated in that affidavit and made this endorsement on the summons: "I refuse to tax bill or order security on ground that the affidavit of plaintiff handed in shows good cause within r. 91." B C D

From that order there was an appeal to the judge who, on Dec. 19, made this order: "On the appeal of the wife from the refusal of the registrar to proceed with taxation I do order that the appeal be allowed," and he directed the registrar to proceed with the taxation of the costs but gave leave to appeal. It is from that order that the present appeal is brought. E

The case may be put quite shortly thus: The husband says: "I have objected altogether to the jurisdiction and it may be found I am quite right, and if there is no jurisdiction I ought not to be hampered by being required to provide now for the costs my wife may incur in fighting this issue." F

There is weight in that argument. But as I have already pointed out, the right to enter an appearance under protest connotes a duty to take proceedings to establish the validity of the plea under which the husband enters an appearance under protest. The husband is the moving party in this issue. It is, however, only an issue, but I do not think that this makes any difference, for the word "cause" as defined in s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, now includes "any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding by the Crown." G

But the husband also says that there is no power under r. 91 to require any taxation or security for costs against him. I may point out that the costs are different in the Divorce court from what they are in other courts.

Going back to a case in 1809, Sir John Nicholl, Dean of Arches, in *Beevor* v. *Beevor* (5) says (3 Phillim. 261): H

> "The general rule is, that the wife has a right to have her costs taxed at all times. The reason is because there are no other means of obtaining justice, since the marriage gives all the property to the husband. The rule, however, is not universal —the exception is where the reason fails—where the wife has separate property of her own: for then marriage does not give all the property to the husband." I

The old rules of the Ecclesiastical Courts were preserved by s. 22 of the Matrimonial Causes Act, 1857, and are now reproduced by s. 103 of the Supreme Court of Judicature (Consolidation) Act, 1925. The result is that the old rule as to the costs of the spouses is still applicable to costs in the Divorce Division, and the husband has to make provision for costs of the wife to enable her to contest the issue. It may be said that there the wife is the petitioner, but in this issue the husband has now become the plaintiff. I doubt, however, whether that is of great importance. We have to determine really

A what is the meaning of r. 91 of the Matrimonial Causes Rules, 1924, which deals with the wife's costs, and under which the wife is entitled to have the means of determining the issue raised, and I think that, whether the husband is the plaintiff on the issue or the respondent to a petition, the wife's costs have still to be provided for by the husband that she may present her case to the court. Rule 91 is a long rule, but, when carefully looked at, I think it justifies the order made by the judge.

B There are several stages in a petition. There is first the petition, then the answer, finally the pleadings are closed and then the matter set down for trial. The costs of the wife may be separated into three stages: (i) preliminary; (ii) down to the setting down for hearing and (iii) trial. There is here an additional stage, by virtue of the protest of the husband to the jurisdiction. That issue could have been raised by Act on Petition, but it was not so raised but by a separate issue.

C Rule 91 of the Matrimonial Causes Rules, 1924, provides:

> "After the registrar's certificate that the pleadings are in order has been given [those words do not apply in this case] or at an earlier stage of a cause by order of the judge or of a registrar to be obtained on summons, a wife who is petitioner or has filed an answer may file her bill or bills of costs for taxation as against her husband."

D It appears to me, therefore, on careful consideration that these words do make provision not only for costs incurred up to the setting down but for costs incurred in the future by estimation. Here an application is made for the costs of the wife to include the costs of the issue. It is said, however, that if the issue is decided in favour of the wife, the pleadings will then have to be closed, and the case set down for trial. The rule continues:

E

> ". . . and the registrar to whom such bills of costs are referred for taxation shall ascertain what is a sufficient sum of money to be paid into court or what is sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause, and may thereupon unless the husband shall prove to the satisfaction of the registrar that the wife has sufficient separate estate or show other
> F good cause issue an order upon the husband to pay her costs up to the setting down of the cause and to pay into court or secure the costs of the hearing within a time to be fixed by the registrar. The registrar may in his discretion order the costs up to the setting down to be paid into court."

The last lines of the rule enable the costs up to the setting down to be paid into court and, therefore, the order to be made is one for the husband to pay into court the costs
G of the wife already incurred and to secure the costs to the hearing. It is meant to secure the costs of the wife in futurity. As the intention is that provision should be made for the costs to be incurred, I see no difficulty in taking the words of the rule as covering the costs of, and incidental to, interlocutory matters that may be incurred before the hearing of the cause, and the registrar with regard to this may make an estimate, when not already incurred. By reason of the power given to the registrar to order costs to be
H paid into court, it appears to me that we can safeguard the husband in case the wife is not, in the result, held to be entitled to costs. Therefore, the words of the rule give power to the court to estimate the sums required by the wife for costs up to the setting down of the cause, and as to the costs of the hearing an estimate may be made.

It appears to me that HILL, J., has rightly determined the powers exercised under
I r. 91, and I agree with what he said in *Smith* v. *Smith* (1) where, referring to *Graham* v. *Graham* (4), he said ([1923] P. at p. 129):

> "I think this sufficiently shows that the court has jurisdiction to order security notwithstanding that the husband is raising a question as to the jurisdiction of the court to entertain the suit. I think that an Act on Petition is a stage in the original suit within Divorce Rule 158, and comes within the general rule about costs."

Therefore the order is right and direction should be given to the registrar to tax the costs in so far as they have already been incurred, and to estimate the costs which will be incurred down to the close of the pleadings if the proceedings get so far, and that

payment into court should be made without prejudice to the determination by the judge at the trial whether the wife is entitled to have part of the money paid in. The appeal must be dismissed.

LAWRENCE, L.J.—I agree. The first point taken by the husband is that he cannot be required to pay or secure his wife's costs until the question of jurisdiction has been decided. HILL, J., following his own decision in *Smith* v. *Smith* (1), has held that the court has power under r. 91 to make the order notwithstanding that the husband has objected to the jurisdiction of the court. In my judgment, the learned judge was right. The husband entered an appearance to his wife's petition under protest, and, in accordance with r. 16 (B) of the Matrimonial Causes Rules, 1924, applied by summons in the cause to have the question of jurisdiction determined. The registrar thereupon directed an issue as to the domicil of the parties to be tried. The wife then applied for security for costs under r. 91.

It appears to me that, as the proceedings so initiated by the husband are proceedings which would not finally dispose of the cause originated by the wife's petition if the issue as to domicil were decided in the wife's favour, they are proceedings of an interlocutory nature in the cause, and that the costs of the issue are costs of and incidental to the hearing of the cause within the meaning of r. 91. It is said, however, that, as the costs have not yet been incurred and as no certificate has yet been made by the registrar that the pleadings are in order, the wife's application for security is premature. In my opinion, this contention cannot prevail in face of the express words of r. 91, under which the wife, by order of the judge or registrar, can obtain security at an earlier stage of the cause than the registrar's certificate that the pleadings are in order.

As under that rule an order may be made, before the pleadings are certified to be in order, to cover all the costs of and incidental to the hearing of the cause, I am of opinion that, in the present case, an order could now be made to cover all the wife's costs, or, on the principle that the greater includes the less, the order could be confined to the wife's costs of the issue which has been ordered to be tried, or to the wife's costs down to the hearing of the cause. I am further of opinion that, on a wife's application at an earlier stage, the judge or the registrar has power to order security, notwithstanding that the proceedings which have induced the wife to make the application at that stage are proceedings initiated by the husband for the purpose of ascertaining whether the court has jurisdiction to entertain the cause. This procedure seems to have been adopted in *Smith* v. *Smith* (1) and also in *Graham* v. *Graham* (4), and I think that there is ample jurisdiction under r. 91 to make such an order in the present case, either covering the whole of the wife's costs, or such portion as may be deemed at this stage to be proper to be covered, founded on her costs already incurred and an estimate of her costs to be incurred in the future.

The last point to be taken on behalf of the husband was that the registrar had exercised his discretion, and, it not having been shown that he had exercised it on any wrong principle, the judge ought not to have overruled his decision. I agree what great weight ought always to be given to the discretion of the registrar, and that such discretion ought not to be interfered with unless the court comes to the conclusion that it was wrongly exercised. It was not suggested in this court that the husband had proved that the wife had sufficient separate estate. The registrar, however, came to the conclusion that the husband by his affidavit had shown "other good cause" why no order should be made. I cannot take this view. The bulk of the affidavit deals with matters directly relating to the issue as to domicil, which has been ordered to be tried on viva voce evidence, and I think that the wife was rightly advised not to file a contentious affidavit in answer to these matters. There are only two other statements in the affidavit to which I need refer. The first of these is that the husband had warned the wife that, if she took proceedings in England, he would object to the jurisdiction of the court, and the second is that the wife had commenced proceedings against her husband for divorce in America. Neither of these statements in any way proves that the wife's petition is frivolous or vexatious, and, in my opinion, they form no ground on which the registrar could properly hold that good cause had been shown why the

order for security should not be made. In the result, I think that the learned judge was right, and that this appeal should be dismissed. I agree with the Master of the Rolls that the sum to cover the wife's costs ought to be paid into court.

GREER, L.J.—After much doubt I have come to the conclusion that this appeal must be dismissed. I differ entirely, however, from the other members of the court as to the construction to be placed on r. 91. In my judgment, on the true construction of that rule, it does appear that the rule was not intended to cover a case of this kind, and the rule does not give power to order security for the wife's costs of an issue as to domicil. But I think that the court has inherent jurisdiction to deal with the costs of an issue of this kind, such jurisdiction being derived from the practice of the old ecclesiastical courts. Consequently, in my opinion, there was jurisdiction in the registrar to make the order which at first he refused to make. As to the contention that there was "good cause" shown within r. 91, assuming that that rule applied, and that the registrar had properly exercised his jurisdiction, I am of opinion that the registrar was unduly influenced by the affidavit put before him by the husband. In my judgment, no great harm will be done to the husband if the order is made, as the money will be paid into court.

Appeal dismissed.

Solicitors: *Bulcraig & Davis*; *Richard Brooks & Son.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

EDWARDS *v.* ATTORNEY-GENERAL FOR CANADA

[PRIVY COUNCIL (Lord Sankey, L.C., Lord Darling, Lord Merrivale, Lord Tomlin and Sir Lancelot Sanderson), July 22, 23, 25, 26, October 18, 1929]

[Reported [1930] A.C. 124; 99 L.J.P.C. 27; 142 L.T. 98; 46 T.L.R. 4; 73 Sol. Jo. 711]

Canada—Senate—Eligibility of women to be summoned to and become members of—"Persons"—British North America Act, 1867 (30 & 31 *Vict.*, *c.* 31), *s.* 24.

Statute—Construction—"Person"—Woman—Eligibility to be member of Senate of Canada—British North America Act, 1867 (30 & 31 *Vict.*, *c.* 31), *s.* 24.

The word "persons" in s. 24 of the British North America Act, 1867, includes members both of the male and female sex.

Decision of the Supreme Court of Canada ([1928], S.C.R. 276) reversed.

Notes. Applied: *British Coal Corpn.* v. *R.*, [1935] All E.R.Rep. 139.

As to general principles of constitutional interpretation in Canada, see 5 HALSBURY'S LAWS (3rd Edn.) 496; and for cases see 8 DIGEST (Repl.) 776 et seq.; as to the interpretation of "person" in a statute, see 31 HALSBURY'S LAWS (2nd Edn.) 474, para. 585, text and note (q), and 476, para. 588.

Cases referred to:

(1) *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339; 38 T.L.R. 759; sub nom. *Re Lady Rhondda's Petition*, 92 L.J.C.P. 81; 128 L.T. 155; 66 Sol. Jo. 630, H.L.; 36 Digest (Repl.) 364, *7*.

(2) *Chorlton* v. *Lings* (1868), L.R. 4 C.P. 374; 1 Hop. & Colt. 1; 38 L.J.C.P. 25; 19 L.T. 534; 32 J.P. 824; 17 W.R. 284; 37 Digest 36, *68*.

(3) *R.* v. *Harrald* (1873), L.R. 8 Q.B. 418; 42 L.J.Q.B. 211; 28 L.T. 767; 38 J.P. 40; 21 W.R. 910; 20 Digest 133, *1068*.

(4) *Beresford-Hope* v. *Lady Sandhurst* (1889), 23 Q.B.D. 79; 58 L.J.Q.B. 316; 61 L.T. 150; 37 W.R. 548; 5 T.L.R. 472; sub. nom. *Hope* v. *Lady Sandhurst*, 53 J.P. 805, C.A.; 13 Digest (Repl.) 212, *330*.

(5) *De Souza* v. *Cobden*, [1891] 1 Q.B. 687; 60 L.J.Q.B. 533; 65 L.T. 130; 55 J.P. 565; 39 W.R. 454; 7 T.L.R. 441, C.A.; 13 Digest (Repl.) 212, *331*.

(6) *Olive* v. *Ingram* (1739), 7 Mod. Rep. 263; 2 Stra. 1114; 87 E.R. 1230; 19 Digest 301, *983*.

(7) *R.* v. *Stubbs* (1788), 2 Term. Rep. 395.

(8) *Bebb* v. *Law Society*, [1914] 1 Ch. 286; 83 L.J.Ch. 363; 110 L.T. 353; 30 T.L.R. 179; 58 Sol. Jo. 153, C.A.; 42 Digest 22, *6*.

(9) *Nairn* v. *St. Andrews University*, [1909] A.C. 147; 78 L.J.P.C. 54; 100 L.T. 96; 25 T.L.R. 160, H.L.; 42 Digest 644, *498*.

(10) *Stradling* v. *Morgan* (1560), 1 Plowd. 201; 75 E.R. 308; 42 Digest 634, *376*.

(11) *Herron* v. *Rathmines and Rathgar Improvement Comrs.*, [1892] A.C. 498; 67 L.T. 658, H.L.; 42 Digest 613, *134*.

(12) *R.* v. *West Riding of Yorkshire County Council*, [1906] 2 K.B. 676; 95 L.T. 248; 70 J.P. 451; 22 T.L.R. 783; 4 L.G.R. 992; sub nom. *R.* v. *Yorkshire (W.R.) County Council, Ex parte A.-G. and Board of Education*, 75 L.J.K.B. 933, C.A.; reversed sub nom. *A.-G.* v. *West Riding of Yorkshire County Council*, [1907] A.C. 29; 76 L.J.K.B. 97; 71 J.P. 41; 95 L.T. 845; 23 T.L.R. 171; 5 L.G.R. 89, H.L.; 42 Digest 613, *135*.

(13) *St. Catharines' Milling and Lumber Co.* v. *R.* (1888), 14 App. Cas. 46; 58 L.J.P.C. 54; 60 L.T. 191; 5 T.L.R. 125, P.C.; 8 Digest (Repl.) 780, *437*.

(14) *Brophy* v. *A.-G. of Manitoba*, [1895] A.C. 202; 64 L.J.P.C. 70; 72 L.T. 163; 11 T.L.R. 198; 11 R. 385, P.C.; 8 Digest (Repl.) 732, *267*.

Appeal by special leave from the judgment of the Supreme Court of Canada pronounced on April 24, 1928, on a reference by His Excellency the Governor in Council for hearing and consideration by the court, pursuant to the provisions of s. 60 of the Supreme Court Act, of the following question relative to the eligibility of women to be summoned to a place in the Senate or Upper House of the Parliament of Canada: "Does the word 'person' in s. 24 of the British North America Act, 1867, include female persons?"

On Aug. 27, 1927, the appellants petitioned the Governor-General in Council to refer to the Supreme Court certain questions touching the powers of the Governor-General to summon female persons to the Senate, and on Oct. 19, 1927, the Governor-General in Council referred to the Supreme Court the aforesaid question. The facts are stated in the opinion of the Privy Council.

Section 24 of the British North America Act is as follows:

"The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator."

Section 23, which specified the qualifications of a Senator, provides:

"The qualifications of a senator shall be as follows: (1) He shall be of the full age of thirty years; (2) he shall be either a natural-born subject of the Queen or a subject of the Queen naturalised by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union; (3) he shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in franc-alleu or in roture, within the province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same; (4) his real and personal property shall be together worth four thousand dollars over and above his debts

and liabilities; (5) he shall be resident in the province for which he is appointed; (6) in the case of Quebec he shall have his real property qualifications in the electoral division for which he is appointed, or shall be resident in that division."

The Supreme Court (ANGLIN, C.J., DUFF, MIGNAULT, LAMONT, and SMITH, JJ.) having answered the question in the negative, the petitioners appealed. The case is reported [1928] S.C.R. 276.

Rowell, K.C., and *Frank Gahan* for the appellants.

Lymburn, K.C., and *Rowell, K.C.*, for the respondent, the Attorney-General for Alberta.

Lafleur, K.C., *Geoffrey Lawrence, K.C.*, and *T. Mathew* for the respondent, the Attorney-General for Canada.

Their Lordships took time for consideration.

Oct. 18.—The opinion of their Lordships was read by

LORD SANKEY, L.C.—By s. 24 of the British North America Act, 1867, it is provided that

> "The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator."

The question at issue in this appeal is whether the words "qualified persons" in that section include a woman, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada.

Of the appellants, Henrietta Muir Edwards is the Vice-President for the province of Alberta of the National Council of Women for Canada; Nellie L. McClung and Louise C. McKinney were for several years members of the Legislative Assembly of the said province; Emily F. Murphy is a police magistrate in and for the said province; and Irene Parlby is a member of the Legislative Assembly of the said province and a member of the Executive Council thereof. On Aug. 29, 1927, the appellants petitioned the Governor-General in Council to refer to the Supreme Court certain questions touching the powers of the Governor-General to summon female persons to the Senate, and on Oct. 19, 1927, the Governor-General in Council referred to the Supreme Court the aforesaid question. The case was heard before ANGLIN, C.J., DUFF, J., MIGNAULT, J., LAMONT, J., and SMITH, J., and upon April 24, 1928, the court answered the question in the negative; the question being understood to be "Are women eligible for appointment to the Senate of Canada?" The Chief Justice, whose judgment was concurred in by LAMONT, J., and SMITH, J., and substantially by MIGNAULT, J., came to this conclusion upon broad lines mainly because of the common law disability of women to hold public office and from a consideration of various cases which had been decided under different statutes as to their right to vote for a member of Parliament. DUFF, J., on the other hand, did not agree with this view. He came to the conclusion that women are not eligible for appointment to the Senate on the narrower ground that on a close examination of the British North America Act, 1867, the word "persons" in s. 24 is restricted to members of the male sex. The result therefore of the decision was that the Supreme Court was unanimously of opinion that the word "persons" did not include female persons, and that women are not eligible to be summoned to the Senate.

Their Lordships are of opinion that the word "persons" in s. 24 does include women, and that women are eligible to be summoned to and become members of the Senate of Canada. In coming to a determination as to the meaning of a particular word in a particular Act of Parliament it is permissible to consider two points, namely: (i) The external evidence derived from extraneous circumstances such as previous legislation and decided cases; (ii) the internal evidence derived from the Act itself. As the learned counsel on both sides have made great researches and invited their Lordships to consider the legal position of women from the earliest times, in justice to their argument they propose to do so and accordingly turn to the first of the above points, namely: (i) The external evidence derived from extraneous circumstances.

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary. Such exclusion is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms, and women did not bear arms. "Nihil autem neque publicæ neque privatæ rei, nisi armati, agunt": (Tacitus Germania, C. 13). Yet the tribes did not despise the advice of women. "Inesse quin etiam sanctum aliquid et providum putant; nec aut consilia earum aspernantur, aut responsa negligunt": (Germania C. 8). The likelihood of attack rendered such a proceeding unavoidable, and after all what is necessary at any period is a question for the times on which opinion grounded on experience may move one way or another in different circumstances. This exclusion of women found its way into the opinions of the Roman jurists, Ulpian (A.D. 211) laying it down. "Feminæ ab omnibus officiis civilibus vel publicis remotæ sunt: (Dig. L. 17, 2). The barbarian tribes who settled in the Roman Empire, and were exposed to constant dangers, naturally preserved and continued the tradition.

In England no woman under the degree of a queen or a regent, married or unmarried, could take part in the government of the State. A woman was under a legal incapacity to be elected to serve in Parliament, and even if a peeress in her own right she was not, nor is, entitled as an incident of peerage to receive a writ of summons to the House of Lords. Various authorities are cited in the recent case of *Viscountess Rhondda's Claim* (1), where it was held that a woman was not entitled to sit in the House of Lords. Women were, moreover, subject to a legal incapacity to vote at the election of members of parliament (COKE, 4 Inst. p. 5; *Chorlton* v. *Lings* (2), or of town councillors (*R.* v. *Harrald* (3)), or to be elected members of the county council (*Beresford-Hope* v. *Lady Sandhurst* (4)). They were excluded by the common law from taking part in the administration of justice either as judges or as jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy: (COKE, 2 Inst. 119; 3 Bl. Comm. 362). Other instances are referred to in the learned judgment of WILLES, J., in *Chorlton* v. *Lings* (2). No doubt, in the course of centuries there may be found cases of exceptional women and exceptional instances, but as LORD ESHER, M.R., said in *De Souza* v. *Cobden* (5) ([1891] 1 Q.B. at p. 691):

> "By the common law of England women are not in general deemed capable of exercising public functions, although there are certain exceptional cases where a well-recognised custom to the contrary has become established."

An instance may be referred to in the case of women being entitled to act as churchwardens and as sextons, the latter being put upon the ground that a sexton's duty was in the nature of a private trust (*Olive* v. *Ingram* (6)); also of being appointed as overseer of the poor (*R.* v. *Stubbs* (7)). The tradition existed till quite modern times: see *Bebb* v. *Law Society* (8), where it was held by the Court of Appeal that by inveterate usage women were under a disability by reason of their sex to become attorneys or solicitors.

The passing of Lord Brougham's Act in 1850 (13 & 14 Vict., c. 21) does not appear to have greatly affected the current of authority. Section 4 provided that in all acts words importing the masculine gender shall be deemed and taken to include female unless the contrary as to gender is expressly provided. The application and purview of that Act came up for consideration in *Chorlton* v. *Lings* (2), where the Court of Common Pleas was required to construe a statute passed in 1861, which conferred the parliamentary franchise on every man possessing certain qualifications and registered as a voter. The chief question discussed was whether by virtue of Lord Brougham's Act the words "every man" included women. BOVILL, C.J., having regard to the subject-matter of the statute and its general scope and language and to the important and striking nature of the departure from the common law involved in extending the franchise to women, declined to accept the view that Parliament had made that change by using the term "man" and held that the word was intentionally used expressly to designate the male sex. WILLES, J., said (L.R. 4 C.P. at p. 387):

"It is not easy to conceive that the framer of that Act, when he used the word

A 'expressly,' meant to suggest that what is necessarily or properly implied by language is not expressed by such language."

Great reliance was placed by the respondents to this appeal on that decision, but in our view it is clearly distinguishable. The case was decided on the language of the Representation of the People Act, 1867, which provided that "every man" with certain B qualifications and "not subject to any legal incapacity" should be entitled to be registered as a voter. Legal incapacity was not defined by the Act, and consequently reference was necessary to the common law disabilities of women.

A similar result was reached in *Nairn* v. *St. Andrews University* (9), where it was held under s. 27 of the Representation of the People (Scotland) Act, 1868, which provided that every person whose name is for the time being on the register of the general council C of such university shall, being of full age and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university, that the word "person" did not include women, but the Lord Chancellor, LORD LOREBURN, referred to the position of women at common law, and pointed out that they were subject to a legal incapacity. Both in this case and in *Viscountess Rhondda's Claim* (1) the various judgments emphasise the fact that the legislature in D dealing with the matter cannot be taken to have departed from the usage of centuries, or to have employed loose and ambiguous words to carry out so momentous and fundamental a change. The judgment of the Chief Justice of the Supreme Court of Canada refers to and relies on these cases, but their Lordships think that there is great force in the view taken by DUFF, J., with regard to them, when he says that s. 24 of the British North America Act, 1867, must not be treated as an independent enactment. E The Senate, he proceeds, is part of a parliamentary system, and in order to test the contention based on this principle that women are excluded from participating in working the Senate or any other institution set up by the Act, one is bound to consider the Act as a whole and its bearings on this subject of the exclusion of women from public office and place.

Their Lordships now turn for a moment to the special history of the development of F Canadian legislature as bearing on the matter under discussion. The province of Canada was formed by the Union under the Act of Union, 1840, of the two provinces of Upper and Lower Canada respectively, into which the province of Quebec as originally created by the Royal Proclamation of Oct. 7, 1763, and enlarged by the Quebec Act, 1774, had been divided under the Constitutional Act, 1791. In the province of Quebec from its first establishment in 1763 until 1774, the government was G carried on by the Governor and the Council, composed of four named persons and eight other "persons" to be chosen by the Governor from amongst the most considerable of the inhabitants or of other persons of property in our said province. The Quebec Act, 1774, entrusted the government of the province to a Governor and Legislative Council of such "persons" resident there, not exceeding twenty-three, nor less than seventeen, as His Majesty shall be pleased to appoint. The Constitutional Act, H 1791, on the division of the province of Quebec into two separate provinces to be called the provinces of Upper and Lower Canada, established for each province a legislature composed of the three estates of Governor, Legislative Council and Assembly empowered to make laws for the peace, order and good government of the provinces. The Legislative Council was to consist of a sufficient number of discreet and proper "persons" not less than seven for Upper Canada and fifteen for Lower Canada. Under the Act I of Union, 1840, these two provinces were reunited so as to constitute one province under the name of the province of Canada and the Legislative Council was to be composed of such "persons" being not fewer than twenty as Her Majesty shall think fit. In 1865 the Canadian Legislature under the authority of the Imperial Act passed an Act which altered the constitution of the Legislative Council by rendering the same elective. The new constitution as thus altered continued till the Union of 1867.

It will be noted that in all the Acts the word "persons" is used in respect of those to be elected members of the Legislative Council, and there are no adjectival phrases so qualifying the word as to make it necessarily refer to males only. In Quebec, just as in

England, there can be found cases of exceptional women and exceptional instances. For example, in certain districts, namely at Trois Rivières in 1820, women apparently voted, while in 1828 the returning officer in the constituency of the Upper Town of Quebec refused to receive the votes of women. In 1834 the Canadian Parliament passed an Act of Parliament excluding women from the vote, but two years later the Act was disallowed because the Imperial Government objected to another section in it. The matter, however, was not left there and in 1849 by a statute of the province of Canada (12 Vict., c. 27, s. 46) it was declared and enacted that no woman is or shall be entitled to vote at any election, whether for any county or riding, city or town, of members to represent the people of this province in the Legislative Assembly thereof.

The development of the maritime provinces proceeded on rather different lines. From 1719 to 1758 the Provincial Government of Nova Scotia consisted of a Governor and a Council which was both a legislative and executive body composed of such fitting and discreet "persons" not exceeding twelve in number, as the Governor should nominate. A General Assembly for the province was called in 1757, and thereafter the Legislature consisted of a Governor and Council and General Assembly. In 1838 the Executive Authority was separated from the Legislative Council which became a distinct legislative branch only. In 1784 a part of the territory of the province of Nova Scotia was erected into a separate province to be called New Brunswick, and a separate Government was established for the province consisting of a Governor and Council composed of certain named persons and other persons "to be chosen by you from amongst the most considerable of the inhabitants of or persons of property" but required to be men of good life and of ability suitable to their employment. In 1832 the Executive Authority was separated and made distinct from the Legislative Council. In the province of Nova Scotia there was in the early Acts governing the election of members of the General Assembly no express disqualification of women from voting, but by the revised statutes of Nova Scotia (second series) in 1859 the exercise of the franchise was confined to male subjects over twenty-one years of age and a candidate for election was required to have the qualification which would enable him to vote. In the province of New Brunswick by the Provincial Act (11 Vict., c. 65), s. 17, the Parliamentary franchise was confined to male persons of the full age of twenty-one years who possessed certain property qualifications.

It must, however, be pointed out that a careful examination has been made by the Assistant Keeper of Public Records of Canada of the list containing the names of the Executive and Legislative Councils and Houses of Assembly in Quebec (including those of Upper and Lower Canada), of the province of Canada, of the province of Nova Scotia and of the province of New Brunswick down to 1867, and on none of the lists did he find the name of a person of the female sex. Such, briefly, is the history and such are the decisions in reference to the matter under discussion.

No doubt in any code where women were expressly excluded from public office the problem would present no difficulty, but where, instead of such exclusion, those entitled to be summoned to or placed in public office are described under the word "person" different considerations arise. The word is ambiguous, and in its original meaning would undoubtedly embrace members of either sex. On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office, it would have been understood that the word only referred to males, but the cause of this was not because the word "person" could not include females but because at common law a woman was incapable of serving a public office. The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made, or the point being contested. Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. The appeal to history, therefore, in this particular matter is not conclusive.

As far back as *Stradling* v. *Morgan* (10) it was laid down that extraneous circumstances may be admitted as an aid to the interpretation of a statute, and in *Herron* v. *Rathmines*

and Rathgar Improvement Comrs. (11) LORD HALSBURY, L.C., said ([1892] A.C. at p. 502):

> "The subject-matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act they did,"

but the argument must not be pushed too far, and their Lordships are disposed to agree with FARWELL, L.J., in *R.* v. *West Riding of Yorkshire County Council* (12) ([1906] 2 K.B. at p. 716),

> "although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are exceedingly slight" (see CRAIES' STATUTE LAW (3rd Edn.), p. 118):

Over and above that, their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development. Referring, therefore, to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act, 1867. Their Lordships fully appreciate the learned arguments set out in his judgment, but prefer, on this part of the case, to adopt the reasonings of DUFF, J., who did not agree with the other members of the court for reasons which appear to their Lordships to be strong and cogent. As he says:

> "Nor am I convinced that the reasoning based upon the 'extraneous circumstances' we are asked to consider (the disabilities of women under the common law and the law and practice of Parliament in respect of appointment to public place or office) establishes a rule of interpretation for the British North America Act, by which the construction of powers, legislative and executive, bestowed in general terms is controlled by a presumptive exclusion of women from participating in the working of the institutions set up by the Act."

Their Lordships now turn to the second point, namely: (2) The internal evidence derived from the Act itself. Before discussing the various sections they think it necessary to refer to the circumstances which led up to the passing of the Act. The communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution. His Majesty the King in Council is the final Court of Appeal from all these communities, and this Board must take great care, therefore, not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another. Canada had its difficulties both at home and with the mother country, but soon discovered that union was strength. Delegates from the three maritime provinces met in Charlottetown on Sept. 1, 1864, to discuss proposals for a Maritime Union. A delegation from the Coalition Government of that day proceeded to Charlottetown and placed before the Maritime delegates their schemes for a union embracing the Canadian provinces. As a result the Quebec conference assembled on Oct. 10, continued in session till Oct. 28, and framed a number of resolutions. These resolutions, as revised by the delegates from the different provinces in London in 1866, were based on a consideration of the rights of others, and expressed in a compromise which will remain a lasting monument to the political genius of Canadian statesmen. Upon those resolutions the British North America Act, 1867, was framed and passed by the Imperial Legislature. The Quebec resolutions dealing with the Legislative Council, namely, Nos. 6–24, even if their Lordships are entitled to look at them, do not shed any light on the subject under discussion. They refer generally to the "members" of the Legislative Council.

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution

to Canada. "Like all written constitutions it has been subject to development through usage and convention": (Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55). Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

> "The Privy Council, indeed, has laid down that courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order, and good government of a British colony": (see CLEMENT'S CANADIAN CONSTITUTION (3rd Edn.), p. 347).

The learned author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catharine's Milling and Lumber Co.* v. *R.* (13) (14 App. Cas. at p. 50):

> "The Act should be on all occasions interpreted in a large, liberal, and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words."

With that their Lordships agree, but as was said by HERSCHELL, L.C., in *Brophy* v. *A.-G. of Manitoba* (14) ([1895] A.C. at p. 216), "the question is, not what may be supposed to have been intended, but what has been said."

It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion, or its provinces which arise under ss. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its provinces their respective spheres of government. Their Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country. Nor are their Lordships deciding any question as to the rights of women, but only a question as to their eligibility for a particular position. No one, either male or female, has a right to be summoned to the Senate. The real point at issue is whether the Governor-General has a right to summon women to the Senate. The Act consists of a number of separate heads. The preamble states that the provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom. Head No. 2 refers to the union; Head No. 3, ss. 9 to 16, to the executive power. It is in s. 11 that the word "persons", which is used repeatedly in the Act, occurs for the first time. It provides that the persons who are members of the Privy Council shall be from time to time chosen and summoned by the Governor-General.

The word "person" as above mentioned may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not. In these circumstances the burden is on those who deny that the word includes women to make out their case. Head No. 4 (ss. 17–21) deals first with the legislative power. Section 17 provides there shall be one Parliament for Canada consisting of the Queen, an Upper House styled the Senate, and the House of Commons. Sections 21–36 deal with the creation, constitution, and powers of the Senate. They are the all-important sections to consider in the present case and their Lordships return to them after briefly setting out the remaining sections of the Act. Sections 37–57 deal with the creation, constitution, and powers of the House of Commons, with special reference to Ontario, Quebec, Nova Scotia, and New Brunswick, which were the first provinces to come in under the scheme, although power was given under sect. 146 for other provinces to come in which other provinces have availed themselves of. Head No. 5 (ss. 58–90) deals with the provincial constitutions, and defines both their executive and legislative

powers. Head No. 6 (ss. 91–95) deals with the distribution of legislative powers. Head No. 7 (ss. 96–101) deals with the Judicature. Head No. 8 (ss. 102–126) deals with revenues, debts, assets, and taxation. Head No. 9 (s. 127–144) deals with miscellaneous provisions. Head No. 10 (s. 145) deals with the intercolonial railway, and Head No. 11 (ss. 146–147) deals with the admission of other colonies.

Such being the general analysis of the Act, their Lordships turn to the special sections dealing with the Senate. It will be observed that s. 21 provides that the Senate shall consist of seventy-two members who shall be styled senators. The word "member" is not in ordinary English confined to male persons. Section 24 provides that the Governor-General shall summon qualified persons to the Senate. As already pointed out, "persons" is not confined to members of the male sex, but what effect does the adjective "qualified" before the word "persons" have? In their Lordships' view it refers back to the previous section, which contains the qualifications of a senator. Subsections 2 and 3 appear to have given difficulties to the Supreme Court. Subsection 2 provides that the qualification of a senator shall be that he shall be either a natural born subject of the Queen naturalised by an Act of Parliament of Great Britain or of one of the provincial legislatures before the Union or of the Parliament of Canada after the Union. The Chief Justice in dealing with this says that it does not include those who become subjects by marriage, a provision which one would have looked for had it been intended to include women as being eligible. The attention of the Chief Justice, however, was not called to the Aliens Act, 1844, s. 16 of which provides that any woman married or who shall be married to a natural born subject or person naturalised shall be deemed and taken to be herself naturalised and have all the rights and privileges of a natural born subject. The Chief Justice assumed that by common law a wife took her husband's nationality on marriage, but by virtue of that section any woman who marries a natural born or naturalised British subject was deemed and taken to be herself naturalised. Accordingly, s. 23 (2) uses language apt to cover the case of those who become British subjects by marriage. Their Lordships agree with DUFF, J., when he says:

> "I attach no importance to the use of the masculine personal pronoun in s. 23, and, indeed, very little importance to the provision in s. 23 with regard to nationality"

and refer to s. 1 of the Interpretation Act, 1889, which in s. 1 (2) provides that words importing the masculine gender shall include females.

The reasoning of the Chief Justice would compel their Lordships to hold that the word "persons" as used in s. 11 relating to the constitution of the Privy Council for Canada was limited to "male persons" with the resultant anomaly that a woman might be elected a member of the House of Commons but could not even then be summoned by the Governor-General as a member of the Privy Council. Subsection 3 of s. 23 provided that the qualification of a senator shall be that he is legally and equitably seised of a freehold for his own use and benefit of lands and tenements of a certain value. This section gave some trouble to DUFF, J., who says that subsection points to the exclusion of married women and would have been expressed in a different way if the presence of married women had been contemplated. Their Lordships think that this difficulty is removed by a consideration of the rights of a woman under the Married Women's Property Acts. A married woman can possess the property qualification required by this subsection. Apart from statute a married woman could be equitably seised of freehold property for her own use only, and by an Act respecting certain separate rights of property of married women, consolidated statutes of Upper Canada, cap. 73, s. 1, it was provided:

> "Every woman who has married since the 4th May, 1859, or who marries after this Act takes effect, without any marriage contract or settlement, shall, and may, notwithstanding her coverture, have, hold and enjoy all her real and personal property . . . in as full and ample a manner as if she continued sole and unmarried . . ."

Their Lordships do not think it possible to interpret the word "persons" by speculating whether the framer of the British North America Act purposely followed the system of

Legislative Councils enacted in the Acts of 1791 and 1840 rather than that which prevailed in the Maritime Province for the model on which the Senate was to be formed, neither do they think that either of these subsections is sufficient to rebut the presumption that the word "persons" includes women. Looking at the sections which deal with the Senate as a whole (ss. 21–36) their Lordships are unable to say that there is anything in those sections themselves on which the court could come to a definite conclusion that women are to be excluded from the Senate.

So far with regard to the sections dealing especially with the Senate. Are there any other sections in the Act which shed light upon the meaning of the word "persons"? Their Lordships think that there are. For example, s. 41 refers to the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly, and by a proviso it is said that until the Parliament of Canada otherwise provides at any election for a member of the House of Commons for the district of Algoma in addition to persons qualified by the law of the province of Canada to vote, every male British subject aged twenty-one years or upwards being a householder shall have a vote. This section shows a distinction between "persons" and "males." If persons excluded females it would only have been necessary to say every person who is a British subject aged twenty-one years or upwards shall have a vote. Again in s. 84, referring to Ontario and Quebec, a similar proviso is found stating that every male British subject in contradistinction to "person" shall have a vote. Again in s. 133 it is provided that either the English or the French language may be used by any person or in any pleadings in or issuing from any court of Canada established under this Act and in or from all or any of the courts of Quebec. The word "person" there must include females as it can hardly have been supposed that a man might use either the English or the French language but a woman might not. If Parliament had intended to limit the word "persons" in s. 24 to male persons it would surely have manifested such intention by an express limitation as it has done in ss. 41 and 84. The fact that certain qualifications are set out in s. 23 is not an argument in favour of further limiting the class, but is an argument to the contrary because it must be presumed that Parliament has set out in s. 23 all the qualifications deemed necessary for a senator and it does not state that one of the qualifications is that he must be a member of the male sex.

Finally with regard to s. 33, which provides that if any question arises respecting the qualifications of a senator or a vacancy in the Senate the same shall be heard and determined by the Senate, that section must be supplemented by s. 1 of the Parliament of Canada Act, 1875, and by s. 4 of c. 10 of R.S.C. 1906, and their Lordships agree with DUFF, J., when he says,

> "as yet, no concrete case has arisen to which the jurisdiction of the Senate could attach. We are asked for advice on the general question, and that, I think, we are bound to give. It has, of course, only the force of an advisory opinion. The existence of this jurisdiction of the Senate does not, I think, affect the question of substance. We must assume that the Senate would decide in accordance with the law."

The history of these sections and their interpretation in Canada is not without interest and significance. From Confederation to date both the Dominion Parliament and the provincial legislatures have interpreted the word "persons" in s. 41 and s. 84 of the British North America Act as including female persons and have legislated either for the inclusion or exclusion of women from the class of persons entitled to vote and to sit in the Parliament and Legislature respectively, and this interpretation has never been questioned. From Confederation up to 1916 women were excluded from the class of persons entitled to vote in both federal and provincial elections. From 1916 to 1922 various Dominion and Provincial Acts were passed to admit women to the franchise and to the right to sit as members in both Dominion and provincial legislative bodies. At the present time women are entitled to vote and to be candidates: (i) at all Dominion elections on the same basis as men; (ii) at all provincial elections save in the province of Quebec. From the date of the enactment of the Interpretation Acts in the province of

Canada, Nova Scotia and New Brunswick prior to confederation and in the Dominion of Canada since confederation and until the franchise was extended, women have been excluded by express enactment from the right to vote. Neither is it without interest to record that when on May 20, 1867, the Representation of the People Bill came before a committee of the House of Commons, John Stuart Mill moved an amendment to secure women's suffrage and the amendment proposed was to leave out the word "man" in order to insert the word "person" instead thereof. See Hansard, 3rd series, vol. 187, col. 817.

A heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court, and this board will only set aside such a decision after convincing argument and anxious consideration, but having regard (i) to the object of the Act, namely, to provide a constitution for Canada, a responsible and developing State; (ii) that the word "person" is ambiguous and may include members of either sex; (iii) that there are sections in the Act above referred to which show that in some cases the word "person" must include females; (iv) that in some sections the words "male persons" is expressly used when it is desired to confine the matter in issue to males, and (v) to the provisions of the Interpretation Act, 1889; their Lordships have come to the conclusion that the word "persons" in s. 24 includes members both of the male and female sex and that, therefore, the question propounded by the Governor-General must be answered in the affirmative and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly.

Solicitors: *Blake & Redden*; *Charles Russell & Co.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

SHEFFIELD CORPORATION *v.* LUXFORD. SAME *v.* MORRELL

[King's Bench Division (Talbot and Wright, JJ.), May 14, 1929]

[Reported [1929] 2 K.B. 180; 98 L.J.K.B. 512; 141 L.T. 265; 93 J.P. 235; 45 T.L.R. 491; 73 Sol. Jo. 367]

Landlord and Tenant—Recovery of possession—Action in county court—Refusal of order for possession or postponement of order—Discretion of judge—County Courts Act, 1888 (51 *& 52 Vict., c.* 43), *s.* 138.

By s. 138 of the County Courts Act, 1888, with regard to making an order for possession of a small tenement, upon compliance with the procedure laid down in the section, "the judge may order that possession of the premises . . . be given by the defendant to the plaintiff, either forthwith or before such day as the judge shall think fit to name . . ."

A county court judge, in two cases concerning weekly tenants whose tenancies had been validly determined by notice to quit, refused to make any order for possession in one case, and in the other case made an order for possession, but postponed its operation for twelve months.

Held: the county court judge had not exercised judicially his discretion under s. 138 of the County Courts Act, 1888, in either case, because (i) while the word "may" in s. 138 was permissive, once the landlord had established his legal right to possession of the premises, it was the duty of the judge to make an order for possession, and (ii) in exercising his discretion as to the postponement of the coming into operation of the order for possession, the judge must fix a period which was reasonably adjusted to the circumstances of the case, including the nature of the tenancy.

Notes. The County Courts Act, 1888, s. 138, has been repealed by the County Courts Act, 1934, s. 193, and the County Courts Act, 1955, s. 2, and Sch. 1, Part 2, para. 4, and Sch. 5. See now s. 48 of the 1934 Act and the County Court Rules, 1936, Ord. 25, r. 72.

Distinguished: *Yates* v. *Morris*, [1950] 2 All E.R. 577. Referred to: *Jones* v. *Savery*, [1951] 1 All E.R. 820.

As to actions for the recovery of land in a county court, see 9 HALSBURY'S LAWS (3rd Edn.) 153–155; and for cases see 13 DIGEST (Repl.) 388–390. For the County Courts Act, 1934, s. 48, see 5 HALSBURY'S STATUTES (2nd Edn.) 44; and for the County Courts Act, 1955, s. 2 and Sched. 1, Part 2, see 35 HALSBURY'S STATUTES (2nd Edn.) 28, 40.

Cases referred to:

(1) *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214; 49 L.J.Q.B. 577; 42 L.T. 546; 44 J.P. 600; 28 W.R. 726, H.L.; 16 Digest 277, *900*.

(2) *R.* v. *Metropolitan Police Comr., Ex parte Holloway*, [1911] 2 K.B. 1131; 81 L.J.K.B. 205; 105 L.T. 532; 75 J.P. 490; 27 T.L.R. 573; 55 Sol. Jo. 773, C.A.; 42 Digest 857, *108*.

(3) *R.* v. *Hopkins* (1900), 64 J.P. 454; 16 Digest 290, *1018*.

(4) *R.* v. *Mitchell, Ex parte Livesey*, [1913] 1 K.B. 561; 82 L.J.K.B. 153; 108 L.T. 76; 77 J.P. 148; 29 T.L.R. 159; 23 Cox, C.C., D.C.; 42 Digest 717, *1359*.

(5) *Kelly* v. *White, Gaskell* v. *Roberts*, [1920] W.N. 220, D.C.; 13 Digest (Repl.) 452, *758*.

Appeals from Sheffield County Court.

The plaintiffs in both actions, the Sheffield Corporation, were the landlords of a number of houses built under a large housing scheme. The houses were built subsequent to 1919, and were, therefore, not subject to the provisions of the Rent Restriction Acts. In the first action, the landlords had, in 1924, let one of their houses to the defendant tenant, Luxford, on a weekly tenancy, and notice to quit, expiring on Dec. 31, 1928, had been duly given by the landlords. On an action for possession being subsequently brought by the landlords, under the County Courts Act, 1888, s. 138, the county court judge made an order for possession, but postponed its operation for twelve months from the date of hearing, and imposed certain conditions on the tenant in regard to rent and user of the premises. In the second action, the landlords had, in July, 1928, let another house to the defendant tenant, Morrell, on a weekly tenancy and notice to quit, expiring on Dec. 31, 1928, had been duly given by the landlords. In an action for possession being brought by them, the county court judge refused to make an order. He was of opinion that, in each case, the discretion conferred on him by s. 138 of the County Courts Act, 1888, was sufficiently wide to enable him to refuse to make an order or to postpone its operation for such period as he thought fit.

The landlords appealed against both decisions.

W. A. Macfarlane, for the landlords, referred to *Julius* v. *Lord Bishop of Oxford* (1), *R.* v. *Metropolitan Police Comr., Ex parte Holloway* (2), *R.* v. *Hopkins* (3), *R.* v. *Mitchell, Ex parte Livesey* (4), and *Kelly* v. *White* (5).

The tenant in each case did not appear and was not represented.

TALBOT, J.—These are two cases in which the Lord Mayor and Corporation of the City of Sheffield proceeded under s. 138 of the County Courts Act, 1888, against two of their tenants who held houses on a large housing estate. It was established that notice to quit had been served on the tenants, both of whom were weekly tenants, and that those notices had expired. No question arises under the Rent Restriction Acts, because these houses have been built and let after 1919, the date mentioned in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (9). The learned county court judge has taken a different line in the two cases. I do not know that it very clearly appears why, nor is it necessary to inquire. It is unfortunate that we have not had the advantage of any argument for the tenant in either case; but counsel for the landlords has laid all the facts before us and, I think, has put us in a position to come to a decision.

A In the absence of any such argument and having regard to the way in which the County Courts Act, 1888, is worded, it is important that we should not go beyond what is absolutely necessary to be decided.

The language of s. 138 of the Act is that when there has been compliance with the conditions of the Act, with regard to which there is no dispute,

B "the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name."

In the case of the tenant Morrell, the learned judge has refused the order altogether. In his view he has, both with regard to the power of giving possession and with regard to the date at which possession is to be given, a discretion; and I think by that he means C a complete discretion, subject, of course, to the condition that it must be exercised, like all discretions committed to judicial officers, in a judicial manner. In his opinion, the tenant showed reasonable cause why possession should not be given. He assumed from the statement made before him by the representative of the landlords that the motive which operated, or principally operated, to induce the landlord to take legal proceedings was the fact that the tenant was using his house as a shop. That was not D allowed by the terms of his tenancy, as I understand, because the landlords were themselves under covenant to the vendor of the land on which these houses were built not to allow the use of them except as dwelling-houses. Having that in view, the learned county court judge said that no condition that the house was not to be used as a shop was brought to the tenant's attention until after he accepted tenancy, but that, in fact, the tenant had undertaken not to use the house as a shop; that the landlords had E refused eight weeks' rent tendered or offered by the tenant; and that there would be a difficulty in the way of a tenant whose rent book showed arrears in getting other premises. The learned county court judge appears to have offered to the solicitor who was representing the landlords to defer the operation of the order for possession for six months, and, on that being refused, he gave judgment for the tenant, with costs.

F It is quite true that the language of the Act is permissive and not compulsory. It has often been said—and the expression is possibly a convenient abbreviation, but like all inaccurate expressions it often leads to misunderstanding—that in many statutes the word "may" means "must." I think it has been pointed out once and for all in *Julius* v. *Lord Bishop of Oxford* (1) and in other authorities that that is an inaccurate expression. "May" always means "may." "May" is a permissive expression; but there are cases G in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it. One of those cases is where there is an application to him to use the power which the Act gives him in order to enforce the legal right of the applicant. I think this is such a case. On the information before us, the legal right of the landlords was complete as soon as the notice to quit duly given had expired, and the tenant's right to remain in occupation of this house had absolutely H ceased. I think it is true to say, as was said to us by the learned counsel for the landlords, that all that induces the landlord to resort to the county court is, first of all, the desire to get the power to give effect to the right to possession by force through the ministry of the court; and, secondly, the desire to save himself from taking measures for resuming possession and to get the authority of the court for that purpose; but his legal right is complete. That being so, I think that, as soon as the application for an I order for possession is made to the judge, who has obtained from the Act of Parliament the power to make such an order, it becomes his duty to make it. If the Act contained no more than that, it would be his duty to make an order for possession then and there and without any qualifications. The Act does undoubtedly give him a certain discretion in terms, because, as I have already said, after the words "the judge may order that possession . . . be given," it continues "either forthwith or on or before such day as the judge shall think fit to name."

That discretion becomes directly material when we are considering the case of the tenant Luxford. The facts in the two cases are in many respects very similar, but the

learned judge made two quite different orders. His judgment in the tenant Luxford's case was: "Possession in twelve months; rent to be paid; premises not to be used as a shop." The tenant was, as I have said, a weekly tenant, and the effect of this judgment in substance is to turn him from a weekly tenant into a tenant for a year certain, and to order that, for that year certain, a payment, which the learned judge describes as rent, is to be made. He does not say how much that rent is to be; but I suppose we may infer that he means it to be on the same basis as the rent already paid on the weekly tenancy. Also he imposed a further condition that the place was not to be used as a shop. The learned counsel has called our attention to several difficulties which present themselves the moment one considers how effect is to be given to those conditions. Quite apart from that it appears, following the language of this court in *Kelly* v. *White* (5)—a case which, though the facts were different, bore some similarity to the present case—that this order creates, or purports to create, a new tenancy in lieu of that which the tenant had got and against the will of the landlords who have at the present moment the actual vested right, subject to this discretion of the court so far as it can be exercised, to the possession of the premises. I think, though with rather more doubt, that a mere postponement of the operation of the order for twelve months is not a permissible or legitimate exercise of the discretion conferred by this Act. It is certainly not permissible unless there are circumstances entirely different from those of the present case.

I recognise that this is a somewhat difficult question, because undoubtedly the Act, by its terms, contemplates a postponement of the day on which possession is to be given and it indicates no limit to the period for which that postponement may extend. I do not think it would be fair to the learned judge to regard this as a colourable exercise of his discretion; that is to say, a denial to the landlords of the justice which they are seeking. I am thinking of a case such as one has heard of where there was judgment for a debt to be paid in instalments of a penny a month when the amount of the debt was £20 or £30. It would not be fair to the learned judge to compare the two cases, but I think that a period of postponement of possession of twelve months, even apart from the other conditions, is not such an exercise of his discretion as the Act of Parliament, in spite of its unlimited terms, contemplates or permits. The question is, of course, to some extent a question of degree, but I think the period must not be more than is reasonably adjusted to the circumstances of the case, including the nature of the tenancy, that is to say, the term (in this case a weekly term), and the object of this enactment which presumably may be attributed to the legislature—namely, that of relieving the judge of the necessity of making an order for possession to be given then and there without further warning to the tenant. I rather hesitate to name any time for giving possession, and we shall not give judgment fixing any definite time; but I think that some such period as four or five weeks, in the absence of any circumstances altogether exceptional and quite different from those here, as to the nature of which it is not necessary to speculate, would probably represent the extreme limit of the postponement which, under this power, a judge would be justified in making.

I think, therefore, that in both these cases the proper order will be to allow the appeal and to remit the cases to the learned judge to make an order for possession, postponing the operation of it, if he thinks fit to exercise his discretion, for some such period as he thinks right, having in view what I have endeavoured to express. The landlords will be entitled to the costs of these appeals. I ought to add one thing. I think the learned judge ought to consider, when he has the case again before him, the postponement that has already taken place since the right of the landlords was tested.

WRIGHT, J.—I agree. I do not desire to add anything to what has fallen from my Lord.

Appeals allowed.

Solicitors: *Rollit, Sons & Haydon*, for *Sir William Hart*, Sheffield.

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

THE SANDGATE

[Court of Appeal (Scrutton, Lawrence and Greer, L.JJ.), December 6, 1929]

[Reported [1930] P. 30; 99 L.J.P. 49; 142 L.T. 356; 35 Com. Cas. 221; 46 T.L.R. 116; 18 Asp.M.L.C. 83]

Shipping—Discharge of cargo—Time for discharging—"At average rate of 125 *tons per working hatch per day"—Marginal clause—Consignees not obliged to take cargo from alongside at a higher rate than* 500 *tons per day.*

A charterparty provided that a cargo of coal should be discharged "at the average rate of 125 tons per working hatch per day," and by a marginal clause it was further provided that the consignees should not be obliged to take cargo from alongside at a higher rate than 500 tons per day. The vessel had four cargo hatches, and other non-cargo hatches, such as poop and bridge hatches.

Held: "working hatch" meant, not cargo hatches as distinguished from non-cargo hatches, but cargo hatches from which cargo was capable of being worked as distinguished from cargo hatches from which cargo was incapable of being worked, e.g., by reason of the fact that there was no cargo in the holds to which such cargo hatches gave access; the obligation of the consignees to take cargo, therefore, varied each day according to the number of cargo hatches from which cargo could be discharged on that day; and the number of working days allowed for discharge was the number of tons in the hold containing the largest quantity of coal, divided by 125.

Notes. Applied: *Compañia de Navigacion Zita, S.A.* v. *Dreyfus et Campagnie*, [1953] 2 All E.R. 1359.

As to stipulations in charterparties relating to the time for discharge of cargo, see 30 Halbury's Laws (2nd Edn.) 338–344; and for cases on the subject, see 41 Digest 539–542.

Appeal from a decision of an Admiralty Divisional Court (Lord Merrivale, P., and Hill, J., dismissing an appeal from a decision of the judge of the Mayor's and City of London Court.

The owners of the steamship *Sandgate*, claimed from the charterers of the *Sandgate* the sum of £55 18s. 9d., which the charterers claimed to be entitled to retain as dispatch money due under the terms of a charterparty (in Chamber of Shipping Welsh Coal Charter 1896, Form A) under which the *Sandgate* had been chartered to carry a cargo of coal. The charterparty provided that dispatch money should be payable at the rate of £15 for a running day or pro rata in respect of time saved at the port of discharge. It was further provided that the cargo should be taken from alongside by the consignees at the average rate of 125 tons "per working hatch per day"; and by a marginal clause it was also provided that the consignees should not be obliged to take cargo from alongside at a higher rate than 500 tons per day. The *Sandgate* had four hatches which were used as cargo hatches and certain hatches, such as the bridge hatch and poop hatch, which were not used for the discharge of cargo. The shipowners claimed that the meaning of the charterparty was that the consignees were obliged to discharge at the rate of 125 tons per day from each hatch other than hatches which were not cargo hatches (such as the bridge or poop hatch), whether discharge was in fact capable of proceeding from such cargo hatches or not; on this basis only five-and-a-half hours had been saved by the charterers. The charterers contended that the expression "per working hatch per day" meant per cargo hatch capable of being worked in the circumstances, and excluded cargo hatches which were incapable of being worked, as, for example, where the cargo in the hold had already been completely discharged. On this construction of the clause the charterers had saved three days and twenty-three hours, and were entitled to retain dispatch money amounting to the above sum. The judge of the Mayor's and City of London Court gave judgment in favour of the charterers.

The shipowners appealed.

Clement Davies, K.C., and *W. R. Howard* for the shipowners.
Raeburn, K.C., and *G. St. C. Pilcher* for the charterers.

Oct. 17. **LORD MERRIVALE, P.,** stated the facts and arguments, and continued: What does "125 tons per working hatch per available day" mean? When one comes to look at the facts of this case, "working hatch" does not mean a hatch capable of being used for the discharge of the hold. That has so wide a meaning that it would be impossible to apply it as between business people, and I do not think it means a hatch in which there had been coal, a hatch which had been used for the discharge of coal. I think it is a business provision that so long as the consignees are proceeding in a business-like way with the discharge of the ship, not playing tricks with it, such as were suggested, they are fulfilling their obligation if they discharge 125 tons from each hatch at which coal can at that time be discharged. That is what I think is their obligation. That view is helped by the later words in the second line of cl. 7 in the charterparty, to which my brother called attention, "provided the vessel can deliver it at this rate." If there is coal in the hatch and in the course of work regularly done it can be delivered, there is a working hatch, and you are to go on working, applying your standard at per hatch and not for the bulk of the cargo at per day until you have found out that the consignees have fulfilled their obligations. [His lordship then referred again to the argument for the shipowners, and concluded that the trial judge was right in his decision.]

HILL, J.—I agree. The right of the charterers depends on the correct ascertainment of the lay days under the charter. The form of charter used is one of the Chamber of Shipping documentary forms, and provides for the ascertainment of lay days by putting on the charterer the obligation to take delivery at an average rate of so many tons per day, Sundays and holidays excepted, provided the ship can deliver at that rate—125 tons per working hatch per day—with a proviso that the charterers shall not be bound to take more than 500 tons. The shipowner contends that as soon as the number of hatches is ascertained the quantity is fixed; two hatches, 250 tons; three hatches, 375 tons; four hatches, 500 tons; and, but for the proviso, with five hatches, 625 tons. If that contention is right the obligation is the same throughout the discharge of the whole cargo, whether a smaller hold has already been emptied or not. They say that the word "working" is only used to denote cargo hatches as distinguished from other hatches, such as bunker hatches. If so, one does not know why they did not say "cargo hatch," which would have been a simple expression to have used, but if the effect is as contended by the shipowner it is not easy to see why the shipowner, who knew his own ship and knew that he had four cargo hatches, did not say 500 tons a day in accordance with the printed form. He did not. The agreement with the charterers has the words "working hatch," which is not a very common form of expression.

The charterers contend that "working hatch" means something more than cargo hatch and has reference to the actual working of the ship; that it denotes a hatch which can be worked because there is cargo underneath it awaiting to be discharged. The charterers recognise an obligation to take delivery at 500 tons while all four holds can discharge, but if when working at the rate of 125 tons per hatch per day one hold is emptied, and the hatch can no longer be worked, then the charterers contend that the obligation to take by the other hatches is not increased but remains at the same rate: 125 tons per hatch.

I think that is a sound contention. Test it in this way. Suppose the discharge began at the beginning of the lay days at all four hatches and continued at 125 tons per hatch per day, then in this particular case before the sixth day was out No. 1 hatch would be emptied and before the seventh day was out No. 4 hatch would be emptied, and from that time forward the ship cannot deliver at the rate of 125 tons, or, at any rate by hatches No. 1 and No. 4, because they have no cargo under these hatches which they can get out. The ship in such case seems to have become, and in fact is, incapable of giving delivery by those hatches. Those hatches have ceased to be working hatches, but the obligation to take delivery still remains an obligation to take delivery at the rate of 125 tons per working hatch. The fact that two of the hatches, No. 2 and No. 3, can still

work while No. 1 and No. 4 cannot work does not seem to me to convert the obligation from an obligation to take 125 tons per hatch into an obligation to take 250 tons per hatch. In the same way, on the eleventh day, I think it is, or the beginning of the twelfth day in this case, working at 125 tons per day from the beginning of the lay days, No. 3 was emptied, the shipowner could not deliver any more coal by No. 3, but there was still some coal left in No. 2. It does not seem to me that that fact converted the obligation to take 125 tons per No. 2 working hatch into an obligation to take either 250 or 375. The obligation continued to take 125 until it was emptied, and then the lay days expired. That seems to me to be the business of this thing, and the only way to give any force to the use of the word "working" before "hatch."

It is said that the proviso limiting the obligation of the charterer to take a maximum of 500 tons a day was somehow inconsistent with that. I cannot see it in the least. The shipowner knows how many hatches he has got; it may be that the charterer does not know how many hatches; and he says: "You say you want four hatches; at any rate I must not be called upon to take more than 500 tons a day." Nor do the words in the dispatch clause about "lay days in this connection to be calculated on bill of lading quantity without deductions" really affect this question. It seems pretty clear what the object of that is. "Freight payable by bill of lading per quantity delivered or at charterer's option on bill of lading quantity less 2 per cent." This only applies if instead of ascertaining your lay days either upon quantity delivered or upon bill of lading quantity less 2 per cent., you are to take the actual bill of lading quantity. As to the suggested difficulty of the shipowner in knowing what the lay days are going to be, there is nothing in it at all, because it appears from the charterparty that a bill of lading was to be issued and presumably was issued specifying the quantity of tons in each of the respective holds. I suppose worked out most accurately you would take these several quantities and start with 500 and go on reducing to 375, reducing to 250 and finally to 125; but you get exactly the same result, and the shipowner would have no difficulty in doing the arithmetic; if he took the quantity in the hold which contains the largest quantity and divided that by 125, then that would give you the period in which the discharge had to be carried out, and you would then take into account Sundays and holidays.

I think the learned judge was right.

The shipowners appealed.

Clement Davies, K.C., and *W. R. Howard* for the shipowners.
Raeburn, K.C., and *G. St. C. Pilcher*, for the charterers, were not called on.

SCRUTTON, L.J.—The shipowners have to satisfy us that the court below are wrong in their opinion of an ambiguous and mysterious clause. It may be that that puts a considerable burden on the shipowners when it is difficult to say what the clause means, but I think I have come to a conclusion as to what the clause means. Whether the parties meant it, I do not know, but they have used certain words.

From the freight due by them the charterers have deducted a certain sum for dispatch money, nearly four days. The shipowner says they were not entitled to deduct so much for dispatch money—they were only entitled to deduct five-and-a-half hours. To find out what dispatch money is due you must find out what time was allowed for discharging the ship, because dispatch money is generally due because the ship is discharged sooner than the time allowed for under the provisions of the charter. The clause as to the time discharging is this: "The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the vessel, and at the average rate of 125 tons per working hatch per day weather permitting," with a marginal clause: "Consignees shall not be obliged to take cargo from alongside as per clause 7 at a higher rate than 500 tons per day." Counsel for the shipowners in his captivating argument said that means that the ship is to be dispatched at the rate of 500 tons a day. If it is so it is a great pity that the parties did not use that very simple and well-known clause. What they do say is this: "Shall not be obliged to take cargo from alongside . . . at a higher rate than 500 tons per day," which is not the same as saying that they must take

cargo from alongside at the rate of 500 tons a day. Instead of putting it in the very simple way that counsel for the shipowners suggests that they should have put it, they do this: First of all they do not say it is to be done in so many days—apparently that will not suit them, though that would be a simple way of doing it—but they do not say that. They do not say that the cargo is to be discharged at a certain rate per day—that apparently does not suit them. They do not want to say so much each day is to be discharged, and so they put in the word "average," by which more may be discharged one day and less another day, so long as you get an average rate. Then, apparently, that still will not do. They do not want to say at an average rate of so much per day. They do say "at the average rate of 125 tons per working hatch per day," and counsel for the shipowners says there are always the same number of working hatches whether there is coal in them or not. But if so there was no need to put in this roundabout phrase of "per working hatch per day," because the hatches being the same every day you could, by putting in a rate per day, have calculated on the same number of hatches every day. They put in something different to that. They say "at the average rate of 125 tons per working hatch per day." That appears to me to assume that there may be a different number of working hatches on one day than what there is on another. If one considers why there may be a different number of working hatches on one day as compared with another, the answer may be that the hatch is not a working hatch if there is no coal in it to work, but the hatch may be a working hatch if there is coal in it and one does not work it. In the original form in which it came into charterparties, the definition of a working day was a day on which ships in the port ordinarily worked, although a particular ship did not work on that day. A working hatch in the same way, it seems to me, is a hatch with coal in it on that day, and the fact that you do not happen to work it on that day does not prevent it being a working hatch which you ought to have worked, and which must be taken into account on the average.

I come to the conclusion, therefore, that one cannot read this roundabout form as a roundabout way of saying what might have been said quite simply: "I will discharge 500 tons per day out of four cargo hatches, 125 tons for each hatch." What it does mean is to assume that the amount may vary per day, according as there is a working hatch—a hatch which one can work because there is coal in it. Whether it was a reasonable agreement to make or not, it is not for me to say. The parties have made it in that form and not in the simple form in which they would have made it if counsel for the shipowners construction had been right.

For these reasons I think that the two courts below came to the correct view of what this phrase means. If shipowners do not like it the obvious course for them is not to go on putting into the form of charter the additional words "a working hatch," but to leave the charter as it was originally—so many tons per day, weather permitting. The appeal must be dismissed with costs.

LAWRENCE, L.J., and **GREER, L.J.,** concurred.

Solicitors: *Botterell & Roche*; *Ballantyne, Clifford & Co.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

A

COMPANIA MEXICANA DE PETROLEO "EL AGUILA" *v.* ESSEX TRANSPORT AND TRADING CO., LTD.

[COURT OF APPEAL (Scrutton, Sankey and Russell, L.JJ.), February 14, 15, 19, 27, 28, 1929]

B

[Reported 141 L.T. 106; 34 Com. Cas. 198; 17 Asp.M.L.C. 590]

Shipping—Loading cargo—Negligence of stevedores—Liability of shipowners—Hatch beam not bolted down by shipowners—Beam left unbolted by stevedores—Beam struck by cargo being hoisted—Fall into hold causing damage.

Stevedores who were experienced in handling cargoes of kerosene and gasoline
C contracted to load such a cargo on board a ship. When loading commenced the stevedores took control of the loading area of the ship and removed various hatch beams, but left others in place. None of these beams was bolted down. Due to the negligence of the stevedores cargo which was being hoisted struck one of the beams which they had left in place. As the beam was not bolted down this dislodged it, and caused it to fall into the hold, where it caused an explosion.

D **Held:** the explosion and the consequent damage were due to the negligence of the stevedores, for which they were liable to the shipowners, and the shipowners were not liable to the stevedores in negligence, because (i) the stevedores were invitees of the shipowners, and so the shipowners owed no duty to the stevedores to guard against the stevedores' own negligence by bolting down the beam; (ii) even if the shipowners had been negligent in not bolting down the beam the stevedores,
E because they had found all the other beams which they removed unbolted, knew or ought to have known that this beam was also unbolted, and so should have used reasonable care to avoid danger from it.

Dictum of WILLES, J., in *Indermaur* v. *Dames* (1) (1866), L.R. 1 C.P. at p. 288, applied.

F **Notes.** Contributory negligence is no longer a complete defence to a claim in negligence (Law Reform (Contributory Negligence) Act, 1945, s. 1 (1)); and the obligations of persons occupying or having control of a vessel to visitors to such vessel are now set out in the Occupiers' Liability Act, 1957, s. 2 (see s. 1 (3) (a) of that Act). Neither of these Acts, however, appears to affect the authority of this case.

Referred to: *Jerred* v. *Roddam Dent & Son*, [1948] 2 All E.R. 104.

As to loading by stevedores, see 30 HALSBURY'S LAWS (2nd Edn.) 456, para. 614; and
G for cases see 41 DIGEST 471, *D.*; and as to the duty of an occupier of premises to persons coming thereon, see 23 HALSBURY'S LAWS (2nd Edn.) 596–614, pp. 846–864.

Cases referred to:

(1) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur. N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311;
H 36 L.J.C.P. 181, Ex. Ch.; 36 Digest (Repl.) 46, *246*.

(2) *Re Polemis and Furness, Withy & Co., Ltd.*, [1921] 3 K.B. 560; sub nom. *Polemis* v. *Furness Withy & Co., Ltd.*, 90 L.J.K.B. 1353; 126 L.T. 154; 37 T.L.R. 940; 15 Asp.M.L.C. 398; 27 Com. Cas. 25, C.A.; 36 Digest (Repl.) 38, *185*.

(3) *Latham* v. *R. Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49,
I *262*.

(4) *Hayward* v. *Drury Lane Theatre, Ltd., and Moss Empires, Ltd.*, [1917] 2 K.B. 899; 87 L.J.K.B. 18; 117 L.T. 523; 33 T.L.R. 557; 61 Sol. Jo. 665, C.A.; 36 Digest (Repl.) 48, *255*.

(5) *British Columbia Electric Rail. Co., Ltd.* v. *Loach*, [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946, P.C.; 36 Digest (Repl.) 182, *981*.

Appeal from a decision of BATESON, J.

By a charterparty made in February, 1926, the defendants, who were shipowners, agreed to carry for the Anglo-Mexican Petroleum Co., Ltd., who were closely associated

with the plaintiff company, the stevedores, about one-and-a-half million cases of petroleum products from Mexican ports to South American ports over a period of twelve months. The charterparty provided that the ship was to employ the charterers' stevedores and ship's agent to load the cargo. The *Essex Isles* was the seventh vessel to be nominated under the charter and she arrived at Tampico on Jan. 8, 1927, to load a cargo of kerosene and gasoline. For the purposes of loading the vessel provided the gear, but the loading itself was done by the stevedores. After the work had proceeded for some time an explosion took place on board the vessel, followed by a serious fire with the result that ten stevedores were burnt to death and twenty-five others severely injured. There was no direct evidence as to the cause of the explosion. The stevedores accordingly instituted the present action, wherein they alleged that the explosion was caused by the negligence of the shipowners' servants in leaving unbolted a hatch beam which became dislodged in the course of loading and fell into the lower hold of the ship, causing the explosion and fire. They claimed some £20,000, being £1,500 which they said they had expended as agents for the shipowners before the explosion took place, a further sum of £8,500 by way of salvage expenses, and some £10,000 in respect of compensation paid by the stevedores under Mexican law to the injured workmen and the relatives of those who had been killed. The shipowners denied liability, save for the £1,500, and said that even if their servants had left a hatch beam unbolted the accident was really caused by the negligent management of the tray on which the cargo was loaded so that it struck the beam, and they counterclaimed for the damage caused to the ship. BATESON, J., held that both parties were negligent and that neither could prove that the other could have avoided the accident by the exercise of reasonable care. He therefore gave judgment for the plaintiff stevedores on the first two items of their claim and dismissed the counterclaim.

The shipowners appealed and there was a cross-appeal by the stevedores.

The facts are fully stated in their Lordships' judgments.

Clement Davies, K.C., and *Cyril Miller* for the shipowners.
W. N. Raeburn, K.C., and *James Dickinson* for the stevedores.
Charles Stevenson for the underwriters.

SCRUTTON, L.J.—This case took some time in the court below, and there was a very careful judgment given by the learned judge who tried it, a very experienced judge in this class of action. It has taken considerable, but not too much, time in this court, for it is a curious case as far as the facts are concerned. It arises out of a very serious explosion on board a ship loading cases of petrol and gasoline in Mexico, an explosion which unfortunately killed ten men and seriously injured some ten more, and destroyed the ship; and the stevedores brought an action against the shipowners, claiming three things: They said, first of all, We, as your agents, before this accident happened, had paid a number of disbursements for you amounting to £1,500, which had nothing to do with the explosion, and had all been incurred before the explosion. It is admitted that that £1,500 is due, and that if it is not interfered with and an account is taken of the sums to be recovered the plaintiff stevedores will have credit for that £1,500. The stevedores claimed in addition certain sums paid for salvage of the ship after the explosion, and lastly, the money which they were liable to pay to the dependants of their servants who were killed when working in the hold, and to the people who were injured working in the hold. As to those, the answer of the shipowners was in effect their counterclaim. You, the stevedores—said the shipowners—are liable for this explosion and its consequences, and consequently, if we have to pay salvage or compensation to the dead and injured men, we should recover that from you, because it is a consequence of your breach of duty to us as stevedores.

The facts are a little complicated, and as to some of the things that happened one has to conjecture what has happened from the facts that one knows. The stevedores are Mexican shippers, who are in trade connection with a European firm, who market the gasoline or kerosene. The marketing firm have a charter with the shipowners for a series of ships extending over a year, all of which go to Tampico, to load the gasoline and kerosene. The particular ship on which this accident happened was the *Essex Isles*,

A and was the seventh ship that had come under the charter. Gasoline and kerosene—particularly gasoline—are very dangerous goods. The gas emitted by them is very liable to explode, and consequently, and not unnaturally, the Mexican firm insist on the processes of shipping and loading being carried out by people whom they control; and the practice with all these ships that came to Tampico was the same. The representatives of the stevedores, the shippers, came on board; they ascertained from the B captain how many hatches he had and their sizes, and they said: We will load in such a way at one hatch and in such and such a way at another hatch; they then took off the hatches and fitted the holds for loading. The holds, as is usual with most ships' holds, when the hatches were taken off, had removeable beams across them transversely, with removal fore and afters between the beams, and between the beam and the hatch coamings, and these beams and fore and afters had to be taken away before the cargo C could be loaded into the hold. The beams, very substantial metal structures, weighing about a ton, fitted at each end into slots about 18 in. deep, so that if the beams were in their proper place, to take them out meant raising them some 18 in.

The particular hold at which this explosion occurred was to be worked in two ways. The stevedores had a kind of conveyor or elevator of the sort used now in most up-to-date loadings, which by a sort of endless band conveyed a series of cases in a stream into D the hold, where they were discharged and stowed. That was one way of doing it. Another way of loading, and the more old-fashioned way, was that on to a wooden tray there were piled a series of cases; to the tray was attached a sort of net which covered the cases, the net and ropes attached to the tray ended in a hook, and the hook was made fast to the derrick, and the tray, by the combination of the two derricks which were worked, was then hoisted, swung across over the hatch, dropped down the hatch, and E then moved, swung, as far as it could be, towards that part of the hold where the stowage was going on. In this particular hold No. 1, it was determined by the stevedores to work the elevator in the forward part of the hold, and to work by tray in the aft part of the hold. The hold was 24 ft. long by 16 ft. broad, there being two beams dividing the hatch into three sections. The elevator was going to work in the forward section, 16 ft. by 18 ft. and the tray was going to work in the aft two sections, 16 ft. by 16 ft. F To work the elevator you have to leave in the top beam. The stevedores took off the hatches, and then the after three beams, as they did in three other holds in the ship, so that in all they took out twelve beams. They left in the forward beams, the top beam because the elevator was going to rest on it on a baulk, and the beams of the second and third decks, because nobody thought that it was necessary to take them out.

When one follows what was happening, one makes a guess at the sort of thing that did G in fact happen. The elevator is loading cases into the forward part of the hold, where they are being stowed. The tray is going to be used to stow the after part of the hold, and as one would expect, you would begin with the part furthest aft and work up to under the hatch. Very properly, to save trouble, the method of stowage is adapted which anyone who has seen ships loaded has seen dozens and hundreds of times: the tray is loaded, it is lifted from the quay; it is swung across plumb over the hatch, it is H lowered down into the hatch, but stops before it gets to the bottom, and then, still hanging on to the sling from the derrick, it is pushed or moved partly by the derrick swinging and partly by the men below hauling it until it is dispatched as far aft as it can be got while hanging to the derrick, the object being, of course, to save the men the trouble of carrying the cases from the centre of the hatch to the after part of the hold, where the things are going to be stowed. When the tray is empty it has to come up, I and if it is done carefully, the men who have pulled it aft, to the place where it is dropped, will also hold on to it when the derricks gets a hoist on it, and let it go forward slowly until it is plumb with the centre of the hatch, when there will be a direct hoist up. If the men below are careless, as men frequently are, when they have emptied the tray, they will not hold on carefully to the tray, as it is swinging forward on the derrick, with the result that it may swing forward of itself, further than the centre of the hatch, and if the derrick is pulled fast enough so as to get the initial pace on, if the hoist is going at such a speed, it may easily swing forward so as to hit anything which happens to be in its way on the forward side of the centre of the hatch, it may be a pillar, it may be a

beam, it may be men, it might be cargo. Again, anyone who has seen cargo loaded, knows perfectly well that with a fairly rough cargo and a good tramp ship the hoisting goes on in rather a rough way, and the hoist may bounce about and swing about, and may bump into the coamings and may bump into the beams. How much care must be taken with that sort of work depends a great deal on the cargo that is being hoisted, and on the construction of the ship. It may be that the cargo is such that a little bumping does not hurt it, and the ship takes its chance. It may be casks of liquor, and then of course more care must be taken, because you run the risk of spilling the whole contents if you bump a cask hard into a beam or a pillar. But in the case of petrol or gasoline, it is quite obvious that the greatest care must be taken to avoid any risk of explosion. A spark may blow the hold up, with the greatest risk to life and to property. Anything metal in the hoist hitting another metal part in the ship may make a spark. This court, in a case which has achieved great notoriety in the world of law, *Polemis* v. *Furness, Withy & Co., Ltd.* (2), was face to face with a similar terrible explosion which destroyed a great deal of life and property by a plank dropping and making a spark in some way —whether it had a metal bind or not one does not know—and there is no doubt that the operation of loading and unloading in an atmosphere charged with a dangerous explosive vapour should be carried on with the greatest care.

In the course of loading, on Jan. 13, 1927, an explosion did occur, which, as I have said, killed ten men, injured seriously some ten more, and caused the ship to be towed over to the other side of river and sunk, and I think abandoned. What caused that explosion? Of direct evidence there is very little, but two men who were in the hold, some thirteen months or more after the explosion, did make two declarations which, according to the practice of the Commercial Court, have been admitted in evidence. The first man, Juan Herrera, says that he was working as stevedore in hold No. 1 of the British ship *Essex Isles* when approximately at 11 o'clock in the morning of Jan. 13, 1927, he saw that an empty tray, on being lifted from hold No. 1 referred to, caught a beam of the shelter deck and raised it, dislodging same from its place. He also solemnly declares that he saw that on the beam mentioned falling to the bottom of the hold referred to, it grazed the iron column which produced large sparks causing immediately an explosion. The second man, Lazaro Garcia, says that he also was working as stevedore in hold No. 1 of the British ship *Essex Isles* when approximately at 11 o'clock in the morning of Jan. 13, 1927, he saw that an empty tray, on being lifted from hold No. 1 referred to, caught a beam of the shelter deck and raised it, dislodging same from its place—he does not say, as the first witness did, that it grazed an iron column which produced large sparks. Mr. Dodds, to whose evidence the judge had evidently attached considerable importance, who had both stowing experience and sea experience, on coming down shortly after the explosion, saw the forward beam of No. 2 deck lying at the bottom of the hold, and that positive evidence suggests, and the learned judge finds, that the explosion was caused by that beam, the forward beam of No. 1 hold on the No. 2 deck, getting out in some way from the slots that held it, and falling, and by hitting some metal, making a spark which caused the explosion.

There were possible alternative theories. One always suspects in these explosion cases that somebody has been smoking. One knows, unfortunately, by English experience in mines, that workmen will smoke in the most dangerous conditions; but there is no evidence here which one can find that this was caused by smoking, so as to overthrow that positive evidence. There is another possible theory that the hoist swinging from the derrick and being raised too quickly and without being steadied into the middle of the hatch, the metal hook of the hoist struck some metal and made a spark, sufficient to cause the explosion. But if one accepts Mr. Dodds' evidence that almost directly after the explosion he saw that beam to which I have referred at the bottom of the hold, it is much more probable that the explosion was caused by a spark made by that beam dropping on to metal, than that it was made by the hook of the hoist striking metal, because, if the latter theory was correct, you would have to account for the beam going down to the bottom of the hold.

If the explosion was caused by the swinging forward of the hoist catching the beam somehow, either by catching it by the hook or catching it by the edge of the tray, the

hoist continuing and the beam coming out, was that or was that not negligence on the part of the stevedores? They are working in a most dangerous atmosphere, an atmosphere where a spark may cause an instant explosion. It appears to me that the greatest care was necessary on their part to ensure that their hoist did not strike so as to make a spark, or dislodge things which might make a spark; and I come to the clear conclusion, as the learned judge did, that there was negligence on the part of the stevedores and those supervising them, in so carelessly letting the hoist go up that it dislodged a beam which, falling, caused a spark. It is significant, although one must not attach too much importance to it, that the hoist depending on control by the signalman, a servant of the stevedores, the signalman, disappeared directly after the accident happened—there is no suggestion that he was killed.

A further thing which supports the view at which I have arrived is the report Mr. Dodds himself made shortly after the accident. On the question of whether the stevedores were negligent in their operation, which in some way caused the beam to fall by careless swinging of the tray and plant, this report, made on Mar. 3, 1927, by Mr. Dodds, one of the principal managers of the stevedores, is of vital importance. He says this:

> "From the evidence of all shore witnesses, it is perfectly clear that the accident was caused by an empty tray which was being raised from the lower hold of No. 1 hatch catching under the shelter deck beam [that is the beam of No. 2 deck] on the fore side of the hatch, dislodging it and causing it to fall down below, striking the spark in all probability when it hit the 'tween deck coamings [the 'tween deck being No. 3] I have not the slightest doubt that this version is the correct one."

Then he goes on to give his reasons, stating how early he saw the beam in the lower part of the hold, and that he personally unshackled the empty loading tray from the runners of the forward derrick, the tray at this time being on the starboard side of the deck. Then he goes on:

> "It is the responsibility of the ship [this of course is a matter of dispute] to see that any beams which are not removed for the loading or discharge of cargo are bolted in place, and it appears that on this vessel none of the beams were bolted. When the empty tray is being hoisted out, it is customary to take the strain, lift the tray slightly and then steady it until the runner is plumb with the block on the derrick head before hoisting out, in order to avoid the tray swinging around. There is no doubt that on this occasion the tray was allowed to swing unduly, otherwise it could not possibly have caught the beam."

That of course is a very clear statement that the stevedoes were negligent in allowing excessive swinging of the tray, and one therefore starts the consideration of the legal position by coming to the conclusion that the explosion was caused by negligent work of the stevedores in allowing the tray and plant to swing so that it dislodged a beam which caused damage. The learned judge takes that view.

Now comes the troublesome part of the case, because the stevedores say: At any rate the shipowners were negligent as well as us. There were two concurrent negligences, and if that is the case neither of us can recover against the other. We cannot recover against you for the sums that we have to pay to our workmen, but you cannot recover against us for the damage which you say is caused to the ship, because it is caused by both our negligences. That is the view the learned judge has taken. His judgment involves rejecting the claim of the stevedores for the sums they have to pay their servants, and rejecting the claim of the ship for damage done to the ship. But the stevedores have a cross-appeal, because they say: We want to go further than the learned judge did. They say: We want to say this, that the ultimate cause of the damage was that you had not bolted the beams, as it was your duty to do, and if you had bolted the beams, then however negligently we swung, this damage would not have happened, and therefore the proximate cause of the damage is that you negligently did not bolt that beam. If you had bolted it, it would not have come out, and there would not therefore have been a spark caused by its falling, and consequently the liability for this loss really rests on you. You cannot recover on your counterclaim for damage to the ship, but we can recover

against you in respect of the sums that we have to pay our servants, because the cause of that payment was your negligence in not bolting the beams. A

This, undoubtedly, is not an easy question, and I have no desire to lay down a complete code of law as to how 'tween deck beams are to be dealt with as between all people. I can conceive that there may be a different measure of liability between shipowner and charterer from that which exists between a shipowner and his stevedore, because, as has been pointed out during the argument, to find out whether anything is negligence in a particular person, you must find out what duty that person owes. If there is no duty, there is no negligence. If, to put a case which has been put in one of the authorities, you see a blind man walking straight at a deep river and do not stop him, there is no legal duty on your part to stop him, and no negligence in not stopping him. Your moral duty and your moral blame may be very great, but it is impossible to say that you, the person standing by, are negligent is not stopping the blind man walking into the river. What is the duty of the shipowner to the stevedore whom he employs? It seems to me that such a stevedore is an invitee, and being an invitee, the duty of those who invite him is the duty laid down by WILLES, J., in *Indermaur* v. *Dames* (1), (L.R. 1 C.P. at p. 288). B C

> "He [that is the invitee] using reasonable care on his own part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know." D

That is sometimes put in this way: that you expect the person you invite to use reasonable care to avoid danger which he can see or ought to see; but as to traps which by using reasonable care he would not be aware of, you are under a duty either not to create such traps, or, if you have created them, to warn him of them. I have cited WILLES, J., in *Indermaur* v. *Dames* (1) because it is the beginning of that law, but similar passages will be found by the present LORD SUMNER in *Latham* v. *R. Johnson & Nephew, Ltd.* (3), and there is one of my own in *Hayward* v. *Drury Lane Theatre, Ltd. and Moss Empires, Ltd.* (4), which has been two or three times approved by members of this Court, and which is the same, substantially, with one minor alteration, as LORD SUMNER'S view in *Latham* v. *R. Johnson & Nephew, Ltd.* (3). E F

Apply that to this case. The stevedore in this case, from very proper motives, insists on having the work in his own hands. He is dealing with a dangerous substance, which he thoroughly understands, and he objects to having other people dealing with his work. Consequently on this ship, and on the other ships that come in, he takes the work into his own hands. The captain informs the stevedore of the size of the hatches; the stevedore settles how he is going to work those hatches, whether he will work them only with a tray or whether he will work with a tray and an elevator, and having settled that, he goes to the hatches, and his men take off the hatches and his (the stevedore's) men take out such beams as they think necessary in order that their work may be done, and they leave in such beams as they think it is unnecessary to move. In taking out the beams they must see and must know whether they are bolted. If they are bolted, they have to take the bolts out; if they are not bolted they can hoist straight away, and the beams come out. G H

There is no doubt that in this ship, before the explosion took place, the stevedores had themselves taken out twelve beams, three in each hatch, and had found all of them unbolted. We have not heard what happened in No. 4 hatch, where apparently they worked both elevator and tray, but in No. 1 hatch they did leave three beams. They left in a top beam because they could not work the elevator by leaving it out. They left in the two beams below, because presumably they thought that they did not interfere in any way with the work that they (the stevedores) were going to do. And indeed Mr. Dodds, in the passage that I have read, says that when they left 16 ft. square for their tray, they left a space ample for the proper working, and any swing of their tackle which did hit the lower deck beams was undue swinging. "The tray was allowed to swing unduly, otherwise it could not possibly have caught the beam." The learned judge has found, and this is the first point on which I part company with him, that the ship owed a duty to the stevedore to bolt the beams that the stevedores left in because I

they were not in any way interfering with the work that the stevedores were going to do. As between the ship and the stevedore, I am unable to take that view. It does not seem to me that those unbolted beams were in any way a trap. They were perfectly visible. Anybody looking at them could see whether or not they were bolted, and the stevedores had ample notice that the beams on the ship generally were not bolted, because every beam that they had taken out they had found not to be bolted. I am therefore unable to take the view that there was a duty owing by the ship to the stevedores to bolt the beams which the stevedores, having looked at the hatch, left in because such beams would not interfere with their work. The mere fact that the stevedores thought that those beams would not interfere with their work seems to me to relieve the ship from any liability of dealing with the beams which the stevedores themselves did not think were in their way. The stevedores knew much better the nature of their work than the ship did.

That is enough, as it seems to me, to dispose of the finding of negligence, but I think it might also be disposed of by saying that by the work of the stevedores on the beams they did take out they had ample notice that the condition of the ship as a whole was a condition of unbolted beams; and if so, there is no question of a trap. It is a matter that they knew, or by the smallest intelligence could know, and it is important from that point of view to remember that the two people in charge of the loading on behalf of the stevedores, Mr. Echevaria and Mr. Guzman, were not called, so that one had not the advantage of knowing, from the people in charge of the work on behalf of the stevedores, what their view of the matter was. If, therefore, there was no duty owing, and if there were no traps, the view taken by the learned judge appears to me to be one which we cannot support. I notice only one other matter in regard to his judgment. He appears to be impressed, as I have been impressed, with the difficulty of imagining exactly what did happen to get that beam out, because I agree that one would not expect a rope sling hauled up by a derrick with a wooden tray to catch so fast round a beam that it hoisted it out and then became separated from it. One would be much more inclined to think that the derrick itself would go, or the rope would go, or that parts of the tray and sling would go down with the beam to the bottom of the hold. As far as I can see, the learned judge has taken the view that there must have been something wrong with the beam besides the want of bolting, that is to say, that it cannot have been in the slot, or can only have been so very slightly in the slot that what may be called a "touch and go" would let it go, and leave the sling to go on. Whether that is so or not is a matter that is easily discernible. It is not in any way a trap. If, as I think, the duty is on the stevedore and not on the ship to see that the hold, apart from traps, is in a condition in which loading can properly take place, the learned judge's view does not assist in supporting the view which I hold to be erroneous.

There is only one more matter to which I may refer, and that is the argument by which counsel for the stevedores endeavoured to support his cross-appeal. He said, as I understood him: If one really understands this case, it is really the same sort of case as the decision of the Privy Council in *British Columbia Electric Rail. Co., Ltd.* v. *Loach* (5). There, a wagon with a driver and a passenger—I will say something about the passenger in a moment—drove across a track without looking to see whether anything was coming. An electric tram came along the track at a fairly fast pace, saw the wagon in time to have avoided it if the tram's brakes had been in order, but unfortunately it had a defective brake, so that although the tram could have pulled up to avoid the wagon if its brakes had been in order, owing to its brakes being out of order it could not do so. The Canadian courts were divided three and three as to the result of that, one side of course saying, This is negligence on both sides. Here are people who drive on to a track without looking to see what is coming, and here is a tramcar driving with a defective brake. That is contributory negligence. The wagon cannot recover against the tram. The Privy Council took the view that as the tram saw the wagon in time to pull up if it had had a proper brake, the real cause of the accident was that it had not a proper brake, and that consequently the negligence of the wagon and those on board it in not looking where they were going and seeing what was coming was not the immediate cause of the accident, but the immediate cause of the accident

was that a tram which could have pulled up if it had had a proper brake, had not a proper brake. A

There is no doubt that *British Columbia Electric Rail. Co., Ltd.* v. *Loach* (5) is a very odd case, because the man who sued was not the driver, but a passenger. It is described in the judgment in this way "One Hall took Sands"—the representatives of Sands were the plaintiffs—"with him in a cart." The jury found, for some reason which I do not understand, that the passenger in a wagon was bound to take extraordinary B precautions to see if the road was clear. Well, in English law, we have parted for some time with the proposition that a passenger is identified with his driver, and is affected by the negligence of the driver. But oddly enough, there is no reference whatever in the judgment to the fact that Sands was a passenger and would not be supposed to be liable for the negligence of the driver. I have sent for the record in that case and I find that the position of Sands, according to the C evidence, was that he was a timekeeper in the employ of the same people as the driver of the wagon, that the wagon was going on a job for the company, having nothing to do with the timekeeper, and that the driver says: "I got my load and was passing the office when this man Sands came up. He came out of the office and he said 'Where are you going?' I said 'Up to the other end of the road'; and he said 'I will ride with you.'" So a man who had got on just for a casual ride as a passenger was in some way held by D the jury as bound to take extraordinary precautions to see that the road was clear; and I confess that I find some difficulty in understanding why that point is not referred to in the judgments of the Privy Council. But whether it be so or not, it appears to me that the case of *British Columbia Electric Rail. Co., Ltd.* v. *Loach* (5) is an entirely different case from this case.

In *Loach's Case* the man who is injured says, Yes, it is true that I was negligent, but E you could have avoided my negligence by taking reasonable care with regard to me. The present case is as if the wagon had run into the tram, and the tram had sued the wagon for the damage done, and the wagon had replied: Yes, it is true that I unlawfully ran into you, but your fittings were not in a condition to stand being negligently run into, and that is a good defence, because I can say that the damage was caused by your fittings being in an unfit condition to be run into negligently by me. It seems to me to F be impossible that a man who is negligent and who is sued for damage done by his negligence can reply "The damage would not be so much if you had taken precautions to guard against my negligence." Why the ship should be under any obligation to guard against the negligent doing of work by stevedores, which they could have done quite properly, as Mr. Dodds says, in the space provided for them, I find myself unable to say. G

I agree with the learned judge that the stevedores were negligent. I do not agree with him that the ship was negligent, because (i) I do not see any duty of the ship towards the stevedores to provide that the ship should be fit to withstand the negligence of the stevedores; and (ii) so far as the finding of the learned judge rests on the defective condition, it seems to me that the stevedores knew, or ought to have known of that condition, and, knowing it, to have avoided it. The result is that the judgment of the H learned judge in favour of the stevedores must be set aside, that the ship must have judgment against the stevedores on its counterclaim, that the amount of the damage must be assessed in some way which I suppose has been provided for by the parties, or if not, must be mentioned to the court, and that in assessing that damage the stevedores will have credit for the £1,500, the amount of their first claim, about which there appears to be no dispute and the stevedores must pay the costs of this appeal and the costs of I the action in the court below.

SANKEY, L.J.—In pursuance of a charterparty dated Oct. 8, 1926, and made between the Anglo Mexican Petroleum Co., Ltd., as charterers and the defendants as owners, the defendants' steamship the *Essex Isles* proceeded to Tampico in Mexico for the purpose of loading a cargo of kerosene and gasoline. The charterparty provided that the steamer was to employ the charterers' stevedores for loading at current rates, and that the steamer was to be consigned at the loading ports to the charterers' agents.

The *Essex Isles* was duly consigned to the plaintiff stevedores, the Compania Mexicana de Petroleo "El Aguila," who were the charterers' agents referred to in the charterparty, and was supplied, when she arrived, by them, with the necessary labour for loading and stowing cargo. According to the evidence, the practice when the ship arrives is as follows, that the stevedores' foreman goes on board the vessel, sees the master, and arranges with him about loading the ship; and, as the learned judge finds, and in my view rightly finds, in effect, the captain leaves the loading and stowing in the foreman's hands. The foreman, or the senior person in charge of the loading on behalf of the stevedores, was a Mr. Echevaria, and he was assisted by a Mr. Guzman, who was chosen for his ability as an interpreter, and who would be able to act as a means of communication between the captain and the Mexican labourers. It is to be noticed that at the hearing of this case neither Mr. Echevaria nor Mr. Guzman was called, nor was any statement by them other than certain documents or reports put in.

The vessel arrived at Tampico early in January, 1927, and immediately on her arrival Mr. Echevaria saw the master as to the stowage and as to the various holds, and he then went ashore, got a squad of labourers, who were Mexican peons, and sent them aboard. When the peons arrived on board, they took off the hatches, and removed some of the beams and the fore and afters, and having by these means obtained access to the holds, they set up elevators, and subsequently began to load and stow the cargo, using both the elevators and certain trays by means of which they lowered the kerosene and the gasoline, some of which was in cases, into the holds. On Jan. 13, after the loading had gone on for a little while, there was a disastrous explosion. A number of the peons were killed in the hold, and others were so severely burnt that they died after removal to hospital. It was found impossible to extinguish the flames on the vessel; it was feared that she might set fire to the warehouse in the neighbourhood of which she had been moored, and so she was towed across the river, and eventually water was let into her holds, and she became a total wreck; and the question to be determined in this case is: Whose fault was it?

The stevedores issued their writ in which they claimed under three distinct heads. They claimed first of all a sum of £1,500 for disbursements which they had made on behalf of the vessel before the fire broke out at all. As to that there is no dispute, but the shipowners say: It will be found that you owe us a great deal more than £1,500 and that £1,500 can be deducted from it. Secondly, the stevedores claimed a sum of £8,500 for expenses which they were put to after the accident in connection with their endeavours to extinguish the flames and to salve the vessel; and, thirdly, the stevedores claimed a sum of £10,500, which was compensation that they had been compelled to pay under the Mexican law to the relatives of the peons who had met their death, and to the injured men. The learned judge in effect gave judgment for the first two of those sums, the £1,500 and the £8,500, but not the £10,500 compensation which the stevedores had been compelled to pay for the workmen. The shipowners counterclaimed for the loss of their vessel, and they took up the position that it was the stevedores' fault that these occurrences had happened, and that, therefore, they were entitled to receive from the stevedores the damage that they had sustained by reason of the fact that the *Essex Isles* had become a total loss.

The case made by the stevedores was of this character. They said: You, the shipowners, did not properly bolt the hatch beams as you ought to have bolted them, and as we, the stevedores, were hauling up one of the empty trays from the hold, it came into contact with one of these unbolted beams and unshipped it, the beam fell to the bottom of the hold, and in falling, somehow or other made a spark, which set fire to the highly inflammable petrol vapour. If you, the shipowners, had done your duty and bolted that beam, even if we were negligent in dislodging it by hauling up a tray, a thing which frequently happens, it would never have become unshipped, and the explosion would never have occurred. With regard to the stevedores' case the shipowners put it in issue; and they said this: Well, even if this beam was unbolted and did become unshipped in the way you suggest, at any rate you, the stevedores, ought to have known. You had ample opportunity of seeing that the beams were unbolted and you took the risk.

The learned judge had a very large body of evidence before him. He had the evidence

of a number of experts; he also had had the statements, referred to by my Lord in the judgment he has just given, of two peons who were in the hold and described what they saw, how the beam became dislodged and fell, and one of them says he saw the spark; and after listening to the whole of the evidence, the learned judge comes to the following conclusion: "In my view"—he says—"the cause of the accident was the falling of the beam"—by which he means to say, the beam falling and striking something and creating a spark—"which was not carefully and properly secured by the crew of the ship, and which was displaced by a tray carelessly hove up by the stevedores' servants." I agree with the learned judge, on the evidence, that that was the cause of the accident, namely, that the stevedores hauled up the tray, allowed it to come into contact with the unbolted beam, and down it fell, a spark ensued, and the explosion and subsequent fire was caused.

Those being the two findings of fact, (i) that it was the tray which dislodged the beam, and (ii) that the beam was unbolted, two propositions were admitted. First, that the stevedores were the servants or agents of the plaintiffs. Secondly, that the way in which they hauled up this tray, having regard to all the circumstances, was admittedly negligent. Therefore, we start the difficult part of the case by the admission that it was the plaintiff stevedores' negligence which dislodged the beam. Then comes a question which I think is a double one, and which would have been submitted to a jury in the following terms: (i) Were the shipowners negligent in leaving the beam unbolted? (ii) Even if they were negligent in leaving the beam unbolted, did the stevedores know, or ought the stevedores to have known that it was unbolted?

I will deal with those questions separately. Were the defendants negligent in leaving the beam unbolted? There can be no negligence in English law unless the person who alleges the negligence of his opponent is able to show that his opponent owed some duty, a breach of which has been committed; and I agree with my Lord, if I may be allowed to say so, in thinking that the law governing this case is that laid down in *Indermaur* v. *Dames* (1), in the judgment of WILLES, J., and which is in the following terms (L.R. 1 C.P. at p. 288):

> "The class to which the consumer belongs includes persons who go, not as mere volunteers or licensees, but who go upon business which concerns the occupier, and upon his invitation express or implied."

Now here, I think, the stevedores were in that position. And the learned judge continues:

> "With respect to such a visitor [that is, with respect to the stevedores] we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know, and that where there is evidence of neglect the question whether such reasonable care has been taken must be determined by a jury as a matter of fact."

What duty did the ship owe to the stevedores with regard to this question of bolting the beams? I wish to guard myself very carefully from laying down any general rule with regard to the duty owed by stevedores to a vessel when they are loading or unloading her. It all depends on the particular facts in the particular case. I have already stated that the learned judge finds—a finding with which I am in agreement—that in effect the captain left the loading and stowing in the foreman stevedore's hands. The learned judge finds—and I agree again with his finding—that the stevedores took out a beam in each hatchway in each deck, leaving a space of 16 ft. by 16 ft. for the trays to work in. They took out the fore-and-afters, and left the forward beam in each hatchway without removing it. The cargo was of an extremely dangerous kind, gasoline and kerosene, in cases, no doubt being loaded in a very hot climate, and no doubt those persons who were charged with the loading operations would be extremely careful to see that nobody who was not used to loading such goods under such conditions would be allowed to interfere at all. In other words, when the ship arrived at Tampico, she was handed over to what I might call these experts in loading gasoline and kerosene, in order that with their expert knowledge and their experience they might do the proper

things to load her. What was the duty of the vessel in such a case? There again, I do not want to lay down any hard and fast rule, but it appears to me that the shipowners' duty was to hand over the vessel to the stevedores for the purpose of its being properly loaded, and to provide such proper instruments for loading, as, for example, derricks, winches, and so forth, as a vessel usually provides. If that is the duty, there is no evidence of any breach of it. It was sought to be said that one is not handing over a vessel in a proper condition to receive the cargo if one hands it over with unbolted beams. My answer to that is the answer which appears to me to be founded upon the facts. When the ship arrived at Tampico the labourers were the people who did the actual work of opening and preparing the hatches. They opened the hatches, they took out the beams, they erected the platform, they put up the elevator; and it seems to me that from that time onwards, the superintendence and the control of the operations were vested in the stevedores and their men. Therefore, I cannot see that there was any breach of duty by the shipowners which would entitle the stevedores to say that the shipowners were negligent in leaving the beams unbolted.

But even if the shipowners had been negligent, the second question would equally have to be determined in favour of the shipowners. The second question is: Even if the shipowners were negligent in leaving the beams unbolted, ought the stevedores to have known that the beams were unbolted? In other words: Were the stevedores guilty of such contributory negligence on their part as disentitled them to recover?

There again the answer must be found on the same evidence as applies to the first two questions. From the time when Mr. Echevaria put his squad on board, this vessel was in the hands of the stevedores' servants; they did the actual work of opening and preparing the hatches. But not only that: in opening and preparing the hatches in order that the holds might receive the cargo, they saw that every beam that they took out was not bolted, and they must have known, or ought to have known, that the beam they left in and upon which the platform was erected to enable their men to work, was in a similar condition. We need not go into the exact number of beams here which they had taken out, but it appears to me that, even if the shipowners were negligent in leaving the beams unbolted, the stevedores well knew or ought to have known that the beam upon which the platform was built was in that condition, as every other beam in the ship was. In these circumstances, the plaintiff stevedores are not entitled to recover. There is no dispute that the stevedores are entitled to the £1,500 to which I have already referred. But the amount to which the defendant shipowners are entitled to on their successful counterclaim must be ascertained, in default of agreement, by the proper authority, and the £1,500 will have to be given credit for. I agree that the appeal should be allowed and the cross-appeal dismissed.

RUSSELL, L.J.—I am of the same opinion, and inasmuch as we are taking a different view from that entertained in the court below, I desire to state my reasons in my own words, but I am glad to think that I can do so quite shortly. It is unnecessary to recapitulate the facts. Before us, as the case was argued, there was no dispute, it was admitted that the stevedores were negligent in the loading, their negligence consisting of doing what Mr. Dodds described as allowing the tray to swing unduly in what he also described as a space ample for their requirements. That was the stevedores' negligence as found in the court below, and was accepted by the stevedores in this court.

The questions which arose for our consideration were two. The first was this: Was the ship guilty of any negligence in allowing the beam to remain unbolted? and the second question was this: Assuming that to leave the beam unbolted constituted negligence in the ship, were the stevedores aware of the fact that the beam was unbolted, or ought they to have been aware of that fact? It is on the existence of this alleged negligence on the part of the ship that the stevedores' cause of action against the shipowners and the stevedores' defence to the shipowners' counterclaim rests. But the alleged negligence, as it is conceded, must not be negligence at large; it must be negligence of such a kind that it involves the breach of some duty by the shipowners to the stevedores. And the question resolves itself, therefore, upon this part of the case, into this: Was there any duty of the ship to the stevedores to bolt the beam? The witnesses in

the court below said in general terms that in their opinion it was the duty of the ship or of the ship's officers to bolt the beam, and the learned judge has accepted that view. So far as that merely means that there may have been a duty, or was a duty, on the part of the ship towards, say, the charterers to bolt the beam, we need not necessarily quarrel with that. But if it means—and I think we must take it here that it was accepted in the court below to mean—that there was a duty of the ship towards the stevedores to bolt the beam, that view I feel myself unable to accept. I cannot see how such a duty can arise. The unbolted beam was perfectly safe and harmless if the loading was conducted without negligence. It only becomes a possible source of danger if the stevedores acted negligently in the course of the loading. In my opinion the ship cannot owe, and does not owe, any duty to the stevedores to anticipate that the stevedores will be negligent, and to avoid the effects of that negligence by anticipation. For those reasons I hold that there was no negligence in the ship.

The second question is only material if there has been negligence by the ship, but I may say that as to that second question, if it arose, I am satisfied on the facts of this case that the stevedores must have known that the beam was in fact unbolted. The evidence shows this: It shows first of all that these stevedores were most experienced people. Mr. Hartford, the plaintiffs' wharfmaster at Tampico, who gave evidence on commission, was asked: "Are they people who have had a lot of experience?" and the answer was, "A tremendous experience in this work." The evidence further shows this, that what has been called with sufficient accuracy for this purpose, the loading area, was handed over, or the control of it was handed over, to the stevedores for the purpose of being prepared for the loading. Further, the evidence shows that in the course of that preparation the stevedores took away and removed a number of these beams and that every single beam which they removed was in fact an unbolted beam. And finally the evidence in my opinion establishes this, that it is, as a matter of practice, quite common for a ship in ballast arriving at a port of loading for the purpose of receiving a cargo, to arrive at that port with the beams unbolted, at all events so far as concerns the two lower decks. In that state of circumstances there can to my mind be no doubt of what the answer should be to the question whether in fact those experienced stevedores knew or must be taken to have known that the beam in question was in fact unbolted; and the answer must be that they did in fact know or must be taken to have known. In this case, as had already been pointed out, we are handicapped by the fact that the stevedores did not think fit to call either Mr. Echevaria or Mr. Guzman, or any other person in authority from the stevedores. For these reasons I think that the second question should be answered in the way I have indicated. It was suggested in argument by counsel for the stevedores that they were entitled to assume, when they started loading on the Monday morning, having picked out the beams which they wished removed, and having removed them on the Saturday, that the ship had caused to be bolted those beams which had been left behind. Unfortunately for that argument, even if it were otherwise a sound one, the evidence shows that in regard to the particular hold which we are considering, namely, No. 1, the loading in fact started there on the Saturday immediately after the beams which had been removed had in fact been removed, so that with regard to this particular beam in question, there is no room for that particular argument. For these reasons, which I have endeavoured to state shortly, I agree that this appeal should be allowed, with the results indicated by my Lord.

Solicitors: *Middleton, Lewis & Clarke*; *Thomas Cooper & Co.*; *Parker, Garrett & Co.*

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

A

GULF AND SOUTHERN STEAMSHIP CO. (INC.) *v.* BRITISH TRADERS INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Roche, J.), December 3, 1929]

B [Reported [1930] 1 K.B. 451; 99 L.J.K.B. 208; 142 L.T. 406; 35 Com. Cas. 198; 18 Asp.M.L.C. 94]

Insurance—Marine insurance—Freight—Insurance by shipowners on cargo including "charges of assured upon said cargo"—Total loss of vessel and cargo—Claim by shipowners for freight in process of being earned at time of loss—Liability of insurers.

C Insurers issued to a shipowner a policy of insurance in respect of one of his steamships "on cargo as per form attached." In the form attached the term cargo was defined as including (inter alia) "charges of said assured upon said cargo or any portion thereof." During the currency of the policy the steamship became a total loss with all her cargo, and the shipowner lost his right to recover freight which was in process of being earned at the time of the loss. The shipowner claimed to recover the lost freight from the insurers under the terms of the policy.

D **Held:** freight must be specifically insured by apt wording in the policy, but the words "charges of said assured upon said cargo" included and were intended to cover the freight that was in process of being earned by the ship, and so the shipowner was entitled to recover.

Notes. As to the need for freight to be specifically insured, see 22 HALSBURY'S LAWS (3rd Edn.) 54; and for cases on the subject, see 29 DIGEST 96–97.

E Case referred to:

(1) *The Bedouin*, [1894] P. 1; 63 L.J.P. 30; 69 L.T. 782; 42 W.R. 299; 10 T.L.R. 70; 7 Asp.M.L.C. 391; 6 R. 693, C.A.; 29 Digest 210, *1687*.

Action tried before ROCHE, J., in the Commercial List.

By order pleadings were dispensed with and the action proceeded to trial on an agreed F statement of facts, which was as follows: 1. The insured, the Gulf and Southern steamship Co. (Inc.) were a subsidiary company of the Eastern Steamship Lines (Inc.). They were at all material times the owners of the steamship *Louisiana*, and ran that steamer and other steamers for the purposes of lines maintained by them between (inter alia) New Orleans and Key West and Miami. They were entitled to sue on the policy hereinafter mentioned. 2. By a policy of insurance dated Nov. 2, 1926, a copy of which was G attached to the statement of facts, and which was admitted to be valid, the insurers, the British Traders Insurance Co., Ltd., insured the insured in respect of (inter alia) the said steamer as therein mentioned. The policy was described as an insurance for $7,965, part of a total similar insurance of $150,000 from noon on Aug. 15, 1926, to noon on July 1, 1927, "on cargo (first interest) as per form attached including and subject to the clauses and conditions of the form attached." The form attached H provided that the insurance was:

"On cargo of any kind owned by the assured, and on the assured's liability to others in respect to cargo of any kind, covering same from time said assured becomes responsible therefor, and until its responsibility ceases, wheresoever the same may be, including risks while on docks, in and (or) on cars on docks, piers, wharves, lighters, and (or) craft, transfers, and all land conveyances, and also to cover upon J any advances made by and payment of back charges made by or due from said assured, and upon any charges of said assured upon said cargo or any portion thereof, including risk of transhipment. It is agreed that the term "cargo" as used in this policy includes goods, wares, merchandise . . . and where used in this form it includes also all advances made by and payment of back charges made by or due from said assured and (or) charges of said assured upon said cargo or any portion thereof.

"It is agreed between the parties hereto that said steamers are to be employed in carrying cargo, or cargo and passengers, in and on said steamers as aforesaid, the

assured taking upon themselves as to said cargo, or parts thereof, all the risks, perils, and liabilities which by law a common carrier by land or water assumes, and also the insurance on such cargo as may be carried under 'insured' rates of freight against perils of the seas and fire, jettisons, barratry, and all other acts, perils, or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo or any part thereof; and the said assurers agree and undertake to indemnify and hold harmless the said assured against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the assured may be held by the owners thereof under any liability the assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in general average, and (or) for salvage, landing, warehousing and (or) special charges, and to cover in like manner any cargo owned by the assured, and also all advances made by and payment of back charges made by or due from said assured and (or) charges of said assured upon said cargo or any portion thereof."

3. The following facts as to the insured's course of business were at all material times well known to the insurers: (i) Goods carried by the insured were frequently carried with all charges "collect," i.e., payable by the consignees at their ultimate destination. In such cases, in the event of loss, no charges were payable by the consignee. (ii) The insured might either carry the goods over the whole of their transit, or they might be one of a succession of carriers, the first of whom issued a through bill of lading to the consignor covering the whole of the transit. In such cases the freight or other charges of each carrier of goods being carried with charges "collect" were considered as earned on the safe termination of such portion of the whole transit as that carrier might be responsible for, and were paid by the carrier next in the series, who added them to his own charges and collected them from the next carrier or the consignee as the case might be. Such charges so paid to previous carriers were known and referred to in the policy as "back charges." They were at the risk of any carrier who had paid them in so far as if the goods were lost while in the charge of such carrier, he could not recover them from the previous carriers or from the carrier who would have taken on the goods from him or from the consignor or consignee. (iii) The insured on being paid at an appropriate rate frequently took upon themselves in respect of goods carried by them the full liability of a common carrier and/or of an insurer against divers maritime perils (inter alia) perils of the sea. Goods carried on the terms that the insured should thus take upon themselves the insurance of the goods were said to be carried under "insured" rates of freight. 4. On Oct. 27, 1926, the steamship *Louisiana* left New Orleans for Miami and Key West with a general cargo. On the next day she was sunk in a collision and became a total loss with all her cargo. It was admitted that the loss gave rise to claim on the policy, the question for the court being what classes of loss were covered by the policy. 5. The loss of the said steamer and her cargo produced (inter alia) the following classes of loss to the insured: (i) They became liable to pay to the owners of goods accepted at "insured" rates of freight on board the steamer divers sums. (ii) They lost their right to recover from the consignees of certain of the goods certain "back charges" paid by them amounting to $2,974.22. (iii) They also lost their right to recover from the different consignees the freight which was in process of being earned by them at the time of the particular casualty, and which only became payable, together with the said back charges, on right and true delivery by the plaintiffs of the goods in question at their destination. The freight so lost amounted to $7,366.33. 6. No question arose in respect of the classes (i) and (ii) mentioned in the preceding paragraph, the insurers having admitted liability in respect thereof.

The question for the opinion of the court was whether the loss mentioned under (iii) of the said paragraph was covered by the policy or not. If the court should be of opinion that they were so covered, the insurers' proportion amounted to £113 4s. 7d.

J. Dickinson for the insured.
David Davies for the insurers.

ROCHE, J.—This case raises a short, neat, and interesting point on the construction of a policy of marine insurance. The parties have very wisely agreed to try it upon an agreed statement of facts, which is clear and to the point, and leaves the matter, having explained the terms which are used in the insurance documents, as one of construction, but the explanations contained in the statement of facts were necessary having regard to the nature of the trade in which the assured were engaged. The matter may be summarised in the following way. The insured were shipowners engaged in one part of a venture which is often conducted by through bills of lading, and the policy which was effected may be stated to be one which was intended to cover the goods which they were carrying in the part of the transit with which they were concerned. They might be concerned in the whole of the transit, or only with part of a larger transit. The policy is described as an insurance for "7,965 dollars part of 150,000 dollars" on "cargo (first interest) as per form attached including and subject to the clauses and conditions of the form attached." Therefore one is referred to the attached form to see what it was that was covered.

The real question in this case is whether, when one has read that form, the court is satisfied that the assured's freight, which was or might be at risk, was covered. The most material words in the form are as follows: "On cargo of any kind owned by the assured" that is the first point; and it is to be noticed that primarily the assured are not cargo-owners, but if they do own cargo on board the ship then that is covered. But there are other classes which are covered, and no one of those classes consists of the actual ownership of cargo. In respect of the other matters mentioned in the other parts of this clause the assured are not cargo-owners. The next thing is:

> "On the assured's liability to others in respect to cargo of any kind, covering same from time said assured becomes responsible therefor, and until its responsibility ceases, wheresoever the same may be, including the risks while on docks, in and (or) on cars on docks, piers, wharves, lighters and (or) craft, transfers, and all land conveyances."

The next thing, therefore, is liability. Then the third thing is: "also to cover upon any advances made and payment of back charges, made by or due from the said assured." What that means is explained in the statement of facts; it is to cover anything which the assured may have paid other parties concerned in this transit when they took over the goods, but which they could only recover on completion of the voyage by delivery of the goods. That is the third thing, what they have paid other people, but which they have paid at their own risk because it could only be earned by them on completion of the voyage. The clause which gives rise to the controversy in this case is:

> "And upon any charges of said assured upon said cargo or any portion thereof including risk of transhipment."

The next paragraph contains very much the same provisions as to certain matters which I have already dealt with. Then there is a further clause to the effect that the term "cargo" in this form includes all advances made by and payment of back charges made by or due from the assured and/or charges of said assured upon said cargo or any portion thereof.

I read that stipulation as meaning this, whereas the policy is described as one on cargo, yet it is agreed that it is something much more. The question is: Does that something more include freight? In my opinion it does. It is true that ARNOULD ON MARINE INSURANCE (11th Edn.) at para. 233 says that freight must be insured eo nomine in the policy. Counsel for the insurers quite wisely has not contended that that means that you can never insure freight unless you use the word "freight." Any apt wording indicating that freight is the thing covered or one of the things covered is sufficient to give the protection of the policy to freight. Therefore, the question is, is the term "charges" or any "charges" used in this document sufficient to cover and include freight? In my opinion it is. LORD ESHER, M.R., in the course of his judgment in *The Bedouin* (1) says this ([1894] P. at p. 12): "Freight is the charge made by the shipowner for the carriage of goods on board his ship." The parties in these proceedings have in

stating the facts used words—though they do not apply to freight itself—in much the same sense as they were used by LORD ESHER. They say this: "Goods carried by the insured are frequently carried with all charges 'collect,' i.e., payable by the consignee at their ultimate destination." I take that to mean that the word "collect" is used as meaning collectable or that all charges are to be collected and payable at their ultimate destination. There can be no doubt, I think, that in that connection and association the word "charges" must be intended to include freight. It is said that to make this plain, so as to support the insured's contention, the words should have been "freight or other charges," phraseology which, no doubt, is often employed in documents relating to ships, but the very wording of that phrase, "freight or other charges," means and imports that freight is a charge. It is a charge, and, in my judgment, it falls within the sweeping and comprehensive phraseology of "any charges" employed in this form which I am considering.

It is not a matter which admits of any detailed argument or any very extensive judgment, but I may, perhaps, usefully refer to the next paragraph in the form which mentions a number of things which are covered by the policy. One of them is: "also the insurance on such cargo as may be carried under 'insured' rates of freight." What "insured rates of freight" are is also explained by the statement of facts; they are rates of freight which include both insurance and carriage. I do not gather, and it is not stated, that there is any apportionment between what is charged for insurance and what is charged for carriage, and I read that stipulation to mean that insured rates of freight are covered notwithstanding that part of the rates of freight is really charged for as a premium of insurance. I think the only reason why the freight is specifically provided for is because that is the first and most natural thing which the parties would think of as being a charge upon or in respect of the cargo. Counsel for the insurers makes the point that the phrase is not "charges in respect of the cargo," but "charges upon the cargo." I think myself that distinction is too fine and is an unreal one in a consideration of this document, but even if the word "upon" is to be pressed I think it would not be correct to say that freight is not a charge upon the cargo because the freight itself is not earned at the time of the loss. The truth is that the back charges also are only earned or recoverable when the voyage is accomplished, but the insurance is one directed to reimburse the assured against the contingency of the voyage not being accomplished. I think in using the words "charges upon the cargo" the parties have, for the reasons I have already assigned, made it sufficiently plain that they intended to cover that which is the principal charge upon or in respect of the cargo, namely, the freight that is in process of being earned by the ship.

For these reasons I give judgment for the insured for the sum claimed, namely, £113 4s. 7d., with the costs of the action.

Solicitors: *Thomas Cooper & Co.*; *Parker, Garrett & Co.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

A

CARLTON HALL CLUB, LTD. *v.* LAURENCE

[KING'S BENCH DIVISION (Shearman and Acton, JJ.), January 21, 22, 1929]

[Reported [1929] 2 K.B. 153; 98 L.J.K.B. 305; 140 L.T. 534; 45 T.L.R. 195; 73 Sol. Jo. 127]

B

Gaming—Loan for gaming—Money knowingly lent for gaming in England—Cheques given by borrower as security—Action on loan only—Avoidance of consideration as well as securities—Gaming Act, 1710 (9 *Anne*, *c.* 19), *s.* 1—*Gaming Act*, 1835 (5 & 6 *Will* 4, *c.* 41), *s.* 1.

A proprietary club advanced to one of its members a sum of money in the form of
C counters, the money being knowingly lent by the club for the purpose of gaming in England. The member gave two cheques for the sums represented by the counters as security for the advance. Subsequently the club brought an action against the member on the loan only, and the defendant relied on the Gaming Acts, 1710 and 1835.

Held: under these Acts the consideration for the contract (i.e., the loan) as well as
D the securities was avoided, and so the action by the club was not maintainable.

Applegarth v. *Colley* (1) (1842), 10 M. & W. 723, and *Moulis* v. *Owen* (2), [1907] 1 K.B. 746, followed.

Quarrier v. *Colston* (3) (1842), 1 Ph. 147, distinguished.

Notes. As to loans for gaming, see 18 HALSBURY'S LAWS (3rd Edn.) 179; and for a discussion of the effect of this case, see especially pp. 179-180, note (u), cf. *Humphery* v.
E *Wilson*, ante, p. 171. For cases on the subject, see 25 DIGEST 414–415. For the Gaming Act, 1710, and the Gaming Act, 1835, see 10 HALSBURY'S STATUTES (2nd Edn.), pp. 737 and 744 respectively.

Cases referred to:

(1) *Applegarth* v. *Colley* (1842), 10 M. & W. 723; 12 L.J.Ex. 34; 7 J.P. 741; 7 Jur. 18; 152 E.R. 663; 25 Digest 416, *203*.

F (2) *Moulis* v. *Owen*, [1907] 1 K.B. 746; 76 L.J.K.B. 396; 96 L.T. 596; 23 T.L.R. 348; 51 Sol. Jo. 306, C.A.; 25 Digest 420, *240*.

(3) *Quarrier* v. *Colston* (1842), 1 Ph. 147; 12 L.J.Ch. 57; 6 Jur. 959; 41 E.R. 587, L.C.; 25 Digest 421, *243*.

(4) *Saxby* v. *Fulton*, [1909] 2 K.B. 208; 78 L.J.K.B. 781; 101 L.T. 179; 25 T.L.R. 446; 53 Sol. Jo. 397, C.A.; 25 Digest 421, *245*.

G (5) *Robinson* v. *Bland* (1760), 2 Burr. 1077; 1 Wm. Bl. 234, 256; Bull. N.P. 275; 97 E.R. 717; 25 Digest 420, *239*.

(6) *Barjeau* v. *Walmsley* (1746), 2 Stra. 1249; 93 E.R. 1161; 25 Digest 414, *181*.

(7) *Wettenhall* v. *Wood* (1793), 1 Esp. 17, N.P.; 25 Digest 414, *182*.

(8) *M'Kinnell* v. *Robinson* (1838), 3 M. & W. 434; 1 Horn & H. 146; 7 L.J.Ex. 149; 2 Jur. 595; 25 Digest 415, *185*.

H (9) *Société Anonyme des Grands Etablissements du Touquet Paris-Plage* v. *Baumgart* (1927), 96 L.J.K.B. 789; 136 L.T. 799; 43 T.L.R. 278; Digest Supp.

(10) *Société des Hôtels Réunis* (*Société Anonyme*) v. *Hawker* (1914), 30 T.L.R. 423, C.A.; 25 Digest 409, *127*.

(11) *Young* v. *Moore* (1757), 2 Wils. 67.

I **Appeal** from Marylebone County Court.

The plaintiffs, the Carlton Hall Club, Ltd., were the proprietors of premises in Maidavale, London, which they used and provided for the purposes of a proprietary club. The membership of the club consisted of four hundred elected members of both sexes, who used the club for social purposes and played cards, billiards, etc. Counters, called "chips," with money values marked upon them were supplied to members who desired to play games for money, and the members gave the club cheques for sums so advanced. On May 6, 1924, the defendant Laurence, who was a member of the club, played poker and snooker at the club, and the managing director of the club lent him £18 in "chips"

and £2 in cash. The defendant gave the club a cheque for £20. On May 8, 1924, the defendant again played poker at the club, and was lent by them a further sum of £8 7s. 3d. in "chips" giving his cheque, as before, for that amount. The plaintiffs commenced an action in the High Court for the recovery of £28 7s. 3d. as money due under agreements made on the above dates, and the action was subsequently remitted to the County Court. The defendant contended that the money claimed by the plaintiffs was knowingly lent to him by them, at least in regard to part of it, for the purpose of gaming: that the consideration and the agreement in respect of which it was given were rendered void and illegal by the Gaming Act, 1710, and the Gaming Act, 1835; and that the action was not maintainable. The county court judge found that part of the money advanced to the defendant was lent, to the knowledge of the plaintiffs, for playing cards; that part was used by the defendant in playing cards and part in playing snooker; and that £2 was advanced in cash, in regard to which there was no dispute. He gave judgment for the plaintiffs. The defendant appealed.

By the Gaming Act, 1710, s. 1:

> "All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall during such play, so play or bet, shall be utterly void, frustrate, and of non-effect to all intents and purposes whatsoever . . ."

By the Gaming Act, 1835, s. 1, it is enacted that so much of the Gaming Act, 1710—

> "as enacts that any note, bill or mortgage shall be absolutely void, shall be and the same is hereby repealed; but nevertheless every note, bill or mortgage which if this Act had not been passed would by virtue [of the Gaming Act, 1710] have been absolutely void shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration."

M. O'Connor and *G. L. Hardy*, for the defendant, referred to *Applegarth* v. *Colley* (1), *Moulis* v. *Owen* (2), *Saxby* v. *Fulton* (4), *Robinson* v. *Bland* (5), and *Quarrier* v. *Colston* (3).

G. Beyfus and *A. S. Diamond*, for the plaintiffs, referred to *Barjeau* v. *Walmsley* (6), *Wettenhall* v. *Wood* (7), *Saxby* v. *Fulton* (4), *M'Kinnell* v. *Robinson* (8), *Applegarth* v. *Colley* (1), *Quarrier* v. *Colston* (3), *Société Anonyme des Grands Etablissements du Touquet Paris-Plage* v. *Baumgart* (9), and *Société des Hôtels Réunis* (*Société Anonyme*) v. *Hawker* (10).

SHEARMAN, J.—In my judgment, this appeal must be allowed. The case raises a most unusual point. The defendant was a member of a proprietary club, where he received the sum in dispute in the form of "chips." The "chips" were to be used either in playing games or in paying losses at games. The transaction was, in substance, a loan. The games played in the club included bridge, poker and snooker. Incidentally, £2 was advanced to the defendant in cash, and in regard to that there has been no dispute.

For very good reasons, which are well known, although the defendant gave two cheques in return for the chips, no action has been brought on the cheques, on the well-known principle that such securities are avoided by the Gaming Acts, 1710 and 1835. The matter which has to be decided in this court and which hitherto lacks a complete and convincing decision is whether, where an advance of money for the purposes of gaming in this country has been made here, and a security has been given, the statutes

here in force avoid not only the security, but also the consideration for the contract. The relevant statute is the Gaming Act, 1710, s. 1. It seems to me a somewhat nonsensical statute if it can be said that the creditor may fall back on the consideration. That view, however, does not seem to have commended itself to some of the judges, who decided the earlier cases, *Barjeau* v. *Walmesley* (6), *Wettenhall* v. *Wood* (7), and *Robinson* v. *Bland* (5), in which it was laid down that the statute avoided the security, but not the consideration. On the other hand, it was laid down in *Young* v. *Moore* (11) that under the statute all contracts were void, and in 1842 in *Applegarth* v. *Colley* (1) it was stated by ROLFE, B. (10 M. & W. at p. 732), that

> "it is impossible to impute to the legislature an intention so absurd, as that the consideration should be good and capable of being enforced, until some security is given for the amount, and then that by the giving of the security the consideration should become bad."

Before the date of this last case, the Gaming Act, 1835, had been passed. It provided that the security, instead of being void, was to be deemed to have been given for illegal consideration. The object of that Act was not to intensify the disabilities of the borrower, but to make provision for securities which had got into other hands. The real point in the present case is, what is the meaning of the earlier enactment of 1710?

If the decision in *Applegarth* v. *Colley* (1) be right, the defendant here is entitled to succeed. But about the same time *Quarrier* v. *Colston* (3) was decided. That was an action on the consideration for money advanced abroad for the purpose of gaming abroad. The argument in that case was that, though the security could not be sued on in this country by reason of the statutes, yet the consideration could, and there has since been a succession of cases in which the argument has been put forward that, if money has been advanced abroad in connection with a game which is illegal only in this country and not abroad, the decision in *Applegarth* v. *Colley* (1) does not apply. It was a formidable argument on behalf of the present plaintiffs that the games in question were legal at the time and place where they were played. If that argument was sound, it conflicted with *Applegarth* v. *Colley* (1). Counsel for the plaintiffs contended that the reasoning in *Quarrier* v. *Colston* (3) entitled him to succeed, and that *Applegarth* v. *Colley* (1) could no longer be regarded as law. It is not necessary to go through the multiplicity of cases since those decisions. In 1907 *Moulis* v. *Owen* (2) came before the Court of Appeal. That was an action on a cheque for money advanced abroad partly for the purpose of playing baccarat abroad, and partly for the purpose of discharging debts incurred in the course of playing baccarat abroad. In this country baccarat is an illegal game, and the one thing clear on this obscure section is that, if money has been lent for the purpose of playing an illegal game or of playing in a common gaming house, then not only is any security given therefor unenforceable, but the money itself also is irrecoverable. In *Moulis* v. *Owen* (2), though the action was on the security, the question whether the consideration also was unenforceable was discussed at great length, and all three judges gave long judgments. FLETCHER MOULTON, L.J., in a dissenting judgment, expressed the view that the plaintiff was entitled to succeed, but the other two judges took the opposite view that *Applegarth* v. *Colley* (1) was still good law and a conclusive decision, and they held that the action was not maintainable. Afterwards *Saxby* v. *Fulton* (4) came before the Court of Appeal and BUCKLEY, L.J., expressed the view—though it was not the ground of decision of the whole court—that the statute of 1710 did not avoid the consideration. On the other hand, KENNEDY, L.J., referred to the judgments in *Moulis* v. *Owen* (2), and said that he would be slow to dissent from the decision in *Applegarth* v. *Colley* (1), and would find difficulty in holding that the consideration could be sued on, when the security could not.

In my view, this court is bound to follow the majority of the Court of Appeal which decided *Moulis* v. *Owen* (2) and the curious position, therefore, arises that though the decisions on foreign gaming should logically apply to legal games in this country, the

better authority is that the consideration cannot be sued on, because it is avoided under the statute of 1710. The result is not a very satisfactory one, but we are bound to follow the decision of *Moulis* v. *Owen* (2) and to hold that this appeal succeeds.

ACTON, J.—I agree.

Appeal allowed.

Solicitors: *S. Myers & Son*; *Isadore Goldman & Son.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

Re CONQUEST. ROYAL EXCHANGE ASSURANCE *v.* CONQUEST

[Chancery Division (Clauson, J., May 7, 1929]

[Reported [1929] 2 Ch. 353; 98 L.J.Ch. 441; 141 L.T. 685]

Administration of Estates—Trustee for sale—Power during minority to repair houses and make improvements—Work done of repair and also improvement—Payment out of capital—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28 (2)—*Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 84, *s.* 102.

Trustees for sale of land during the minority of a beneficiary executed repairs which were both repairs which, under s. 102 of the Settled Land Act, 1925, and s. 28 (2) of the Law of Property Act, 1925, might be paid for out of income, and "improvements" which, under s. 84 of the Act, might be paid for out of capital.

Held: the work should be paid for out of capital, as improvements authorised by s. 84 should generally be paid for out of capital, and there was nothing in the particular circumstances of the case to displace this general rule.

Re Robins (1), [1928] Ch. 721, and *Re Whitaker* (2), [1929] 1 Ch. 662, followed: *Re Hotchkys* (3) (1886), 32 Ch.D. 408, applied; *Re Gray* (4), [1927] 1 Ch. 242, explained and distinguished.

Notes. Referred to: *Re Smith, Vincent* v. *Smith*, [1930] 1 Ch. 88; *Re Wynn, Public Trustee* v. *Newborough*, [1955] 2 All E.R. 865.

As to the expenses of management of property of an infant, see 21 Halsbury's Laws (3rd Edn.) 166; and as to trustees' powers of management, see 33 Halsbury's Laws (2nd Edn.) 259. For cases see 30 Digest (Repl.) 317–330. For Law of Property Act, 1925, and Settled Land Act, 1925, see 20 and 23 Halsbury's Statutes (2nd Edn.), pp. 427 and 12 respectively.

Cases referred to:

(1) *Re Robins, Holland* v. *Gillam*, [1928] Ch. 721; 97 L.J.Ch. 417; 139 L.T. 393; 40 Digest (Repl.) 700, *1958.*

(2) *Re Whitaker, Rooke* v. *Whitaker*, [1929] 1 Ch. 662; 98 L.J.Ch. 312; 141 L.T. 28; 40 Digest (Repl.) 701, *1966.*

(3) *Re Hotchkys, Freke* v. *Calmady* (1886), 32 Ch.D. 408; 55 L.J.Ch. 546; 55 L.T. 110; 34 W.R. 569, C.A.; 40 Digest (Repl.) 699, *1954.*

(4) *Re Gray, Public Trustee* v. *Woodhouse*, [1927] 1 Ch. 242; 96 L.J.Ch. 159; 136 L.T. 401; 70 Sol. Jo. 1112; 40 Digest (Repl.) 699, *1957.*

Adjourned Summons as to how trustees should charge the cost of repairs.

A testator who died in 1901, leaving surviving him, nine children named in his will, some of whom were married and had issue, devised and bequeathed his real and personal estate to trustees to sell and convert the same, and directed that they should stand possessed of the residuary trust funds upon trust to divide the same as therein mentioned amongst his nine children for their lives with remainder over as therein mentioned; and the testator directed that the shares should be retained by the trustees

A and should not be vested absolutely in the said children. Moreover, the testator empowered the trustees to postpone the sale and conversion so long as they should think fit, and to apply the rents and profits and income of the unsold residuary estate as if the same were income of the moneys arising from sale and conversion. Power to let the hereditaments remaining unsold and generally to manage the same was also given to the trustees. Certain freehold houses in Islington forming part of the testator's B estate were retained by the trustees after his death, and they had paid the rents thereof to the said nine children according to their respective shares. During 1928 certain serious structural defects became apparent in three of those houses, and the necessity arose for pulling down and rebuilding walls, renewing roofs, timbers, &c., the cost of which work amounted to £727. In these circumstances this summons was issued on the application of the trustees to determine whether on the true construction of the will C or by the effect of the Settled Land Act, 1925, the £727 ought to be raised in whole or in part out of the corpus of the residuary estate, or out of the current income of the residuary estate, and if out of corpus, whether the trustees ought to recoup such payment out of income by instalments spread over a number of years.

W. F. Swords for the plaintiffs, the trustees.

D *H. C. Bischoff*, for the tenant for life, referred to *Re Gray* (4), *Re Robins* (1), *Re Whitaker* (2), and *Re Hotchkys* (3).

E. W. Lavington for the defendant grandchild representing the remaindermen.

CLAUSON, J., stated the questions raised by the summons and continued: The circumstances are these. By his will Mr. Conquest made provisions which result in E this: that the plaintiffs, who are now the trustees of the will, are trustees for sale of, among other items of property, the houses to the repairs or alteration of which this summons relates. They are trustees for sale with a power to postpone the sale—which has been exercised—and it is in consequence of the exercise of that power to postpone that they are holding these houses and collecting the rents. It is in those circumstances that the problem of repairs and structural alterations arises.

F In August, 1928, the plaintiffs, the trustees, put in hand general repairs to houses Nos. 12 to 17, Gordon Street; and in the course of those repairs it was ascertained that there were serious defects in houses Nos. 16 and 17, and also in another house, No. 18, which for the moment apparently the trustees were not proposing to repair. The trustees thereupon consulted with a firm of surveyors, who went into the whole matter with the district surveyor; and they advised the trustees that certain work should be G carried out. That work has been carried out and the total amount expended has been £778 8s. That is made up in this way: general repairs to Nos. 12 to 17, Gordon Street, £50 17s. 6d.; pulling down the back walls of 16 and 17, Gordon Street, to the level of the ground floor window heads, and rebuilding, cutting back party walls, and bonding into new work, and renewing defective roof timbers, £172 10s. 6d. As regards 18, Gordon Street, it has been necessary to pull down the back wall of the premises to the level H of the ground floor window heads and to pull down the flank wall to foundation level and to rebuild in accordance with the requirements of the London County Council. It has also been necessary to renew the whole of the roof timbers and re-tile and provide new valley gutters, and also to renew defective floor joists and sashes. The cost of that work was £555, no part of which, as the trustees have been advised, is referable to ordinary repairs. Accordingly, the whole of the £727 10s. 6d. mentioned in the sum- I mons, which is made up of £172 10s. 6d. for structural repairs to 16 and 17, Gordon Street, and £555 for structural repairs to 18, Gordon Street, is required for structural repairs. There is no question that the sum of £50 17s. 6d., which was expended on, which I may call, current ordinary repairs, ought to be paid out of income. The work on which this £727 10s. 6d. has been spent appears to me to be work of repair of the character of rebuilding. It may also, I think, be truly described as alterations in buildings reasonably necessary or proper to enable the buildings to be let. The trustees in their affidavit say: "It is necessary in order to enable the said premises to be let that the whole of the said repairs should be executed."

Section 28 (1) of the Law of Property Act, 1925, conferred upon trustees for sale in relation to land, and to the proceeds of sale all the powers of a tenant for life, and the trustees of a settlement under the Settled Land Act, 1925, including in relation to land the powers of management conferred by the Act during a minority. It is not, I think, disputed that the effect of that section is to give trustees for sale two sets of powers. One set is that which is referred to in the section by reference to minority. Those are powers which are set out in s. 102 (2) of the Settled Land Act, 1925; and the expenses incurred in exercising those powers may by virtue of s. 28 (1) of the Law of Property Act, and s. 102 of the Settled Land Act, 1925, be met out of income. There are also conferred by the same section upon the trustees the powers under which s. 84 of the Settled Land Act, 1925, coupled with the provisions in the third schedule, a tenant for life can exercise, of making improvements and paying for them out of capital. Accordingly, the effect of s. 28 (1) of the Law of Property Act, 1925, is to confer power on the trustees to spend income for such purposes as are particularised in s. 102 (2) of the Settled Land Act, 1925, and to spend capital for such purposes as are particularised in Part I of the third schedule. It is suggested, and I think it is probably the fact, that those powers to some extent overlap; that you may have work—and it is suggested that the work in question in this particular case is of such a character—which the trustees could carry out under s. 102 under the power given to them to erect, pull down, rebuild and repair houses, and could under that section pay for out of income, and which at the same time they could, under the first part of the third schedule, carry out and pay for out of capital.

I do not, however, propose to consider whether the work in this particular case does or does not fall within the class of work which the trustees may pay for out of income. It is clear to me that it falls within the class of work which the trustees *may* pay for out of capital. It is, in fact, structural reconstruction; and I have the guidance of the course taken by TOMLIN, J., *Re Robins* (1), which has been referred to, a course approved and justified by EVE, J., in *Re Whitaker* (2) to which I have also been referred, for the view that expenditure on work of that character ought to be borne by capital. I see nothing in the particular circumstances of this case to induce me to take any other view, and the evidence, I think, is quite sufficient to justify the view that the work ought to be paid for out of capital, as the trustees undoubtedly have power so to pay for it; and as they are anxious for the guidance of the court I give that guidance by authorising them to pay, as they have power to pay, for this work out of capital.

It is suggested that the order which I made in *Re Gray* (4) would seem to indicate that some different order should be made in this case. I do not take that view. What I decided in *Re Gray* (4) was that the work in question in that particular case came within the expression "repair" in s. 102 (2) (b) of the Settled Land Act, 1925; and speaking from my own recollection of the case, supported by reference to the report in the LAW REPORTS, I cannot help thinking that there can be no reasonable doubt that the work did come within the term "repair," and did not come within Part I of the third schedule of the Settled Land Act, 1925, and accordingly was properly to be met out of income. I will only add this. In the judgment that I delivered in *Re Gray* (4), I indicated a certain view as to the general effect of the new legislation in the year 1925. Whether that view was right or wrong, my attention has now been drawn to the possibility that the powers given by the Acts to trustees to pay for certain works out of income and for certain works out of capital may sometimes overlap. Where in such a case the trustees have a choice of powers, they may, I venture to think, be properly guided in their choice by the equitable principles laid down and applied in *Re Hotchkys* (3). I hope that my language in *Re Gray* (4) in which I was not dealing with such a case will not be construed as an authority for the contrary proposition. In this particular case my order will be: to declare that the £727 10s. 6d. or thereabouts required to be expended for structural repairs may properly be raised by the trustees out of the corpus of the residuary estate without any recoupment out of the income.

Solicitors: *Huntley, Son & Phillips.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

A

SILVER *v.* OCEAN STEAMSHIP CO., LTD.

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), October 22, 23, 24, 25, November 11, 1929]

B [Reported [1930] 1 K.B. 416; 99 L.J.K.B. 104; 142 L.T. 244; 46 T.L.R. 78; 73 Sol. Jo. 849; 35 Com. Cas. 140; 18 Asp.M.L.C. 74]

Shipping—Bill of lading—"Shipped in apparent good order and condition"—Estoppel—Goods shipped obviously improperly packed—Exception of liability for loss due to "insufficiency of packing"—Liability of shipowners—Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sched., Art. III, rr.* 3, 4, *Art. IV, r.* 2 (*n*).

C Cans of frozen eggs were delivered on board a ship for shipment to London. The master signed bills of lading stating that the cans were shipped "in apparent good order and condition." The bills of lading were expressly made subject to the rules scheduled to the Carriage of Goods by Sea Act, 1924 (i.e., the Hague Rules), art. IV, r. 2, of which provides that "neither the carrier nor the ship shall be responsible for loss or damage due, arising or resulting from . . . (n) insufficiency of packing".

D On arrival in London many of the cans were found to be damaged, some being gashed or punctured and others having only pinhole perforations. On a claim by the cargo-owners, endorsees of the bills of lading, for damages, the shipowners alleged that some of the tins were already damaged before delivery to the ship, and that all the damage was due to insufficiency of packing in that (a) the tins were not covered, and so were difficult to handle, and gave less protection to

E the eggs, and (b) the tins had sharp edges and corners, and were, therefore, likely to damage each other.

Held: (i) in the absence of evidence to the contrary it must be accepted that the cargo-owners took the bill of lading on the faith of the statement that the cans were shipped in apparent good order and condition, and as against the cargo-owners the shipowners were estopped from proving that when delivered to the ship the tins

F had defects which were apparent on reasonable examination, and, therefore, from proving that the tins then had gashes which would have been so apparent, but they were entitled to rely on perforations which would not have been so apparent: *Compañia Naviera Vasconzada* v. *Churchill and Sim* (1), [1906] 1 K.B. 237, approved and applied; (ii) the insufficiency of packing was apparent on reasonable examination, and so (per SCRUTTON and SLESSER, L.JJ., GREER, L.J., dubitante) the

G shipowners were estopped from relying on it and on art. IV, r. 2 (n).

Per **Curiam:** A person who discharges cargo negligently is not entitled to say: "If I had discharged the cargo properly, there would have been some damage, which I can deduct from the damage caused by my negligence."

Notes. Considered: *The Skarp*, [1935] All E.R.Rep. 560; *Canada and Dominion Sugar Co.* v. *Canadian National (West Indies) Steamships, Ltd.*, [1947] A.C. 46. Referred

H to: *United Molasses Co.* v. *National Petroleum, Ltd.* (1934), 50 T.L.R. 266; *Dent* v. *Glen Line, Ltd.* (1940), 45 Com. Cas. 244; *Brown, Jenkinson & Co., Ltd.* v. *Percy Dalton (London), Ltd.*, [1957] 2 All E.R. 844.

As to rights and immunities under art. IV of the Hague Rules, see 30 HALSBURY'S LAWS (2nd Edn.) 614; as to the effect of the words "shipped in good order and condition," see 30 HALSBURY'S LAWS (2nd Edn.) 388–391; and for cases see 41 DIGEST

I 379–380. For the Carriage of Goods by Sea Act, 1924, see 23 HALSBURY'S STATUTES (2nd Edn.) 884.

Cases referred to:

(1) *Compañia Naviera Vasconzada* v. *Churchill and Sim, Same* v. *Burton & Co.*, [1906] 1 K.B. 237; 75 L.J.K.B. 94; 94 L.T. 59; 54 W.R. 406; 22 T.L.R. 85; 50 Sol. Jo. 76; 10 Asp.M.L.C. 177; 11 Com. Cas. 49; 41 Digest 379, *2254.*

(2) *Gosse Millard, Ltd.* v. *Canadian Government Merchant Marine, Ltd., The Canadian Highlander*, [1929] A.C. 223; 98 L.J.K.B. 181; 140 L.T. 202; 45 T.L.R. 63; 34 Com. Cas. 94; 17 Asp.M.L.C. 549, H.L.; Digest Supp.

(3) *F. O. Bradley & Sons, Ltd.* v. *Federal Steam Navigation Co., Ltd.* (1927), 137 L.T. 266; 17 Asp.M.L.C. 265; 27 Lloyd, L.R. 395, H.L.; 41 Digest 442, *2777*.

(4) *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.*, [1924] 1 K.B. 575; 93 L.J.K.B. 646; 130 L.T. 392; 16 Asp.M.L.C. 262; 29 Com. Cas. 57, C.A.; 41 Digest 379, *2257*.

(5) *The Peter der Grosse* (1876), 34 L.T. 749; 3 Asp.M.L.C. 195, C.A.; 41 Digest 383, *2286*.

(6) *Martineaus, Ltd.* v. *Royal Steam Packet Co., Ltd.* (1912), 106 L.T. 638; 28 T.L.R. 364; 56 Sol. Jo. 445; 12 Asp.M.L.C. 190; 17 Com.Cas. 176; 41 Digest 383, *2287*.

(7) *Barbour* v. *South Eastern Rail. Co.* (1876), 34 L.T. 67, D.C.; 8 Digest (Repl.) 23, *133*.

(8) *Gould* v. *South Eastern and Chatham Rail. Co.*, [1920] 2 K.B. 186; 89 L.J.K.B. 700; 123 L.T. 256, D.C.; 8 Digest (Repl.) 23, *132*.

(9) *The Tromp*, [1921] P. 337; 90 L.J.P. 379; 125 L.T. 637; 37 T.L.R. 752; 15 Asp.M.L.C. 338; 41 Digest 384, *2288*.

Appeal from a decision of ROCHE, J.

Cargo-owners, the endorsees of bills of lading in respect of two parcels of cans of frozen eggs—one parcel consisting of 16,000 cans and the other of 5,334 cans—which had been delivered to shipowners in May, 1927, for carriage from Shanghai to London, claimed damages from the shipowners for alleged breach of the contract of carriage evidenced by the bills of lading. The cargo-owners alleged that the goods were in a damaged condition when delivered in London, and that the shipowners were liable. Alternatively, they alleged that the damage was caused by the shipowners' alleged negligence.

The shipowners pleaded that the damage was due to the inherent defects or quality or vice of the goods, or was due to insufficiency of packing, and while denying liability they brought into court the sum of £350.

The cargo-owners, in reply, said that the shipowners, by their bills of lading, having acknowledged the receipt of the goods in apparent good order and condition, and having accepted the goods without protest and with full knowledge of their packing, and having given clean bills of lading in respect of such goods, were not entitled to rely on any inherent defect, quality, or vice of the goods, nor on the exception of insufficiency of packing within the meaning of art. IV, r. 2 (n), of the schedule to the Carriage of Goods by Sea Act, 1924.

ROCHE, J., came to the conclusion that the bulk of the damage was done before loading, or, if after loading, was due to the cans being of a shape calculated to cause the damage, but that some damage was done by the shipowners in the course of discharging the cargo by nets, and he decided that the £350—which the shipowners had paid into court—was sufficient to cover the damage caused by the negligent method of discharging by nets, and he gave judgment for the shipowners on the plea of payment into court.

The cargo-owners appealed.

Clement Davies, K.C., and *G. St. C. Pilcher* for the cargo-owners.
S. Lowry Porter, K.C., and *James Dickinson* for the shipowners.

Cur. adv. vult.

Nov. 11. The following judgments were read:

SCRUTTON, L.J.—This appeal relates to damage done to a large shipment of Chinese eggs while in course of transit from China to London. The transit was from shipper's warehouse in Shanghai to cold stores in London, the defendants' ship being only responsible from delivery on board in Shanghai to delivery overside in London. The liquid content of the eggs was contained in metal cases, holding 42 lb. each, cases of a rectangular shape, and, therefore, with twelve right-angled edges. The cases were not covered with any cloth, fibre or cardboard covering. The contents were frozen and the cases were carried in refrigerated holds. The more usual method of conveyance was either in rectangular cases covered with some kind of covering, or in circular drums which are sometimes uncovered. In this case the rectangular cases of the size in fact

used were used at the request of London purchasers for reasons connected with their own business. They were probably uncovered for cheapness. With regard to shape, rectangular cases were obviously better for the ship's stowage, as cylindrical cases wasted room in stowage. But the right-angled edges were probably more likely to damage other goods even in careful stowage and handling; and were certainly more likely to do so if there was negligent handling. There was in the whole transit from shipper's warehouse to store very considerable damage to the cases. None of it was due to failure of refrigeration. But out of 21,334 cases shipped, 10,982 cases were damaged in their metal coverings, so that London purchasers rejected them. The damage varied in degree, but when experienced checkers at the stores tallied them in at Nelson's Wharf, 1,038 were damaged out of 5,334; at Bermondsey Cold Store, out of 16,000 cases 1,732 were recorded as specially damaged. When the goods were more carefully examined and the two parcels taken together out of 21,334 cases, 2,499 were classed as heavy and exceptional damage, on which £1,337 5s. 3d. was claimed, and 8,433 were classed as slight damage; in all nearly 11,000 cases were damaged out of 21,334.

These figures are nearly accurate, but owing to some small parcels being dealt with in various ways, are only to be taken as approximate. They show heavy and unusual damage, and the question is where was it caused, and is the ship responsible to any and what extent for it. The cases go through a number of stages between shipper's warehouse and London stores, and one difficulty is that witnesses at each stage deny that any damage was caused at their particular stage. Yet at the end of the transit there was this very large damage. The judge below has not accepted the evidence of any of the witnesses who say that there was no damage at their particular stage, and finds, as I understand him, that there was damage at every stage though not necessarily damage for which the ship was responsible. The cases are surveyed by Lloyd's surveyor in shipper's store and are then taken down to the ship's side by insulated van and lighter.

This is stage one. Stage two: The cases are hoisted on trays over ship's rail and placed on ship's deck, from whence, after casual examination, they are lowered into ship's hold and stowed one by one in tiers. Stage three is the transit from loading to commencement of discharge—the voyage. There is no suggestion of any specially bad weather on the voyage, and I do not think either side suggests any special damage in this stage. Stage four is discharge from the ship's hold to the consignee's insulated barges. Stage five is carriage by the insulated barges to the wharf and discharge there. Stage six is carriage by insulated vans to the cold store. I understand the learned judge to find that 50 per cent. of damage was caused before discharging commenced, described in the evidence as "old damage," and that none of it was caused by negligence of the ship's men in loading. This must apparently mean that in the judge's view this 50 per cent. was made up of damage before loading, for which the ship is not responsible, and damage in loading resulting from insufficiency of packing, for which again the ship is not responsible. The judge finds damage in discharging, for which the ship is responsible, in that the ship's people negligently discharged the cases in nets, during which process the cases were unnecessarily flung about. He assesses this damage as not exceeding 10 per cent. of the total damage assessed in money. This leaves 40 per cent. of the damage to be accounted for, in his view, either after discharge from the ship or in discharge due to the nature of the packages, without negligence on the part of the ship. There is very specific evidence about the negligence in discharging in nets and the damage thereby caused; there is not much evidence with regard to the amount of damage at any stage—except that with regard to ultimate total damage both in number of cases and in money loss, which damage has to be accounted for somehow—to enable the damage to be divided between the various persons who may be liable for it. Any conclusions with regard to the amount of damage at any stage must be in the nature of a jury estimate, made on very slight materials, and I should be very slow to interfere with the estimate of the judge below, unless I thought the estimate was very substantially wrong, or was vitiated by erroneous views on legal considerations. The plaintiffs, the cargo-owners, submit that they have been awarded far too little in getting only 10 per cent. of the actual damage sustained.

It is necessary, therefore, to go in detail into the various stages with the legal

considerations affecting them. The transit begins with a survey of the cases by Lloyd's surveyor at the shipper's refrigerating store on May 23 and May 24. The survey describes the cases as "strong rectangular tins—no fibre or other cover." Tins—one hundred and fifty in number—were weighed; others taken at random, sounded, and found solid frozen. The cargo is certified as "fit for transportation." It cannot be said that there is any individual examination of the cases for perforations or punctures. The cases then go down in insulated vans to be loaded into insulated barges and taken alongside the ship. All refrigerated cargo at that time of year is loaded at night, but the ship has clusters of electric lights on deck and in the insulated hold. Alongside the ship the cases are stowed on a tray with some side protection—eighty-four tins in each lift—in a block seven cases long and three cases wide and four cases high. It is obvious that in the block of eighty-four tins, having 504 sides, only eighty-one sides in the block are externally visible. When the tray is landed on the ship's deck a ship's officer taps the external tins to see if they are frozen, and if he sees any damage to the tins, he rejects the damaged tins. The tray is then lowered into the hold and each tin is individually handled by the stowing gang, and if any damage is seen in that process the tin is rejected. In fact, a small number of the original 21,334 tins were rejected at this stage, the shippers say fifty, the ship sixty. It is not clear whether they were replaced by sound tins, but 21,334 cases seem to be the total shipment.

Then comes the stage which raises the first question of law. On May 25 a bill of lading is signed stating that a number of tins are shipped "in apparent good order and condition." After issuing such a bill, can the ship prove that at the time (i) the tins were perforated or punctured, or (ii) that they were insufficiently packed, or must it be taken that on shipment the tins, so far as reasonable inspection would discover, were not perforated or punctured and were by all reasonable inspection sufficiently packed? The Carriage of Goods by Sea Act, 1924, only directly applies to carriage of goods from Great Britain abroad, not from abroad—for example, China to Great Britain. But the bills of lading, by which the shipowner acknowledges the receipt of goods, are for 16,000 and 5,334 cases respectively in apparent good order and condition "for delivery subject to conditions and exceptions hereinafter mentioned" and the first condition mentioned in each bill of lading was

> "this bill of lading is subject to the rules contained in the schedule to the statute of the United Kingdom of Great Britain and Northern Ireland, entitled the Carriage of Goods by Sea Act, hereinafter referred to as 'The Rules.'"

Though the Act does not apply to this bill of lading, the parties have apparently by agreement made the rules in the schedule to the Act conventional terms of the bill of lading. Rule 3 of art. III of the schedule requires the carrier to issue a bill of lading showing the apparent order and condition of the goods, which by r. 4 is to be primâ facie evidence of the receipt of goods as described.

Two questions seem to arise at this stage. First, under the law prior to the Carriage of Goods by Sea Act, 1924, a shipowner who received goods which he signed for "in apparent good order and condition" to be delivered in the like good order and condition, and who delivered them not in apparent good order and condition, had the burden of proving exceptions which protected him for the damage found. The present bill of lading runs "shipped in apparent good order and condition for delivery, subject to conditions,"etc. Has any difference been made in the old law by this wording? In my opinion no difference has been made. I agree with the view expressed by WRIGHT, J., in *Gosse Millard, Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (2) in similar words, that there is still an obligation to deliver in the like apparent good order and condition unless the shipowner proves facts bringing him within an exception covering him. VISCOUNT SUMNER, in *F. O. Bradley & Sons, Ltd.* v. *Federal Steam Navigation Co., Ltd.* (3) appears to express the same view.

The second point of law is this. It has been decided in *Compañia Naviera Vasconzada* v. *Churchill and Sim* (1), and affirmed in the Court of Appeal in *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.* (4), that the statement with regard to "apparent good order and condition" estops—as against the person taking the bill

of lading for value or presenting it to get delivery of the goods—the shipowner from proving that the goods were not in apparent good order and condition when shipped and, therefore, from alleging that there were, at shipment, external defects in them which were apparent to reasonable inspection. Article III, r. 4, which says that the bill shall be primâ facie evidence—not primâ facie evidence only, liable to be contradicted—can hardly have been meant to render the above decisions inapplicable. For the information relates to the shipowner's knowledge; he is to say what is "apparent," that is, visible by reasonable inspection to himself and his servants, and on the faith of that statement, other people are to act, and if it is wrong, act to their prejudice. Rule 4 of art. III has not the effect of allowing the shipowner to prove that goods which he has stated to be in apparent good order and condition on shipment, were not really in apparent good order and condition, as against people who accepted the bill of lading on the faith of the statement contained in it. Apparent good order and condition was defined by SIR R. PHILLIMORE in *The Peter der Grosse* (5) (1 P.D. at p. 420) as meaning that "apparently, and so far as met the eye, and externally, they were placed in good order on board the ship." If so, on the decision in *Compañia Naviera Vasconzada* v. *Churchill and Sim* (1), the shipowner is not allowed to reduce his liability, by proving, or suggesting, contrary to his statement in the bill of lading, that the goods in respect of matters externally reasonably visible, were not in good condition when shipped.

What was reasonably apparent to the shipowner's servants loading at Shanghai at night, but under clusters of electric light? The ultimate damage was classed by the surveyors as (i) serious damage where the tins were gashed or punctured, damage easily discernible in handling each tin; (ii) minor damage, pinhole perforations, which on tins covered with rims were not easily discernible, but which were found when the tins were closely examined. I have considered the evidence and I find that the first class of damage was apparent to reasonable examination; the second, having regard to business conditions, was not apparent. The result of this is that the shipowner is estopped against certain persons from proving or suggesting that there was gash or serious damage when the goods were shipped. He may raise the question whether there was not minor or pinprick damage at that time, but having regard to the small quantity of goods rejected for visible damage, I should not estimate the amount of such minor damage at shipment as very high.

The question whether the shipowner is prevented by the statement with regard to "apparent good order and condition" from relying on the allegation or exception of "insufficiency of packing"—one of the exceptions under the rules in the schedule to the Act—is more difficult. The shipowner's contention is that there was insufficiency of packing, because (a) the eggs were packed in uncovered tins, and, therefore, were difficult to handle when frozen and had less protection than if the tins were covered; (b) the tins had sharp edges and corners and were, therefore, dangerous to each other; and (c) that the tins were of too thin plating to stand the wear and tear of contact with other tins. The facts that the tins were (i) uncovered, and (ii) with rectangular edges, were obvious on shipment. If this was insufficient packing the insufficient packing was obvious. I cannot think that a shipowner who receives, say, a wooden case broken open at one corner or side can describe it as "in apparent good order and condition," and afterwards prove the opposite. And if the insufficiency of the packing is obvious, again I think it cannot be described as in apparent good order and condition. In truth, the rectangular uncovered packages are not "insufficiently packed," but may be dangerous to other cases and are difficult to handle, each matter being obvious to external inspection. Some suggestion is made that the metal containers were too thin, and they were obviously too thin to resist the treatment which they received. But it appears from the letter of Aug. 26, 1927, that the metal was of the same thickness as the Union Cold Storage Co.'s usual tins. I do not see why rectangular tins, carefully stowed, should damage each other, and they are obviously better for the ship in stowage, in that they waste less space than round tins, while their lack of covering is apparent.

I am, therefore, of opinion, that, against the proper person, the shipowner is estopped by his statement that the cans were shipped in apparent good order and condition from

proving that they were insufficiently packed, or in fact seriously gashed, but that he may prove or suggest pinholes on shipment as not being reasonably apparent. The old damage, that is, damage done before discharge, found on discharge, was variously estimated at 10 per cent. and 40 per cent., and "considerable." The judge finds 50 per cent. On the view which I take above, this must be reduced by eliminating (i) any heavy damage done before shipment; (ii) any damage done before discharge due to insufficient packing. If so, and considering the nature of the ultimate damage, I think, if the old damage is reduced to 25 per cent., covering pinprick damage before shipment, and damage due to the ordinary wear and tear on a voyage of parcels properly packed, the shipowner has a larger allowance than he is entitled to. Whether the cargo-owner is entitled to rely on the statement with regard to apparent good order depends on whether he relied on the statement without knowledge of its untruth to his prejudice. It was argued that as he ordered square tins and uncovered tins, he must have known that they were insufficiently packed. He certainly ordered square tins, but he had certainly no knowledge of the make of the edges, which were said to be unusually sharp. The statement that he ordered uncovered tins is based on his telegram of May 18 ordering "plain" tins. But this, I think, clearly relates only to absence of mark, as the letter of June 21, contrasting "plain tins" with tins branded "Superegg," shows. In my view, the cargo-owner in London had no knowledge of any facts that showed that the tins shipped were not in apparent good order and condition. The last objection was that the witness did not say that he relied on the bill of lading being a clean bill of lading by reason of the statement with regard to good order and condition. The mercantile importance of clean bills of lading is so obvious and considerable that I think the fact that he took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it.

One comes next to the evidence with regard to the discharge, in which the judge has found ship's negligence. While the evidence with regard to the exact amount is not as satisfactory as it might be, this is due to the ship's officers' or agents' quite improper refusal to sign lightermen's receipts stating the amount of damage, or to keep any tallies themselves. They knew that the method of discharge was being objected to and that damage was being done and they refused to sign lightermen's receipts. They cannot complain if the estimate of damage is inaccurate or taken only at the wharf. The facts with regard to the discharge are these. The uncovered frozen tins were slippery to handle or pile. They were discharged by piecework, the men having an obvious motive to do the work quickly. This, so far as it saves the ship demurrage, is to the advantage of the ship, but may lead to the cargo being handled too hastily. It is for this reason that, according to the evidence, the cold stores pay their men by time and not by piecework, finding that they get more careful, though slower, handling. These tins were at first stacked on a wooden tray, with very slight sides. It was found that some tins slid off or fell unpleasantly near the heads of people working below. They not unnaturally protested, and the ship adopted a system of discharging in nets. When the tins were first placed in the net the bottom tier showed flat. But as soon as the net was hoisted the flat tier disappeared and the tins were pressed together. The chief officer of the ship admitted that there was a chance of damage at that stage. But when the net was lowered into the lighters and set down the chance of damage became almost a certainty. The chief officer describes what happens as follows: "(Q.) And is it this danger of knocking against the sides that makes you say the trays are better than the nets? (A.) It is to prevent them slipping out. They are slippery, and when they let go the side of the net the whole block of tins collapses. When they land the net in the lighter the whole block of tins collapses. The top tier would slip 2 ft. or 3 ft." Mr. Silver, who saw the discharge in nets, protested at once; he "saw the tins all jumbled up in the nets."

I have considered the evidence and come to the same conclusion as the judge below that there was a negligent method of discharge, for damage done by which the ship is liable. I am satisfied that a very considerable part of the actual damage was caused by this negligence. I do not understand how he can have arrived at so small a figure as 10 per cent. of the actual damage being attributable to actual discharge. If, as he

finds, 50 per cent. of the actual damage was caused before discharge, and 10 per cent. by negligence in discharge, this leaves 40 per cent. to be caused after discharge. While there is some slight evidence of rough handling at the wharf, on the other hand this work was done by men on time work, with no inducement to hurry, with special wooden trays with high sides. I am quite unable to discover the evidence that would justify the judge in the division of this damage into 10 per cent. ship and 40 per cent. after ship. Endeavouring to assess the damage on the figures which I have gone carefully into, somewhat as a jury would, I am of opinion that if 25 per cent. of the actual damage is assigned to the period before discharge, 50 per cent. to discharge, and 25 per cent. after discharge, the ship is being treated very generously. It may be that the learned judge below has arrived at his figure of 10 per cent. by deducting from the actual damage some percentage as due to insufficient packing. In my view, he is not entitled to do this; first, because of the estoppel, and, secondly, because in my view a man who discharges cargo negligently is not entitled to say: If I had discharged the cargo properly there would have been some damage, which I can deduct from the damage caused by my negligence. Further, in my view of the estoppel, the ship cannot claim that some tins were delivered to it gashed and some damaged by insufficient packing.

I assess these two classes of damage before discharge at 10 per cent. as compared to 15 per cent. due to non-apparent pinprick damage before discharge and ordinary wear and tear on voyage. I have stated these figures in order that if any part of my assessment should be dissented from my resultant total may be modified. The percentages which I have given are of the total money values. I am conscious that they are rough-and-ready estimates; but I think that if they were arrived at by a jury they could not be upset. As I have said, I think that they err on the side of generosity to the shipowner, and I am influenced to some extent by the improper refusal of the shipowner's servants to take or agree tallies of actual damage on discharge protecting them by a reference to "old damage." In my view, therefore, the damage for which the shipowners are liable should be roughly assessed at 60 per cent. of the actual damage, and judgment for £2,100 with costs should be entered for the plaintiff cargo-owners, the judgment of the learned judge with regard to amount and costs being set aside.

GREER, L.J.—The cargo-owners, plaintiffs in an action against the shipowners, bring this appeal against the judgment of ROCHE, J., whereby it was decided that a sum of £350 paid into court by the shipowners was sufficient to satisfy the cargo-owners' claim for breach of contract of the carriage of two parcels of cans of frozen eggs from Shanghai to London.

By their statement of claim the plaintiffs claimed to be the owners of a parcel of 16,000 cans and a parcel of 5,344 cans of frozen eggs delivered to the defendants' steamship *Aeneas* by the Henningsen Produce Co. for carriage from Shanghai to London and delivery to shippers' orders or assigns. They made their claim as owners of the said goods and endorsees of the bills of lading to whom the property in the said goods passed by reason of the endorsement of the said bills of lading. They alleged that the goods were delivered in a damaged condition in London, and that the shipowners were liable for breach of the contract of carriage which was evidenced by the two bills of lading. Alternatively, they alleged that the damage was caused by the negligence of the shipowners. By their defence, after the formal denials of the cargo-owners' allegations, the shipowners pleaded that the damage was due to the inherent defects or quality or vice of the said goods, or was due to the insufficiency of packing thereof, and that by the terms of the bills of lading they were exempted from liability, and while denying liability they brought into court the sum of £350. The cargo-owners, by their reply, pleaded that the shipowners by the bills of lading having acknowledged the receipt of the said goods in apparent good order and condition on board the steamship *Aeneas*, were estopped from denying that the goods were shipped in apparent good order and condition, and by para. 3 of the reply they alleged that the tins containing the frozen eggs were square and had sharp corners, and that they were not covered with fibre and/or hessian cloth and/or cardboard, and therefore that the shipowners, having accepted the said goods without protest and with full knowledge of the matters aforesaid and

having given clean bills of lading in respect of such goods, were not entitled to contend that the said matters or any of them constituted acts or omissions of the shipper and/or inherent defect, quality, or vice of the said goods and/or insufficiency of packing thereof within the meaning of the exceptions in art. IV, r. 2, of the schedule to the Carriage of Goods by Sea Act, 1924. A

When the goods were delivered to the ship at Shanghai, it was, of course, apparent to those in charge of the receipt of the goods that the eggs were packed in square tins which necessarily had sharp corners, and that they were uncovered. It was also ascertained that some of them had been damaged before delivery to the ship, and fifty cases were refused on this ground. The goods were carried to London, discharged on to the quay, received by the cargo-owners and put into store, and when finally examined it was found that 2,625 tins were badly gashed, and in respect of these tins the plaintiffs suffered loss to the amount of £1,377 1s. 6d., that 8,357 tins and small dents and holes in respect of which £1,044 12s. 6d. was the loss sustained, and there were certain charges incurred for labour, surveyors' fees, and agency, which the cargo-owners also claimed. The learned judge came to the conclusion that some damage was done by the shipowners in the course of discharging the cargo by nets, but he did not find any damage occasioned by any act of the shipowners at any other time, and he further decided that the amount paid into court was sufficient to cover the damage occasioned by the method of discharge by nets, which he thought was negligence on the part of the shipowners' servants, and he gave the usual judgment in favour of the shipowners on the plea of payment into court. B C D

The bill of lading incorporated the rules contained in the Carriage of Goods by Sea Act, 1924, and the shipowners relied on the exception of insufficiency of packing contained in art. IV, r. 2, of the schedule of the said Act. The bill of lading contained the words "shipped in apparent good order and condition," and the first question to be determined is whether the shipowners are estopped by these words from alleging that the goods were either in a damaged condition when shipped, or that they were insufficiently packed by reason of the fact that the tins were square and unprotected. It was decided in *Compañia Naviera Vasconzada* v. *Churchill and Sim* (1) that those words in a bill of lading are not contractual, but that they contain a representation of fact which may create an estoppel in favour of a purchaser relying on the words in the bill of lading and acting on them to his detriment. The case was decided in 1906, and we ought to accept as good law the proposition that the words are not words of contract but only representations which may give rise to an estoppel. The decision in *Compañia Naviera Vasconzada* v. *Churchill and Sim* (1) was referred to with approval by SCRUTTON, L.J., in *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.* (4). E F G

The elements necessary to create an estoppel are three. There must be (i) a statement of fact, (ii) relied on by the person alleging estoppel, and (iii) he must have acted on the representations to his detriment. So far as the alleged estoppel is concerned with the shape of the tins and the absence of cover, I am of opinion that the plea of estoppel was not established. I doubt very much whether the statement "shipped in apparent good order and condition" has any reference to original defects of quality or type. The words seem to me to refer rather to acquired damage or defect in the goods rather than to original defects of quality or type. I doubt whether a square tin can be said to be not in good order and condition because it is square and has always been so, or because it is uncovered and has always been so uncovered. I am inclined to think that the words are confined to deterioration or damage which has occurred to the goods of the quality and type delivered. A distinction is drawn by CHANNELL, J., in *Compañia Naviera Vasconzada* v. *Churchill and Sim* (1) between quality and condition, and in the definition section of the Sale of Goods Act, 1893, it was considered necessary to specially provide that the word "quality" in the Act should include "condition." It appears to me that when the goods were received for shipment, the shipper and the shipowner were considering that there might be a claim for damage caused during the carriage by sea. In these circumstances the shipowner is willing to say to the shipper, I admit that up to the present the goods have not been damaged so far as can be discovered by such examination as can reasonably be expected. He does not seem to me to be admitting H I

anything as to the fitness of the goods of the kind presented for carriage at sea, but only as to their undamaged condition.

It is, however, unnecessary to decide this point, as there are other sufficient reasons for holding that no estoppel was proved so far as the shape of the tins and the absence of covering are concerned. From Mr. Silver's evidence it is clear that he had ordered square tins and knew that he was going to have square tins shipped to him. I think it is also extremely probable from the letters which he wrote that he knew that the tins would come uncovered, but, in any case, he gave no evidence that he relied on the bill of lading as a statement that the tins were other than square, or that they were covered, and it is remarkable that after he received the bill of lading he never suggested in the letters and telegrams which he wrote that he had been led by the bill of lading to believe that he would get tins other than those which in fact came forward, that is to say, uncovered square tins.

As regards the question whether the shipowners are estopped from denying that the tins accepted by them on the bills of lading were free from gashes and pin-holes, I think there would be such an estoppel as regards gashes and pin-holes which could have been ascertained by such reasonable examination as can be expected when goods of this kind are delivered for shipment under the conditions necessarily prevailing, that is to say, delivery by night. The plaintiff cargo-owner, Mr. Silver, in his evidence did not say that he relied on the statement that the goods were received free from apparent external damage, and in the absence of any statement that he did rely on the bills of lading, it is contended that the court is unable to find his plea of estoppel proved as regards this damage. I think, however, though with some doubt, that the court would be entitled to conclude on the grounds of high probability that he was influenced by the statement that the goods were shipped in apparent good order and condition, and that he must have believed that they were free from reasonably discoverable damage when shipped, and that in accepting the bills of lading and taking delivery he acted to his detriment, but I am not satisfied that all such damage would be apparent on any reasonable examination. On the other hand, I am satisfied that if there was any considerable damage when the goods were shipped, in excess of the fifty cases that were rejected, a substantial part of such damage would have been discovered on a reasonable examination.

I agree with the learned judge's finding that by reason of their shape combined with the thinness and weakness of the metal, which latter defect was not apparent, the goods were insufficiently packed, and that the insufficiency of packing was one of the causes of the damage complained of. But the exception of insufficient packing which was incorporated in the bill of lading by reference to the rules contained in the Carriage of Goods by Sea Act, 1924, will not protect the shipowners if negligence be proved. Even if the liability of the shipowner be that of a common carrier, and it is proved that the damage is within the exception in the contract of carriage, the owner of the goods can still recover notwithstanding the exceptions if he shows that the damage was caused by the negligence of those for whom the shipowner is responsible. The cargo-owners failed to prove any negligence in loading or in the carriage to London, but they did prove negligence in the discharge. The cargo-owners had to prove not merely negligence; they had to prove the amount of damage which they suffered due to that negligence. It was satisfactorily proved by the cargo-owners that the loss which they suffered by reason of the damage finally ascertained as existing at the time when the cans were taken into store in London slightly exceeded the amount claimed, which was £3,544. There was evidence that a considerable portion of this damage was old damage, and one of the cargo-owners' witnesses admitted that the old damage was as much as 40 per cent. For the reasons which I have given it seems to me impossible to hold the shipowners liable for any of the old damage, except such of it as may be affected by the limited estoppel which I have found as stated in the earlier part of my judgment.

The damage for which I hold that the cargo-owners are entitled to be compensated is comprised under two heads: (i) Damage which in fact occurred before the goods were received for shipment under the bills of lading and was of such a character as to be apparent on a reasonable examination. The shipowners are precluded by the estoppel

from alleging that this damage was not caused while the goods were in their custody. They cannot rely on the exception of insufficiency of packing as the cause of damage, because the exception only applies to damage arising during the carriage of the goods. (ii) Damage occasioned by negligence in the discharge of the cans. I cannot think that ROCHE, J., was right in his finding that the £350 paid into court is sufficient to satisfy the damages for which the shipowners are liable. I think on the contrary that a very considerable part of the damage ultimately found was due to causes for which the shipowners are responsible. The goods were discharged by casual labour paid by the piece. I think it very improbable that any large amount of damage was done after the goods were discharged from the ship, but no doubt some of the ultimate damage ought to be attributed to this stage in the journey from Shanghai to the London stores.

This appeal, like all appeals from judgments given on a trial before a judge alone, is a re-hearing. The judge's findings do not depend on the relative value which he attached to the oral evidence of witnesses at the trial. He had to make an estimate based on the general facts of the case and on probability. In my judgment a fair estimate of the damage for which the shipowners are liable is 50 per cent. of the total damages, and if the result of this appeal depended on my judgment, the appeal would be allowed and judgment entered for the cargo-owners for half their claim, that is to say, for £1,772, and with costs here and below.

SLESSER, L.J.—This is an appeal from a judgment of ROCHE, J., whereby he assessed damages against the shipowners for £350 in an action for breach of contract resulting in damage to cargo. The plaintiffs in the action were the holders of two bills of lading which together covered the goods in question. It is not disputed that this cargo arrived at the cold storage depot in a very considerably damaged condition; the damage consisted in gashes, perforations and dents in the tins in which the frozen egg product was contained. The damage was apparently caused by one or more tins coming in contact with their neighbours; nor is there any real dispute that it was the pointed corners of such tin which gashed, pierced or dented the other tins which suffered damage.

The evidence in the case largely resolved itself into inquiries at what stage or stages of the journey this damage occurred, and, for this purpose, the journey may conveniently be divided into five periods; the first being the period when the goods were on their way from the cold store in Shanghai to the ship, the second the loading into the ship, the third the voyage, the fourth the discharging from the ship into lighters, and the fifth the conveyance by the lighters to the wharf and thence to the storage depot in London. It is only for the purpose of loading, carrying and discharging, the second, third and fourth periods that the shipowners, on any view, can be made responsible. In substance, the learned judge has come to the conclusion that the damage began during the first period, when the tins were on their way from the cold storage at Shanghai to the ship and continued while they were being loaded on board the ship in Shanghai and that some damage was done during the discharge from the ship into lighters and some when the goods were being dealt with by the lightermen and vanmen at the later stages of the progress. In effect, the only period which he excludes from possibility of damage is the voyage itself, and, as there is no evidence that during the voyage any damage was done, I also exclude that part of the journey from my consideration. The £350 which the learned judge has awarded to the cargo-owners is arrived at in this way; on arrival in London after an abortive effort to land the tins on trays or boards, the shipowners resolved to use nets; and the evidence is very considerable that, while the tins were in these nets, the tins were "all jumbled up," to use the words of one witness; that they "shot out all over the place when the net opened," in the words of another; and, in the language of a third, "when the net opened the tins spilt all over the show." The learned judge has come to the conclusion that the nets were unsuitable and that they did aggravate the damage, but he has refrained from giving what he believed to be the full damage caused by the nets, because he says that he thinks that some part of the damage due to the nets could not properly be complained of because some of it was inevitable in any event. In the result, he thinks that 10 per cent. is a fair estimate of the amount of damage due to the nets—the whole of the claim amounting to £3,544

A odd, of which sum he awarded the cargo-owners £350, the amount paid into court by the shipowners. It is not at all easy to estimate with any exactitude the degree of damage produced at each stage of the journey; but certain principles may, I think, be applied which have brought me to a conclusion, on amount, different from that of the learned judge.

In the first place the bills of lading contained the usual provision that the goods are B shipped in apparent good order and condition. It is provided by cl. 1 of each bill of lading that the bill is to be subject to the rules contained in the schedule to the Carriage of Goods by Sea Act, 1924, and it is pleaded by way of reply in this case, in para. 2, that the shipowners, having acknowledged the receipt of the said goods in apparent good order and condition on board the *Aeneas*, are now estopped from denying as against the cargo-owners that the said goods, when shipped, were in apparent good order and con- C dition. The effect of these words has been discussed in several cases; but it is sufficient to refer to the judgment of CHANNELL, J., in *Compañia Naviera Vasconzada* v. *Churchill and Sim* (1), in which case the American Harter Act was incorporated in the bill of lading. That case was approved in *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.* (4). See also *Martineaus, Ltd.* v. *The Royal Mail Steam Packet Co., Ltd.* (6). Here the rules in the schedule to the Carriage of Goods by Sea Act, 1924, D are incorporated, the wording of which statute does not affect the old principle (per VISCOUNT SUMNER in *F. O. Bradley & Sons* v. *Federal Steam Navigation Co., Ltd.* (3), and it was held that by the words "shipped in good order and condition," the shipowners were bound by the representation of the Master, not as words of contract, but by the way of estoppel. In this case, however, a complication has arisen by reason of the fact that whereas the gashes may reasonably be said to be apparent, the perfora- E tions were not so apparent. CHANNELL, J., in *Compañia Naviera Vasconzada* v. *Churchill and Sim* (1), says (1 K.B. at p. 244): "In my opinion not only was there damage in fact, but it was damage of such a character that it must have been apparent to anyone."

In my judgment the estoppel in this case goes no further than what was apparent to anyone, which, I think, includes the gashed tins, but reasonably excludes the less apparent perforations and punctures. It then remains to inquire how much of this F damage was sustained after the discharge when the tins passed out of the control and responsibility of the shipowners. There is evidence of Mr. Towers that at Nelson's Wharf, where the 5,000 tins were sent, the tins were pitched into trays and were handled too quickly, and at the National Wharf there was also throwing of tins which must have caused damage; and Mr. Bettly also says that he saw some damage done at National Wharf, and Mr. Holmes says that at Nelson's Wharf the tins were not properly handled. G Holding as I do that the shipowners are estopped from suggesting that any of the gashed tins were injured at the time they were shipped in apparent good condition, I am prepared to accept the amount of liability on this head as computed by SCRUTTON, L.J.

There remains for consideration the position of the tins which were not apparently damaged by gashes, with regard to which the shipowners may properly say that the bill of lading does not estop them. Approaching this as a question of fact without any H estoppel, I think that two periods, namely, the loading and the voyage, may be excluded from consideration as there is no evidence which satisfies me that during either of those periods any injury was sustained. This leaves, however, three periods, the periods before loading, discharge and after discharge, of which the shipowners are only responsible for one, namely, the period of discharge, and again, as I agree with the principles of assessment laid down by my Lord, I adopt his estimate of the shipowners' liability. I

The liability of the shipowners is further disputed on a ground with which I have yet to deal. The bills of lading, as I have said, incorporate the rules in the schedule to the Carriage of Goods by Sea Act, 1924, and the shipowners rely on art. IV thereof, which provides, so far as is here material, that

> "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (n) insufficiency of packing,"

and it is said here that there was, in fact, insufficiency of packing, for two reasons, namely, first, that the corners of the tins being square and pointed were dangerous

unless they had been protected by some covering; and, secondly, that the tin itself was too thin to resist the contact of the points of the other tins. The learned judge has found that the packing was insufficient on the ground that the tins had eight points of excessive and unusual sharpness, such as has never been known or seen in the trade before. He does not appear to have accepted the view that they were too thin as had been contended. Dealing with the question of the pointed tins, I think that such insufficiency of packing must have been apparent to the shipowners. In *Barbour* v. *South Eastern Rail. Co.* (7), in which it was held that the plaintiff, sending furniture by train, had a duty to pack the furniture, the defendants, the railway company, declined the packing, and, as a result, the goods were conveyed unprotected as the packing of the consignor was insufficient. CLEASBY, B., in that case said (34 L.T. at p. 68): "The goods were delivered in a manifestly unsafe condition."

There may well be cases where the insufficiency of the packing is not apparent; but in this case, where the insufficiency, if any, was obvious, the shipowners were nevertheless prepared to take the goods without complaint and to give a clean bill that the goods were shipped in good order and condition. The capacity of the goods safely to travel was part of their order and condition; and so, being apparent on the face of it, I cannot see how the shipowners can now say that the goods were insufficiently packed. In *Gould* v. *South Eastern and Chatham Rail. Co.* (8) it is true that it was held that where goods were insufficiently packed, the carrier's knowledge of their condition at the time of their receipt would not necessarily preclude him from setting up as a defence that the damage was due to the insufficient packing. In STORY ON BAILMENTS (9th Edn.), p. 463 at para. 492, the rule with regard to the obligation of a common carrier is stated not to cover, among other things, the goods "not being properly put up and packed by the owner or shipper"; and ATKIN, L.J., in *Gould's Case* (8) ([1920] 2 K.B. at p. 193), says that "the defendants' knowledge of the improper packing . . . did not make them responsible." YOUNGER, L.J., concurred; but a distinction must be drawn, in my judgment, between a mere knowledge of improper packing and a written statement, on which a consignee might reasonably be expected to act, that they are in fact in a proper order and condition, such as was given in the present case. In the present case the shipowners accept the goods, not only with a knowledge of their condition, but with a statement that that condition is proper.

In my judgment, the clean bill of lading, once the alleged defect in packing is apparent, takes the case out of the ambit of *Gould's Case* (8) and other authorities to the like effect. The cargo-owners took the bill and may be assumed to have relied on it to their detriment, in the absence of any evidence to the contrary; although Mr. Silver may have known that square tins were being shipped to him he was entitled to assume that the shipowners did not regard such square uncovered tins as dangerous in that they had said that the goods were shipped in apparent good order. In *The Tromp* (9) it was held that where potatoes were shipped in wet bags described as shipped in apparent good order and condition, the shipowners were estopped from saying that the external condition of the bags was bad. The bill of lading so endorsed affords evidence that externally and so far as meets the eye the goods are shipped in good order and condition: *The Peter der Grosse* (5).

With regard to the allegation that the tins were too thin, the evidence is not sufficient to justify the court in coming to the conclusion that the tins were insufficiently packed. Indeed, there is some evidence that other consignments had been made with tin of precisely the same thickness; nor does the learned judge appear to reply upon this alleged defect.

In the result, I have come to the conclusion that the defence of insufficient packing is not made out, and, therefore, the shipowners are responsible for the damage to the tins to the extent and to the amount mentioned by SCRUTTON, L.J.

Appeal allowed.

Solicitors: *William A. Crump & Son*; *Stokes & Stokes*, for *Cameron, MacIver & Davie*, Liverpool.

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

GOODWIN, FERREIRA & CO., LTD. *v.* LAMPORT AND HOLT, LTD.

[KING'S BENCH DIVISION (Roche, J.), June 6, 7, 1929]

B [Reported 141 L.T. 494; 45 T.L.R. 521; 73 Sol. Jo. 402; 18 Asp.M.L.C. 38]

Shipping—Carriage by sea—Discharge of cargo—Discharge into lighter—"Discharge" continued so long as other goods raised into lighter—Loss of goods due to insufficiency of packing—Insufficient packing of goods other than those lost—Carriage of Goods by Sea Act, 1924 (14 & 15 *Geo.* 5, *c.* 22), *Sched., art. I* (*e*), *art. II*, *art. IV* (*n*), (*q*).

C Cotton goods were carried from Liverpool to Bahia, where they were discharged into a lighter. Iron goods, packed in a wooden case, were being lowered into the same lighter when the case broke and the iron goods fell out into the lighter and holed it with the result that sea-water entered and damaged the cotton goods. Under the bill of lading lighterage was to be at the risk of the owners of the cotton goods, and the bill of lading incorporated the provisions of the Carriage of Goods

D by Sea Act, 1924. In an action in which the owners of the cotton goods claimed damages from the owners of the ship for the loss of the goods,

Held: (i) if the sea transit had ended when the goods were placed in the lighter the shipowners would have been protected by the terms of the bill of lading, but the discharge of the cotton goods was part of the operations covered by the Act of 1924, and that discharge was not finished when the goods were put into the lighter, but

E continued as long as other goods were being raised into the lighter and stowed in the lighter with them; on the evidence, no fault or neglect on the part of the shipowners or their servants had been proved; and, therefore, under art. IV (q) of the schedule to the Act of 1924, the shipowners were not responsible for the loss; (ii) the exception from liability relating to loss due to insufficiency of packing in art. IV 2 (n), was wide enough to cover the case of the packing of other goods though primarily

F it would apply to the goods themselves that were lost or damaged. The plaintiffs' claim, accordingly, failed.

Notes. Distinguished: *Lindsay Blee Depots, Ltd.* v. *Motor Union Insurance Co.* (1930), 46 T.L.R. 572. Applied: *Pyrene Co.* v. *Scindia Steam Navigation Co.*, [1954] 2 All E.R. 158.

As to the rules relating to bills of lading, see 30 HALSBURY'S LAWS (2nd Edn.) 606

G et seq.; and for Carriage of Goods by Sea Act, 1924, see 23 HALSBURY'S STATUTES (2nd Edn.) 884. For cases see 41 DIGEST 537–539.

Case referred to:

(1) *The Glendarroch*, [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344; 10 T.L.R. 269; 38 Sol. Jo. 362; 7 Asp.M.L.C. 420; 6 R. 686, C.A.; 41 Digest 414, *2580*.

H **Action** for damages for breach of contract.

In January, 1926, the plaintiffs sent twenty-two bales of white cotton yarn from Liverpool to Bahia in the defendants' steamship *Biela*. Discharge at Bahia was into lighters, and under the bill of lading lighterage was to be at the risk of the owners of the goods. By the bill of lading, the provisions of the Carriage of Goods by Sea Act, 1924, were incorporated, and where these were at variance with any terms in the bill of lading

I the provisions of the Act were to prevail. At Bahia the plaintiffs' goods were deposited safely into a lighter, and then a case containing heavy iron pipes was raised from the hold by ship's tackle to be put into the same lighter. While being lowered the bottom of the case broke, and the pipes fell out into the lighter and holed it. Sea-water entered and damaged the plaintiffs' goods. The plaintiffs, accordingly, brought the present action claiming £880 odd as damages for breach of contract in the carriage of the goods. For the defendants it was argued that as soon as the plaintiffs' goods had been placed in the lighter, the sea transit had come to an end, and they were then protected by the terms of the bill of lading under which lighterage was at the risk of the owners of the

goods. For the plaintiffs it was contended that the defendants had acknowledged the receipt of the goods in good order and condition and were bound to deliver in the like good order and condition. The defendants could not rely on the exception under art. IV, 2 (n), in the schedule to the Carriage of Goods by Sea Act, 1924, relating to insufficiency of packing: they could only rely on exception (q) of art. IV, 2, in which case they had to show that there had been no negligence on the part of themselves or their servants, and they had not discharged this onus.

Miller, K.C., and *Atkins* for the plaintiffs.
Le Quesne, K.C., and *W. Lennox McNair* for the defendants.

ROCHE, J.—This action is brought by shippers of a cargo of white cotton yarn against the owners of the ship in which that cargo was laden upon a voyage in the year 1926 from Liverpool to Bahia in the republic of Brazil. I shall speak of the plaintiffs as cargo-owners and the defendants as shipowners. The action arises because when the cargo got to Bahia and had been put into a lighter in which it was to be conveyed from the ship's side to the Customs House on the wharf, certain machinery, which also formed part of the cargo of the *Biela*, and which, like the cotton yarn, was destined for Bahia, when being put into the lighter came out of its case, dropped into the lighter, made a hole in it, let in sea-water, and damaged the cotton yarn to the extent of some 80 per cent. of its sound value. There is no dispute that if the plaintiffs are entitled to succeed they are entitled to substantially the sum claimed in this action. The real question is whether they are entitled to succeed at all. The matter must be determined in accordance with the terms of the bill of lading under which the goods were carried, which, of necessity, incorporates and makes applicable that which is made applicable to the carriage of the goods by the Carriage of Goods by Sea Act, 1924.

The first point in logical order, though I do not know that it is the point which is most highly esteemed by the plaintiffs, is this. It is said that the goods never ought, under the contract contained in the bill of lading, to have been put into the lighter, and that, accordingly, it was really a case of deviation or departure from the terms of the contract and the defendants were not protected by the terms in the contract, and, accordingly, are liable as carriers of the goods in the lighter for the damages they sustained. That depends upon cl. 9 of the bill of lading and upon the facts of the case. The body of the bill of lading having provided that the goods were to be delivered at the port of Bahia, or as near thereto as the ship could safely get, cl. 9 provided:

> "The goods to be discharged from the ship as soon as she is ready to unload at the wharf, or into hulk, lazaretto, or hired lighters if necessary, and be lightered by the master or agent at ship's expense, in the case of Bahia in accordance with the custom of the port . . . but at the risk of the owners of the goods in every case."

It is said by the plaintiffs that it was not necessary to put these goods into a lighter, that there were wharves to which the ship could have got having regard to her draught, which was some 20 ft., the wharves providing 24 ft. of water. It is, therefore, said that the lightering was unauthorised by the contract, and the consequences follow which I have indicated. The first observation is there is evidence that no berth was available; they were occupied. But I do not decide the case on that, although I think it would be a sufficient fact upon which to decide it. The evidence is that these large steamers of the defendant shipowners do not proceed to these wharves. Their usual discharging place and method is that which was followed in this case. The body of the bill of lading would authorise discharge at Bahia in any usual manner and at any usual place providing it was the usual discharging place in the port, as I find this place was. Clause 9, in providing for discharge into lighters, if necessary, did not, in my judgment, provide merely as an indispensable condition that it should be physically impossible to discharge otherwise than by lighters. It provided that if it were necessary, which, in my judgment, meant in the ordinary business sense necessary, that that method of discharge should be followed, and that certain provisions should be made with regard to the lighterage at the ship's expense and ship's risk. I cannot doubt that, if the business is done always in this way by these steamers of the defendants, and that course of business

A is acquiesced in, as it seems to be (there is no evidence of any objection or anything of that sort) by all the consignees of the goods in the defendants' steamers, there is the business necessity which is requisite under the clause in question. For that reason I hold that that point on which the plaintiffs seek to build their case fails.

I can conveniently, I think, at this stage deal with what I may call a parallel contention raised on behalf of the defendants regarding the lighterage, because that con-
B tention also goes to the root of the action if it is well founded. The contention of the defendants with regard to the lighterage is that lighterage was not merely permissible and proper, but that when the goods in question—the yarn—were put into the lighter, the sea transit was over, and, therefore, the whole transit was over which was made the subject of the Carriage of Goods by Sea Act, 1924, so that the defendants were not bound at that stage by the provisions of that Act, and, even if there was negligence by
C their servants, the risks of perils of the sea were all provided for at that stage, and in respect of that stage, by the provisions of the bill of lading unaffected by and not rendered more onerous by the provisions of the Carriage of Goods by Sea Act, 1924. I think it would follow, if the contention that the Act did not apply were well founded, that the exceptions of the bill of lading itself would be sufficient to protect the defendants upon any view of the facts of this case. But, in my judgment, the contention itself is
D erroneous. The discharge of these goods was part of the operations which are covered and affected by the Carriage of Goods by Sea Act, 1924. In my judgment, the discharge of these goods was not finished when they were put into a lighter when other goods were being discharged into the same lighter to make up the load which was to start for the shore. When it is contemplated that these goods are to form the lighter load with other goods, the discharge of the goods themselves within the meaning of
E art. I (e) and art. II in the schedule to the Act of 1924 is, in my judgment, going on so long as other goods are being raised into the lighter and stowed in the lighter alongside or on top of them. For that reason I put out of sight and dismiss that contention, although it is open to the defendants to rely upon it if this judgment, which for other reasons will be in their favour, is impeached before any other court.

I now pass to the questions of fact as to how the accident happened. The real dis-
F pute between the parties has been and is this. The plaintiffs say, by certain affidavits of lightermen, that the accident happened because the case which contained the machinery was bumped into the bottom of the lighter and that the end of the case which contained the machinery was broken and that when the case was lighted up again to make more orderly stowage, it was found that the bottom of the case was smashed, and then the machinery, which consisted of columns of pillars, fell out into the lighter.
G The evidence is very indecisive, and I think variable from time to time, when it appears in different forms, letters, and so forth, whether the holing of the lighter is supposed to have been done when the case was bumped or dropped into the barge in the first instance, or when the columns forming the contents fell out of the case. But I dismiss, and do not believe, that case for various reasons which I need not further define. It is eminently improbable; it was put forward very late; and I definitely prefer and accept
H the version of the defendants, which was set out in correspondence and various documents at the time, which is this—that when the case was in the air the bottom fell out of it and so did the columns, and the columns so falling out holed the lighter and caused the accident. That is the basis of fact upon which I proceed to determine this case. The argument upon that state of facts may be put as follows. It is said by counsel for the defendants that the letting in of the water by the holing, caused by the fall of
I the machinery, brought into operation the perils of the sea, namely, the ingress of water, and there is considerable authority for saying such an incident or damage is a peril of the sea; and he continues that on the basis of the principle stated in CARVER'S CARRIAGE OF GOODS BY SEA (7th Edn.), s. 78, for which the authority is *The Glendarroch* (1), which is there cited, the onus of proving negligence in those circumstances is upon the person who seeks to avoid the operation of the exception of perils of the sea, that is to say, in this case the onus is on the plaintiff. He says that the position is unaffected by the existence and operation of the Carriage of Goods by Sea Act, 1924. It is unnecessary for me to decide whether that contention is well founded or not. In my judgment, I

am going to proceed on the basis that the onus in this matter is upon counsel for the defendants, and that he has discharged it. I am not deciding whether that is so, but I am going to proceed on that basis, and for this reason, that I think I know what brought into operation the perils of the sea, namely, the fall of the machinery, and I think I know, and am going to find I know, why the machinery fell. Therefore, I have to deal with causes more material, more really the causes of the accident and the damage than the entrance of the sea-water. I think that those causes are causes which are specifically dealt with by art. IV, 2, in the schedule to the Carriage of Goods by Sea Act, 1924. I incline to the view that with regard to those causes and their operation and effect, the Act of Parliament has put the onus upon the person who asserts them, the shipowner, and, accordingly, I am going to deal with this case on the basis that the onus is there and has been discharged. In art. III (2) one finds the following:

> "Subject to the provisions of art. IV, the carrier shall properly and carefully . . . care for and discharge the goods carried."

I read the words material to the present case. When one looks at art. IV, which contains the obligations to which art. III is subject, one reads the following in sub-art. (2):

> "Neither the carrier nor the ship shall be responsible for loss or damage . . . resulting from . . . (c) perils, dangers and accidents of the sea . . . (n) insufficiency packing . . . (q) any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

The contention of counsel for the plaintiffs was that he called a gentleman from the engineers who had packed or superintended the packing of this case of machinery, and that I ought to find that the packing was good when it left the works of the engineers, and that, even if I thought that the bottom fell out, the defendants had not proved that it did not fall out because they bumped the case either at the time when the accident happened or that they had not damaged it at some previous stage in the transit and the handling of the case. What I find about the case itself is this. I was satisfied that the engineers are very competent people and had a very competent gentleman superintending the packing, and that the case, a model of which has been made and shown to me, is a common form of package used by these engineers to hold these columns, which are part of sugar-pressing machinery that they are making very commonly, shipping very commonly, and send invariably, as I gather, in this kind of case, which is like a large coffin or sarcophagus of a rectangular shape. On the evidence I am quite satisfied that this case had, and must have had, initial defects. No knocking about, I think, would have accounted for what happened. I am satisfied that the case was received in the apparent good order and condition which the bill of lading says it was. I am satisfied, since no one said anything or suggested anything to the contrary, that when the case left the hold it was in similar apparent good order and condition, and that what was wrong with it was not that some positive injury had been done to it which would never have been visible, but that it was not properly nailed up or fastened at the beginning. There was an odd circumstance, and that was the specimen case submitted to me, it appeared, had no nails at all at one part of the lower end of the bottom which was the vulnerable part in the accident of 1926. If the same nailing had been used on that side of the bottom, where there would have been six nails there were none. Had there been a similar absence of nails in the case in question I think very likely the columns, which are heavy things of 25 cwt., would have dropped out when they were slung over the barge with the weight of the columns upon this bottom part of the case. At all events, I am satisfied that it was initial want of fastening or securing of the case which was the cause of the trouble and not injury done during the voyage. Of course, if part of the battens which surround the bottom had been knocked off that would have been visible. Knocking about would not have knocked out these long French nails which

A are used for fastening. For those reasons I am satisfied that insufficiency of securing the bottom of the case was the cause of the trouble, due to the escape of the columns contained in the case, which escaped through the bottom.

That being so, the question is, has the defendant brought himself within sub-arts. (n) or (q) of art. IV, 2, of the schedule to the Act of 1924? It is said and argued by counsel for the plaintiffs that, as regards (n), insufficiency of packing has reference to the packing B of the particular goods in respect of which or to which loss or damage arises. I have no doubt that (n) is intended chiefly and mainly to apply to such a case, but I am not satisfied and I do not decide that insufficiency of packing of another parcel which is to be shipped with the damaged cargo cannot be prayed in aid or used under (n). I decided two days ago a case where the packing of other articles in the same ownership as the damaged articles was held to be a protection under (n), and I am not prepared to hold, C and I do not hold without further considering the matter, that, if the packing which was insufficient was the packing of some article which was not the property of the person complaining in the action, sub-art. (n) of the article could not be invoked or used in aid. But I do not decide the matter on that point for the reason that clearly on the view I have expressed of the facts, the accident happened through another cause which arose without the actual fault or privity of the carriers or without fault or neglect of the D agents or servants of the carriers, and I have held that there was nothing in the appearance of this case which ought to have roused or did rouse the suspicions of either the carrier or any of his agents or servants, and that the defendants, the shipowners, have discharged the onus of satisfying me that there was no negligence or fault of the shipowners or their agents or servants. I give judgment for the defendants with costs.

Judgment for defendants.

E Solicitors: *Denton, Hall & Burgin*; *Stokes & Stokes*, for *Cameron, MacIver & Davie*, Liverpool.

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

F

PEARCE *v.* BRAIN

G

[KING'S BENCH DIVISION (Swift and Acton, JJ.), May 28, 1929]

[Reported [1929] 2 K.B. 310; 98 L.J.K.B. 559; 141 L.T. 264; 45 T.L.R. 501; 3 Sol. Jo. 402; 93 J.P.Jo. 380]

Infant—Contract—Contract of exchange—Recovery of specific chattel—No total failure of consideration—Infants' Relief Act, 1874 (37 & 38 *Vict., c.* 62), *s.* 1.

H

Where under a contract of exchange an infant parts with a specific chattel and receives another chattel which he uses for his own purposes, the transaction comes within the words "goods supplied" in s. 1 of the Infants' Relief Act, 1874, and the same principle applies as governs the payment of money by an infant as the price of goods under a contract of sale, and, although the contract is void under the pro- I visions of s. 1, the infant is not entitled to recover the chattel, unless there has been a total failure of consideration.

Valentini v. *Canali* (1) (1889), 24 Q.B.D. 166, applied.

Notes. As to the contracts of infants, see 21 HALSBURY'S LAWS (3rd Edn.) 138 et seq.; and for cases see 28 DIGEST 152 et seq. For Infants' Relief Act, 1874, see 12 HALSBURY'S STATUTES (2nd Edn.) 940.

Case referred to:

(1) *Valentini* v. *Canali* (1889), 24 Q.B.D. 166; 59 L.J.Q.B. 74; 61 L.T. 731; 54 J.P. 295; 38 W.R. 331; 6 T.L.R. 75, D.C.; 28 Digest 164, *207*.

Appeal from Clerkenwell County Court.

On Feb. 10, 1928, the plaintiff, Pearce, who was an infant, exchanged a motor-bicycle and sidecar for a motor-car belonging to the defendant, Brain. For the purpose of the transaction the value of each vehicle was agreed at £30, and the transaction was concluded on that day. The plaintiff left the motor-bicycle in the defendant's possession, and himself drove away in the motor-car, but a few days later the car broke down owing to a defect in the axle. The plaintiff subsequently sued for recovery of the motor-bicycle, or, in the alternative, its value on the ground that the contract under which he disposed of it was void under the Infants' Relief Act, 1874, or, in the alternative, was voidable, and had been avoided by him. In the further alternative he claimed damages for breach of warranty. The jury by their findings negatived breach of warranty. They found that the value of the motor-bicycle was £30, but that the value of the motor-car was £15 only. The county court judge held that the contract was one contract of exchange; and that it was void under s. 1 of the Infants' Relief Act, 1874, which provides:

> "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable"

but that, inasmuch as the plaintiff had enjoyed the benefit of the contract, he was not entitled to recover back the motor-cycle. He gave judgment for the defendant, and the plaintiff appealed.

R. J. White for the appellant.

A. A. Anderson for the respondent.

SWIFT, J., stated the facts and continued: The only point is the contention of the plaintiff that, as he was an infant at the time the contract was entered into, the contract was rendered void by s. 1 of the Infants' Relief Act, 1874. It was said that the property in the motor-bicycle never passed from the plaintiff to the defendant and that the plaintiff was entitled to have it back by virtue of s. 1 of the Act. Counsel for the plaintiff contended that the transaction was one which was void under that section, and that, therefore, the plaintiff had never ceased to be the owner of the motor-bicycle and was entitled to have it back. I am quite clear that the transaction was, as the county court judge has found, a contract of exchange of goods, but it comes within the words "goods supplied or to be supplied," which are as much applicable to exchange as to sale. If I were at liberty to decide this case without authority, I would be inclined to accept the argument for the plaintiff and decide that the contract, being by way of exchange, was void under the Act and that no property passed. But I cannot see any difference in principle between the recovery of a chattel given in exchange and the recovery of money paid as the purchase price of goods. If the contract were void by statute I should have thought, apart from authority, that money paid could have been recovered as money had and received to the use of an infant plaintiff. Money paid under a merely voidable contract is in a very different position. But there is direct authority that money paid under a void contract cannot be recovered unless there is a total failure of consideration. In *Valentini* v. *Canali* (1), which was decided by Lord Coleridge, C.J., and Bowen, L.J., sitting as a Divisional Court, Lord Coleridge said:

> "The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. Here the infant plaintiff, who claimed to recover back the money which he had paid to the defendant, had had the use of a quantity of furniture for some months. He could not give back this benefit or replace the defendant in the position in which he was before the contract. The

object of the statute would seem to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications. The legislature never intended in making provisions for this purpose to sanction a cruel injustice."

That case the county court judge treated as binding on him and adopted it as the basis of his decision. He came to the conclusion that the plaintiff had had the benefit of the contract, and that, though he had not had everything which he expected to get, there was not a total failure of consideration. In view of *Valentini* v. *Canali* (1), I think his decision was right. I cannot distinguish between the recovery of a specific chattel under a void contract and the recovery of money. If the latter cannot be recovered, neither can the former. In order to succeed here it was incumbent on the plaintiff to show a complete failure of consideration; this he has failed to do, and in my view the decision of the county court judge was right, and the appeal must be dismissed.

ACTON, J.—I agree.

Appeal dismissed.

Solicitors: *Daphnes*; *Swepstone, Stone, Barber & Ellis.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

THE ESSEX ENVOY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bateson, J.), June 11, 1929]

[Reported 141 L.T. 432; 35 Com. Cas. 61; 18 Asp.M.L.C. 54]

Shipping—Collision—Damages—Time charter entered into after collision—Cesser clause—Ship in dry dock to repair damage—"Loss of time from damage"—Applicability of cesser clause to damage received before charter—Right of owners to recover lost hire in collision action.

A time charterparty contained the following cesser clause: "In the event of loss of time from deficiency of men or stores, breakdown of machinery (whether partial or otherwise), collision, stranding, fire in ship and/or cargo, damage, or interference by authorities, preventing the working of the vessel for more than twelve running hours, the payment of hire shall cease until she be again in an efficient state to resume her service at the place where the accident occurred. . . ." After the steamer came on hire she went into dry dock for four days to repair damage which she had sustained in collision before coming on hire. The owners allowed the charterers four days' hire, and claimed to recover the amount so allowed from the defendants in the collision action.

Held: the cesser clause applied to damage arising before as well as after the vessel came on hire, and there was "loss of time from damage" within the meaning of the clause, this being so even if the charterers were not going to use the vessel during the four days in question, and, therefore, the charterers were entitled to deduct four days' hire, and the owners were entitled to recover the amount so deducted from the defendants as damages for loss of use of their steamer.

Notes. As to time charters, see 30 HALSBURY'S LAWS (2nd Edn.) 308–312; and for cases see 41 DIGEST 356 et seq.

Motion in objection to registrar's report.

The plaintiffs, the Hall Line, Ltd., claimed damages from the defendants, owners of the steamship *Essex Envoy*, in respect of damage sustained by the plaintiff's steamship *City of Lyons* in a collision which took place at Port Said on Dec. 11, 1926. The

defendants admitted liability for the collision. After the collision temporary repairs were carried out, and the vessel eventually proceeded to the United States. On Mar. 21, 1927, the *City of Lyons*, being then at Philadelphia, was chartered by the plaintiffs to the Ellerman Bucknall Steamship Co., Ltd., upon a time charterparty by the terms of which it was provided as follows:

"1. The said owners agree to let and the said charterers agree to hire the said steamship for the term of about six months from the day she is placed at the disposal of the charterers at Philadelphia in such dock, wharf or place as customary, and as charterers may direct, she being then ready with clear, clean holds to receive cargo; and being tight, staunch, strong and in every way fitted for the service. . . . 2. The steamer is expected ready about the 26th March 1927. 11. In the event of loss of time from deficiency of men or stores, breakdown of machinery (whether partial or otherwise), collision, stranding, fire in ship and/or cargo, damage, or interference by authorities, preventing the working of the vessel for more than twelve running hours, the payment of hire shall cease until she be again in an efficient state to resume her service at the place where the accident occurred. . . ."

On Mar. 25 the *City of Lyons* was put at the disposal of the charterers at Philadelphia. On Mar. 27 she went into dry dock for permanent repairs, which it was agreed lasted four days. This period of time was deducted by the charterers from the hire payable under the charterparty, and the plaintiffs claimed to recover the amount so deducted by way of damages from the defendants. At the reference the registrar allowed the amount claimed. The defendants moved to vary his report by omitting the sum claimed in respect of the four days in question.

B. B. Stenham for the motion.

BATESON, J.—In my view, this appeal fails. In consequence of a collision between the *City of Lyons* and the *Essex Envoy*, which occurred at Port Said on Dec. 11, 1926, the *City of Lyons* was so injured that she had to be put into dry dock and repaired. The repairs necessarily occupied four days, and the owners of the *City of Lyons* lost the use of their vessel for that period. The measure of damage for the loss of the use of the vessel for four days is no doubt the amount of hire which the owners could have got for their ship. In fact, they had a charterparty at the time for their ship, and the charterers have not paid for the hire for the four days while the vessel was under repair. That effects only the measure of damage, because, if the vessel had been repaired before the charterparty was entered into, the owners would have had to delay chartering her for four days, and would have lost the hire for those four days. It is said that because of the terms of the charterparty and because of what happened the owners could have recovered hire for the use of their ship during the four days when the owners took her out of the power of the charterers to use her and dry-docked her while they did the repairs. I do not think that argument ought to prevail. After the accident the ship was allowed a voyage (by the surveyor's certificate in Port Said) to Calcutta and back to the United Kingdom for repairs. She, in fact, went to Calcutta, but did not come to the United Kingdom. She went to Philadelphia, via New York, to discharge her cargo. She was surveyed in New York on Mar. 16, 1927, and on Mar. 21 the charterparty in question, which was a six months' charter, was entered into by Ellerman and Bucknall Steamship Co., Ltd., of London, and the Hall Line, Ltd., of Liverpool, who were the managing owners of the *City of Lyons*. The charterparty was signed on Mar. 21. The vessel arrived at Philadelphia on Mar. 24. She finished her discharge and was handed over to the charterers on Mar. 25. She loaded two tons at Philadelphia. She left Philadelphia on Mar. 26, arriving at New York on Mar. 27; she was there examined by surveyors after she had got alongside, was dry-docked on the 30th, came out of dry dock on April 3 and started loading on April 9. The master said: "We were ready for loading and had it not been for this damage probably we should have commenced." There was a telegram from a Mr. Niven who, I am told, is the surveyor in New York to the Hall Line, quoting the offers for repairs and stating that the vessel was not required for loading until April 4. So that there was the evidence of the master that he probably would

have loaded and the evidence of this surveyor who said that she was not required for loading. The registrar's finding, as I understand it, with regard to this matter is that the damage prevented the use of the vessel for more than twelve hours, so I suppose that he accepted the master's evidence that the vessel would have loaded but for the fact that she was being repaired in dry dock.

It seems to me that the charterer was prevented from using and lost the use of this vessel (owing to her being repaired for damage in dry dock) for four days after she had come under the charterparty. The charterparty, which (cl. 1) is a charterparty for a vessel from the day she is placed at the disposal of the charterer "staunch, tight, fitted for service, and to be so maintained." Clause 4 says:

> "The charterer shall pay for the use and hire at the rate of [so much] per calendar month, commencing when she is placed at the charterer's disposal."

Then comes the clause upon which the whole argument was based. Clause 11:

> "In the event of loss of time from damage preventing the working of the vessel for more than twelve running hours the payment of the hire shall cease until she shall again be in an efficient state to resume her service at the place where the accident occurred."

Counsel for the motion in objection takes three points. He says the cesser of hire only applies to an accident after the vessel comes on hire. With regard to that, I think the words are wide enough to cover a case of this kind, because here there was damage which prevented the working of the vessel for more than twelve running hours. The vessel could not be loaded or used by the charterer when she was in dry dock, and that is what she was wanted for. Therefore, there was a loss of time to the charterers, and in those circumstances the payment of hire is to cease. Taking the words in their ordinary and natural meaning, there was a loss of time from damage preventing the working for more than twelve hours. The clause does not say that the damage must be damage that occurs after the vessel comes on hire, and one can well imagine many cases where damage which has occurred before the vessel comes on hire may not be discovered, or may not be repaired until after the vessel comes on hire. The parties, by the terms of the clause, seem to me to have provided for such a matter. As a matter of business, I should think this happens quite constantly, the words are ample to cover such a case, and I do not see any reason why I should confine it to damage subsequently received.

Counsel's second point was that in this case there was no loss of time inasmuch as there was a telegram saying that the vessel was not wanted for loading until a particular date. I think if the words had been "loss of use" there might have been a good deal more to be said for the argument, but I myself cannot see how, if the ship is being dry-docked and the charterer has not the benefit of the time when she is being dry-docked, he has not lost time under the charterparty. He has lost four days to which he had a right, and that is a loss of time. The last point was that there was not prevention of the working of the ship. It seems to me that if you put a ship into dry dock to repair a rent in her, as I am told there was in this case, which had been boxed in with cement temporarily, the vessel cannot be used for the ordinary purposes of a charterer, namely, to control, work, load and send her across the sea. Therefore, she was prevented from working by the damage.

Taking the view that I do, this clause seems to me to be applicable to the present case. There has been a loss of use of this ship suffered by the owner of the ship involving a loss of money measured by the amount which the charterer did not pay. What use the charterer was going to make of the ship after he had hired her is no concern of the tortfeasor in this case, and if it were, the fact that he was not going to use her would not avail the defendants as an answer to the claim in this case. Loss of time I have already pointed out is not the same as loss of use. For these reasons I reject this motion with costs.

Motion dismissed.

Solicitors: *Thomas Cooper & Co.*; *Gregory, Rowcliffe & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

Re WILLIAMS' SETTLEMENT. GREENWELL *v.* HUMPHRIES

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), June 7, 1929]

[Reported [1929] 2 Ch. 361; 98 L.J.Ch. 358; 141 L.T. 579; 45 T.L.R. 541; 73 Sol. Jo. 384]

Settlement—Condition—Settlement for benefit of husband who survived wife—Time for fulfilment of condition—Wife's death—Divorced husband not entitled to benefit.

By a marriage settlement made in 1902 on the marriage of H.W. and M.L. reversions and life policies to which M.L. was entitled were settled on her for life and then to the issue of the marriage if any. If there should be only one such issue, on a re-marriage M.L. was to have power to revoke as to three-fourths of the property and re-settle the same for the benefit of any husband who might survive her and any child or other issue of such future marriage, but so that any husband who might survive her should not take more than a life interest. Subject thereto the funds were to devolve as previously settled. There was only one child of the marriage, which was dissolved in 1908. M.L. then married C.H., and re-settled three-fourths of the income under the settlement on him for his life on her decease and then to the children of this marriage. In 1923 M.L.'s marriage with C.H. was dissolved and she married thirdly V.E. She died in 1928, C.H. and V.E. her surviving, without making any further re-settlement. There was no issue of the third marriage. C.H. claimed a life interest in three-fourths of the fund.

Held: the condition that the object of the re-settlement should be (a) the husband of M.L. and (b) surviving her must be fulfilled when the re-settlement became effective, i.e., at the time of M.L.'s death, and not when it was made, and, therefore, C.H. was not entitled to the life interest.

Notes. Followed and applied. *Re Slaughter, Trustees Corpn., Ltd.* v. *Slaughter*, [1945] 2 All E.R 214; *Re Allan, Allan* v. *Midland Bank Executor and Trustee Co.*, [1954] 1 All E.R. 646.

As to marriage settlements generally and re-settlements, see 29 HALSBURY'S LAWS (2nd Edn.) 589–593; and for cases see 40 DIGEST (Repl.) 567–573, 863–866.

Cases referred to:

(1) *Bosworthick* v. *Clegg* (1929), 45 T.L.R. 438; 40 Digest (Repl.) 504, *160.*

(2) *Re Morrieson, Hitchins* v. *Morrieson* (1888), 40 Ch.D. 30; 58 L.J.Ch. 80; 59 L.T. 847; 37 W.R. 91; 44 Digest 873, *7297.*

(3) *Bullmore* v. *Wynter* (1883), 22 Ch.D. 619; 47 J.P. 373; sub nom. *Re Bullmore, Bullmore* v. *Wynter*, 52 L.J.Ch. 456; 48 L.T. 309; sub nom. *Bullmore* v. *Wynter*, 31 W.R. 396; 44 Digest 875, *7314.*

(4) *Duchess of Marlborough* v. *Duke of Marlborough*, [1901] 1 Ch. 165; 70 L.J.Ch. 244; 83 L.T. 578; 49 W.R. 275; 17 T.L.R. 137; 45 Sol. Jo. 116, C.A.; 40 Digest (Repl.) 642, *1339.*

Adjourned Summons.

Mary Williams, formerly Mary Lenders, being an infant, married H. C. I. Williams in April, 1902. By a marriage settlement made thereon, reversions and life policies to which she was entitled were settled on her for life and then to the issue of the marriage if any. If there should be only one such issue—as the fact was—she was to have power on a re-marriage to revoke the trusts as to three-fourths thereof and re-settle for the second husband and any children by him, his interest, if he survived her, to be limited to a life interest. Subject to this the settled funds were to devolve as originally settled. This settlement was confirmed by her on attaining full age. There was issue of the marriage, a daughter, C. F. M. Williams, born in 1903. By a decree made absolute in February, 1908, the marriage was dissolved, and Mrs. Williams married, secondly, the defendant, C. Humphries. Later in that year, under and by virtue of the power in the settlement, she revoked the trusts as to three-fourths thereof and directed the trustees to stand possessed thereof upon trust after her decease to pay the income to her said

husband, C. Humphries, for life, and then to the children (if any), of which there were none. By a settlement made on the occasion of the marriage of the daughter, C. F. W. Williams, in 1922 with H. Sly, her share in the funds of the settlement of 1902 were duly settled. There was issue of this marriage, one child only, namely, I. H. P. Sly, who was born on Aug. 25, 1923. By a decree absolute made in 1923, the second marriage of Mrs. Williams with Mr. Humphries was dissolved, and Mrs. Humphries then married, thirdly, V. E. Elias. There was no issue of this marriage. In 1928 the lady died intestate, leaving surviving her both C. Humphries and V. E. Elias. The former claimed to be entitled to the income appointed to him under the power as aforesaid, and this summons was issued to determine the question whether he was so entitled. The trustees of Mrs. Williams' settlement had received no notice of the purported appointment to the defendant until after the dissolution of her marriage with him and her decease.

EVE, J., in giving judgment, said that the question was whether, the intestate having made the appointment of 1908 and not having revoked it, the second husband, Humphries, was entitled to claim the benefit of the life interest under the appointment. To be so entitled he must fulfil two conditions. He must be her husband, and he must survive. It was suggested on his behalf that so long as he was her husband at the time of the appointment and survives, he was entitled. He (his Lordship) could not so hold. He ceased to be her husband on the dissolution of the marriage, and thereafter he could make no claim under the appointment. The defendant, Humphries, appealed.

C. E. E. Jenkins, K.C., and *Leonard Stone* for the defendant.

J. F. W. Galbraith, K.C., and *Sir Arthur Underhill* for the trustees of the settlement of the daughter of the only child by the first marriage.

F. Baden Fuller for the trustees of the settlement of 1902.

LORD HANWORTH, M.R., stated the facts and continued: I think there is no doubt that Mrs. Humphries, as I will call this lady, when she made this re-settlement did intend to do so in favour of C. Humphries for life. I think there is evidence of a clear intention to do that; but the question is whether she had power to do it, and that depends upon the terms of the original settlement. Under that settlement a trust fund was created, and by cl. 8 a life interest was given to Mrs. Humphries. Clause 11, which was applicable to the case of a subsequent marriage, gave her power partially to revoke the declared trusts, and power to re-settle up to three-quarters of the trust funds (in the events which have happened of there being but one child of the first marriage) in favour of a future husband, and by the terms of the clause this part of the settled funds after her death is to be held upon trust for the benefit "of any husband who may survive her" with the proviso that he is not to take more than a life interest in the same. It is claimed that Mr. Humphries is a husband who survived her and so is entitled to the benefit of the re-settlement.

It appears to us that the judgment of Eve, J., is right. What was given to this lady was a power to re-settle in a certain way and within certain limits. She was given the right to give a life interest to any husband who might survive her. The question to be decided is: Do the words mean that the condition as to the object of the re-settlement being her husband and surviving her is fulfilled when the re-settlement becomes effective or when it was made? It seems to me quite clear that the latter is the true construction. The very object of the re-settlement was to enable Mrs. Humphries to give a benefit to a particular person, and that was the person who filled the status of a husband and who survived her, if and when he survived her. He could not take until after her death, and it was then that the question arose as to who it was that could take. It seems to me clear that the settlement was not contemplating a husband when a re-settlement would be made, but a person who would fulfil both conditions when both conditions were capable of being fulfilled, namely, at the time when the re-settlement would take effect. At the time when this re-settlement would have taken effect Mr. Humphries was no longer this lady's spouse, and, therefore, I think that he does not fulfil the conditions under which the power to re-settle was given. I agree with Eve, J., and with the decision

of MAUGHAM, J., in *Bosworthick* v. *Clegg* (1); and it seems that the same view was taken in *Re Morrieson, Hitchins* v. *Morrieson* (2), a case of a will. There is a decision to a somewhat different effect in *Bullmore* v. *Wynter* (3), but I think that that case is distinguishable. There under a will there was a trust for the testator's daughter and after her death "in trust for any husband with whom she might intermarry if he should survive her" and that connoted any husband who might have married the daughter, if he should happen to survive her. I think the judgment of EVE, J., was right, and that the appeal must be dismissed.

LAWRENCE, L.J.—In my opinion this is a plain case. To be an object of the power to re-settle a person must fulfil two conditions: (i) he must survive the wife; (ii) he must be the husband of the wife at the time of her death. No person not fulfilling both of those conditions can take any interest under an appointment made under the power. In my judgment the status of husband is one of the controlling parts of the description of an object of the power. We have been referred to several cases. In *Re Morrieson, Hitchins* v. *Morrieson* (2), KAY, J., had no hesitation in holding that under a gift to a wife of a deceased son a divorced wife could not take because she was not at the moment of the son's death "in the station and position of a wife," and I think that this decision in substance covers the present case. *Bullmore* v. *Wynter* (3) and *Duchess of Marlborough* v. *Duke of Marlborough* (4) were, in my judgment, essentially different cases. In both the controlling qualification was not the status of the survivor, but the fact that there had been a marriage. MAUGHAM, J., in *Bosworthick* v. *Clegg* (1), in my opinion, rightly followed the decision of EVE, J., in the present case. I agree that the appeal should be dismissed.

RUSSELL, L.J.—I am of the same opinion. I think this gentleman is not the object of this re-settlement, because he could not be properly described as the "husband" of this lady who survived her.

Solicitors: *Charles Humphries & Co.*; *Whites & Co.*, and *Greenwell & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

MASON *v.* LACK

[KING'S BENCH DIVISION (Humphreys, J.), March 13, 22, 1929]

[Reported 140 L.T. 696; 45 T.L.R. 363; 73 Sol. Jo. 284]

Bill of Exchange—Form—Document not addressed by one person to another—Acceptance without any name on bill—Subsequent signature by drawer—Validity as promissory note—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 3 (1), *s.* 83 (1).

A purported bill of exchange drawn by the plaintiff in the following form: "£125 7s. 4d. On December 31st, 1928, pay to my order the sum of one hundred and twenty-five pounds seven shillings and four pence for value received," was accepted by the defendant "payable at Lloyd's Bank, Ltd., High Street Branch, Shoreditch, London, E.C.2. John H. Lack." At the time when the defendant accepted the bill there was, therefore, no other name on it. The defendant had no account at the above bank. The document was subsequently signed by the plaintiff as drawer.

Held: the document was invalid as a bill of exchange in that it did not comply with the requirements of the Bills of Exchange Act, 1882, s. 3 (1), but was valid as a promissory note under s. 83 (1) of the Act.

Dicta in *Peto* v. *Reynolds* (1) (1855), 11 Exch. 418, approved.

Notes. Referred to: *Haseldine* v. *Winstanley*, [1936] 1 All E.R. 137.

As to bills of exchange and promissory notes, see 3 HALSBURY'S LAWS (3rd Edn.) 144–154; and for cases see 6 DIGEST 34–37. For the Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 508.

Cases referred to:

(1) *Peto* v. *Reynolds* (1854), 9 Exch. 410; 23 L.J.Ex. 98; 22 L.T.O.S. 246; 18 Jur. 472; 2 W.R. 196; 2 C.L.R. 491; 156 E.R. 175; subsequent proceedings sub nom. *Reynolds* v. *Peto* (1855), 11 Exch. 418, Ex.Ch.; 6 Digest 35, *240*.

(2) *R.* v. *Hawkes* (1838), 2 Mood. C.C. 60, C.C.R.; 6 Digest 36, *252*.

(3) *Gray* v. *Milner* (1819), 8 Taunt. 739; 3 Moore, C.P. 90; 129 E.R. 571; 6 Digest 36, *251*.

(4) *Fielder* v. *Marshall* (1861), 9 C.B.N.S. 606; 30 L.J.C.P. 158; 3 L.T. 858; 7 Jur. N.S. 777; 142 E.R. 238; 6 Digest 36, *255*.

Action tried before HUMPHREYS, J.

The plaintiff, Harry Mason, claimed from the defendant, John H. Lack, £125 7s. 4d. on an alleged bill of exchange drawn by the plaintiff, and accepted by the defendant, payable on Dec. 31, 1928. The alleged bill was in the following form:

"£125 7s. 4d. On December 31st 1928 pay to my order the sum of one hundred and twenty-five pounds seven shillings and four pence for value received. Accepted payable at Lloyd's Bank, Ltd., High Street Branch, Shoreditch, London, E.C.2. John H. Lack."

The plaintiff had a son called Alfred. Alfred had been trading as Alfred Mason & Co., and had got into financial difficulties. The plaintiff was willing to pay his creditors the total sum of 5s. in the pound by two instalments of 2s. 6d. each, and apparently the creditors were willing to accept that composition, with the exception of one of them, Mr. Andrew, a creditor for about £1,500, who was willing to accept 5s. in the pound, but was not willing to accept it by two instalments of 2s. 6d. each. He required or suggested the guarantee of the amount due to him at one payment by bills which were to be accepted by the father, the plaintiff. In those circumstances, a meeting took place on Jan. 16, 1928, at which were present the plaintiff, the defendant, the plaintiff's son Alfred, and Mr. Andrew. At that time the plaintiff had paid or was about to pay £595 on behalf of his son. The defendant's position was that he was anxious to acquire a position such as managing director of a company, and he was proposing to become managing director of a new company similar to that carried on by Mr. Alfred Mason as soon as the debts of the old firm had been liquidated. The plaintiff was to some extent secured as regards the amount to be paid for his son by the book debts of the old firm which were to be transferred to him. The parties thus agreed that the plaintiff should accept three bills for Mr. Andrew, of £125 7s. 4d. each, payable at three separate dates, and that, by way of security for him, the defendant should accept three precisely similar bills payable on the same dates and for the same amounts. The defendant desired that he should be secured in some way, and it was agreed that he should have by way of security the stock and fixtures of the old firm. These arrangements were carried out, and the defendant in fact accepted three bills of £125 7s. 4d. each payable at three different dates, June 30, Sept. 30, and Dec. 31, at that time entirely in blank and payable at Lloyd's Bank, Ltd., High Street, Shoreditch. On Jan. 19 the defendant obtained further security because on that day he obtained a document which was signed by Alfred Mason, the son, and also by another son of the plaintiff, in which they agreed to take the responsibility of providing cash to pay the three bills drawn by the plaintiff and accepted by the defendant. The defendant paid the first two of the bills before maturity. When the time came for the third bill he did not pay it, and it was on that bill that this action was brought.

D. N. Pritt, K.C., and *L. O'Malley* for the plaintiff.

G. L. Hardy and *T. A. Brown* for the defendant.

Cur. adv. vult.

Mar. 22. **HUMPHREYS, J.**—In this action the plaintiff, by a specially endorsed writ, sues the defendant, as the acceptor of a bill of exchange. The defendant set out his defence in an affidavit sworn by him asking for unconditional leave to defend. He set up three defences which he alleged that he had to the action: (i) The document sued on was accepted by him as an accommodation bill for which there was no consideration; (ii) after the acceptance of the bill by him it was drawn by the plaintiff without his authority, the defendant's case being that the only person who could be authorised to draw the bill was the plaintiff's son; and (iii) a defence, which raised an interesting question of law, namely, that the instrument in question was not a bill of exchange at all because it had not complied with the provisions of the Bills of Exchange Act, 1882.

[His Lordship stated the facts and continued:] The defence that the bill was an accommodation bill was answered by the fact that ample consideration was given for it. The second defence was that, after the bill was accepted by the defendant, it was drawn by a person who had no authority to draw it. The defendant, however, admitted that, when he signed that bill as acceptor, he knew that it was to be given to the plaintiff as his security, that he understood that the son was to hand it over to his father. In those circumstances, it seems impossible for me to say that the defendant did not appreciate that the person authorised to draw the bill was the plaintiff. As far as these two defences depend on fact they must fail.

I now come to the main defence, which depends on the form of the instrument. When it was accepted by the defendant there was no other name on it at all. There was no name, and there was only an indication of a name in this sense, that the bill is payable at Lloyd's Bank, High Street, Shoreditch, and the bill was not addressed to any person. At a subsequent date the plaintiff put his name to the bill as drawer. In these circumstances, it is submitted that this instrument is not a bill of exchange within the meaning of s. 3 (1) of the Bills of Exchange Act, 1882, which defines the expression "bill of exchange" as

> "... an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer."

And it is further provided in sub-s. (2) that:

> "An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange."

Section 6 (1) of the Act provides: "The drawee must be named or otherwise indicated in a bill with reasonable certainty." In Chalmers' Bills of Exchange (9th Edn.), as a note to s. 6 (1) of the Act of 1882, it is stated by way of illustration:

> "Instrument in the form of a bill, but addressed to no one. B. writes an acceptance thereon. This is not a bill, and B. is not liable as an acceptor, but he may be liable as the maker of a note."

Reference is there made to *Peto* v. *Reynolds* (1). The decision in that case is clearly no authority for that proposition, because the learned judges expressly withheld from deciding that question. But when one looks at the report of the case in the court below, it does appear that some of the judges expressed tolerably strong views that a bill which is not addressed to anybody was not a bill of exchange according to the law as it existed at that date in 1854. The document in that case was drawn by a person named, and purported to be accepted by Samuel Reynolds, but it was not addressed to anyone. In giving judgment in that case, Pollock, C.B., abstained from expressing any opinion on the matter of law because, in his view, there ought to be a new trial. Parke, B., said this (9 Exch. at p. 415):

> "I cannot, however, help observing that, with the exception of *R.* v. *Hawkes* (2), there is no case in which it has ever been decided that an instrument could be a bill of exchange where there was not a drawer and a drawee."

In the same case Alderson, B., said:

A "With respect to the question whether this instrument is or is not a bill of exchange, the case of *R.* v. *Hawkes* (2) is undoubtedly in point. I must own, however, that I now think that I was wrong on that occasion. This case seems to have been decided on the ground that *Gray* v. *Milner* (3) governed it; and the fact was not adverted to, that *Gray* v. *Milner* (3) may be thus explained; that a bill of exchange, made payable at a particular place or house, is meant to be addressed to the person
B who resides at that place or house."

MARTIN, B., said that, if it were necessary to express a decided opinion on the matter of law, he should agree with the views of the two previous judges on that question. He said,

"It seems to me that it is absolutely essential to the validity of a bill of exchange that it should have a drawer and a drawee. . . ."

C Therefore it is right to say that these three judges expressed their views that a bill in the form in which the instruments are in this case was not such an instrument as could be sued on as a bill of exchange at that date. In *Gray* v. *Milner* (3) the document in question was accepted by Milner and drawn by one, W. Sustanance, and was in this form: "May 20th, 1813: Two months after date pay to me, or my order, the sum of thirty-two pounds two shillings.—W. Sustanance." And then there was written on it:
D "Payable at No. 1, Wilmot Street, opposite the Lamb, Bethnal Green, London," and it appeared that No. 1, Wilmot Street was, in fact, the address of the acceptor, and that being so, DALLAS, C.J., said (8 Taunt. at p. 741):

". . . it was not necessary that the name of the party who afterwards accepted the bill should have been inserted, it being directed to a particular place, which could only mean to the person who resided there."

E That case is not of any assistance to the plaintiff in this case because the bill in question here is made payable at Lloyd's Bank, High Street, Shoreditch, where it was proved that the defendant had no account at all. Therefore it was not addressed to any place which could be said to be the address of the defendant.

There is one other case, that of *Fielder* v. *Marshall* (4), where the decision was to the
F effect that the document there sued on was not given as a bill of exchange, but was valid as a promissory note. All that the judges said was that it was right to treat that document as a promissory note, and that judgment might properly be asked on it as a promissory note; but it seems to me that that judgment assumes that that document was not valid as a bill of exchange. It had a drawer and an acceptor, but no addressee.

In those circumstances, it appears to me clear that, at least up to the time of the
G coming into force of the Bills of Exchange Act, 1882, this document would not have been held to be a bill of exchange. And when I come to look at the language of the Act, and the definition of the term "bill of exchange" which it includes, I find myself unable to hold that this instrument is a bill of exchange, and, therefore, the defence must succeed on that issue.

Application was made to me for leave to amend so as to make the claim against the
H defendant not as acceptor of a bill of exchange but as the maker of a promissory note. But since the amendment asked for is a technical matter I thought it right to give leave to amend the statement of claim, which must be that the claim is against the defendant as the maker of a promissory note signed by the defendant and payable on Dec. 31, 1928. And the defendant, as the maker of that promissory note, must be held liable. I have no doubt that, up to 1882, this document would have been held to be a good promissory
I note, and I turn to the Act to see what is the definition of a promissory note, and I find in s. 83 (1) that:

"A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer."

In my opinion, this document fulfils all the requirements of that definition and, therefore, the plaintiff is entitled to judgment on the footing of this document being a promissory note.

Now for the question of costs. [His Lordship held that the plaintiff ought to pay such costs as were incidental to, or occasioned by, the amendment of the statement of claim. As the main defence that the document was not a bill of exchange had succeeded, he ordered the costs to be taxed and one-half of the taxed costs to be paid to the defendant.]

Judgment for plaintiff.

Solicitors: *J. Wylie Patterson*; *Marris & Shepherd.*

[*Reported by* T. R. F. Butler, Esq., *Barrister-at-Law.*]

LEITCH *v.* EMMOTT (INSPECTOR OF TAXES)

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Sankey, L.JJ.), May 7, 8, 1929]

[Reported [1929] 2 K.B. 236; 98 L.J.K.B. 673; 141 L.T. 311; 14 Tax Cas. 633]

Income Tax—Assessment—Widow—Assessment in first year of widowhood—Private income assessed during husband's lifetime as his income—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Rules applicable to Case III, r.* 2; *All Schedules Rules, r.* 16.

The taxpayer owned at all material times war loan stock and victory bonds, and in the years ending April 5, 1921, and April 5, 1922, respectively, she received £2,102 and £2,115 as income from those holdings and interest on her bank balance. On April 10, 1921, the taxpayer's husband died. Up to the date of his death, assessments to income tax had been made on him in respect of the taxpayer's income. Income tax was assessed on the taxpayer in the sum of £2,102 for the year ending April 5, 1922, under the Income Tax Act, 1918, Sched. D, Rules applicable to Case III, r. 2 (i.e., in respect of her income for the previous year, ending on April 5, 1921).

Held: the fact that under the proviso to r. 16 of the All Schedules Rules the taxpayer's income received in the year ending April 5, 1921, was deemed the profits of her husband (which was merely a provision relating to the means of collection) did not preclude the application of r. 2 of the Rules applicable to Case III with reference to her income for that year, and the assessment was correct.

Notes. The Income Tax Act, 1918, Sched. D, Rules applicable to Case III, r. 2, as subsequently amended, was replaced by the Income Tax Act, 1952, s. 131. Rule 16 of the All Schedules Rules of the Act of 1918 was repealed by the Finance Act, 1950, s. 35. The law laid down by this case is, in effect, confirmed by the Income Tax Act, 1952, s. 354 (1), proviso.

Considered: *Viscountess Cowdray* v. *I.R. Comrs.* (1930), 15 Tax Cas. 255. Applied: *Elmhirst* v. *I.R. Comrs.*, [1937] 2 All E.R. 349. Considered: *Palmer* v. *Cattermole*, [1937] 2 All E.R. 667. Referred to: *Browning* v. *Duckworth*, [1935] 1 K.B. 605.

As to assessment to income tax where the husband dies in the year of assessment, see 20 Halsbury's Laws (3rd Edn.), 381. For the Income Tax Act, 1952, s. 131 and s. 354, see 31 Halsbury's Statutes (2nd Edn.) 126, 342.

Cases referred to:

(1) *Walker* v. *Howard* (1927), 138 L.T. 367; 13 Tax Cas. 313; Digest Supp.

(2) *National Provident Institution* v. *Brown*, [1920] 3 K.B. 35; 89 L.J.K.B. 866; 123 L.T. 693; 36 T.L.R. 618; 8 Tax Cas. 57, C.A.; on appeal sub nom. *Brown* v. *National Provident Institution*, [1921] 2 A.C. 222; 90 L.J.K.B. 1009; 125 L.T. 417; 37 T.L.R. 804; 8 Tax Cas. 70, H.L.; 28 Digest 62, *316*.

(3) *Bradbury* v. *English Sewing Cotton Co.*, [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 39 T.L.R. 590; 67 Sol. Jo. 678; 8 Tax Cas. 481, H.L.; 28 Digest 81, *445*.

(4) *Re Levy, Ex parte Walton* (1881), 17 Ch.D. 746; 50 L.J.Ch. 657; 45 L.T. 1; 30 W.R. 395, C.A.; 42 Digest 627, *289*.

Appeal

This was an appeal by the Crown from an order of ROWLATT, J., allowing an appeal by the taxpayer on a Case stated by the Special Commissioners of Income Tax.

At a meeting of the Commissioners for Special Purposes of the Income Tax Acts held on Mar. 14, 1928, the taxpayer, Mrs. Mary W. Leitch, appealed against assessment to income tax in the sum of £2,102 10s. for the year ending April 5, 1922, made on her under Sched. D of the Income Tax Act, 1918, and subsequent enactments. The taxpayer owned in her own right certain war loan stock and victory bonds, and received income therefrom and also bank interest in the year ending April 5, 1921, £2,102 10s. and in the year ending April 5, 1922, £2,115 10s. The taxpayer's husband died on April 10, 1921. Up to this date assessments in respect of the taxpayer's income from the above-mentioned investments had been made on him under the provisions of r. 16 of the general rules applicable to Scheds. A, B, C, D, and E of the Income Tax Act, 1918. It was contended on behalf of the taxpayer that she had no income while her husband was living, and therefore there being no income in the year preceding the year of assessment, no liability to income tax existed for the year ending April 5, 1922.

It was contended on behalf of the Crown, that for the purposes of assessment the taxpayer's income was deemed to be her husband's income only during his lifetime and that as she was in receipt of the income arising to her in the year ending April 5, 1922, she was assessable for that year on the full amount of the profits or income arising in the preceding year, under the provisions of Case III, Sched. D, Income Tax Act, 1918.

The commissioners held that, following the decision in *Walker* v. *Howard* (1), the taxpayer's income prior to the date of the death of her husband was the income of the husband. In view, however, of the opinion expressed by SCRUTTON, L.J., in *National Provident Institution* v. *Brown* (2), they held that the appellant was liable to income tax under Case VI of Sched. D in respect of the income arising to her for the year ending April 5, 1922. The taxpayer accordingly required them to state a Case for the opinion of the court.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the Crown.
R. W. Needham, K.C., and *William Allen* for the taxpayer.

LORD HANWORTH, M.R.—This case raises an interesting point under the Income Tax Acts. ROWLATT, J., before whom the case came, followed *Walker* v. *Howard* (1), and did not give what was in effect an independent judgment. *Walker* v. *Howard* (1) was not taken to the Court of Appeal.

The question that arises is on quite simple facts. Mrs. Mary Leitch, who was the appellant before the commissioners, owned in her own right some war loan inscribed stock and victory bonds, and also had bank interest in the year ending April 5, 1922. In respect of those holdings she was liable to be assessed to income tax, and, by reason of the nature of those holdings, her tax with which she is charged under Sched. D falls to be estimated for the purpose of that schedule under Case III. Turning to the actual words of the schedule, she has to be assessed in this year ending April 5, 1922, in respect of the annual profits or gains arising or accruing to her from any kind of property, and the tax under this schedule is to be charged under (in this case) Case III: "Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case," and the tax in respect of the profits of an uncertain value which fall under Case III,

> "shall be computed in each case on the full amount arising within the year ending on that day of the year preceding the year of assessment on which the accounts are usually made up, or on Apr. 5 preceding the year of assessment, and shall be paid on the actual amount as aforesaid without any deduction."

With regard, therefore, to the assessments to be made on Mrs. Leitch, in respect of her holding during 1922, because of their nature which brings them within Case III, it is necessary for the computation of the duty to estimate what was the full amount of the profits or gains arising therefrom within the preceding year. The preceding year ended on April 5, 1921, and during that year she had of securities of this same nature the income from which fell within Case III, the total amount being £2,102 10s. The tax, therefore, which she is to pay in respect of her profits received from this class of investments in the year ending April 5, 1922, would not be taken at the face value of those profits received in 1922, viz., £2,115 10s., but would be taken at the full amount of the profits arising in the preceding year, viz. £2,102 10s. But Mrs. Leitch was in the year and down to April 10, 1921, a married woman, and it is said that there were no profits or gains which can form the measure in that year because the profits and gains of a married woman are to be deemed to be the income of her husband; thus, in the preceding year, 1921, Mrs. Leitch did not in fact enjoy any profits at all; what profits and gains reached her out of her holding of these securities which fall within Case III, all those profits are to be deemed to be the profits of her husband and to the exclusion of Mrs. Leitch having any profits at all. Thus, it is said on her behalf, inasmuch as the measure of her liability to tax is to be estimated according to this standard in the preceding year, 1921, and the circumstances of her status in that year, there were no profits or gains arising to her which can form a standard of her taxation for 1922, and inasmuch, therefore, as the standard is nought, the liability must also be nought in 1922. ROWLATT, J., following his decision in *Walker* v. *Howard* (1) has acceded to that view, and we have to determine whether it is right.

It has been for a long time, indeed from the date of the Income Tax Act, 1842, provided that the income of a married woman living with her hubsand shall be deemed to be the profits of the husband. Section 45 of the Act of 1842 provided

> "That any married woman acting as a sole trader by the custom of any city or place, or otherwise, or having or being entitled to any property or profits to her sole or separate use, shall be chargeable to such and the like duties, and in like manner, except as hereinafter is mentioned, as if she were actually sole and unmarried: Provided always, that the profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name, or of her trustee."

In the Act of 1918, the consolidation Act of Income Tax Acts, that s. 45 is now found in the form of r. 16 of the General Rules applicable to All Schedules. Rule 16 is as follows:

> "A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried."

That Rule provides for the charge being imposed on a married woman in respect of her property and profits. The proviso to r. 16 provides, however:

> "Provided that (1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee."

Some criticism has been directed, not unfairly, by counsel for the taxpayer to the form of that Rule and proviso. He would contend that the proviso, in effect, negatives the terms of the opening words of the Rule. I do not accept that. Counsel would contend that one may wipe out the first three lines of the Rule and the words "Provided that," and read the Rule as if it stood that "the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name," as if the charge were on the husband in respect of the profits which belonged to his wife. It appears to me that the Rule as drawn is intended to convey the same meaning as in s. 45 of the earlier Act, and definitely to impose a charge on the married woman in respect of her profits although the collection is to be made from the husband, and in that sense, and for that purpose, the profits of the wife are to be deemed the profits of the husband. By the Act of 1914, s. 9, there is a scheme provided whereby it

A is possible for a husband to avoid being made responsible for the profits of his wife. That section was passed in order to get rid of inconvenience placed on husbands where they found difficulty in obtaining the information required to fulfil r. 16 from their wives. A notice can be given by the husband and there can be a separate assessment on the wife, but for all practical purposes the actual charge on them remains as it would be if the collection were from the husband. In these circumstances, viz., that the liability B to tax and the quantum of the tax is measured by the totality of the income of the husband and that of the wife added together, they are unable, the one or the other, to claim that a lower rate of tax should be imposed on them because the smaller income of them respectively brings them below a certain level. The system still remains that there must be the aggregation of their total incomes in order to see whether or not that total income is subject to tax and what is the rate at which it should be charged.

C I turn, therefore, to consider the point which has been raised on behalf of Mrs. Leitch, as to how far it can be said that she was entitled to be discharged from the receipt of any profits in the year 1921. It appears to me that we must take the Rules as we find them; we must treat the proviso as a proviso. Rule 16 operates to provide that the married woman shall be assessable and chargeable to tax. Bearing that in mind and treating that as being so, then the proviso will operate as a proviso and no more, in D allowing that the husband shall be the source through which collection shall be made, and for that purpose of collection the profits which are not his are to be deemed his in that sense and no further sense.

Counsel for the taxpayer has called our attention to one or two cases. *Bradbury* v. *English Sewing Cotton Co.* (3) appears to me not to assist. He called our attention to words which are used by LORD SHAW ([1923] A.C. at p. 756):

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> "Accordingly, when the profits from a trading concern are taxed on the footing that it is an English trading concern then, ex necessitate, this involves that the taxing authority is committed to that situation and is, for all purposes of the Income Tax Acts, precluded from placing or reckoning the income so treated under any other category."

F That may be so on such facts as arose in that particular case, but what we have to consider here is not what was the mode of collection of the tax while Mrs. Leitch remained a married woman, but whether she can bring herself within the proviso so as to claim that the immunity of a married woman can be given to her. The proviso begins: "The profits of a married woman living with her husband" and so on. From April 10, 1921, Mrs. Leitch was not a married woman living with her husband; she became a widow G on that day; she is being taxed in respect of profits that she has received in 1922, a year during which she was a widow. There is, to my mind, little difficulty in estimating what ought to be the amount of the tax to be paid in that year, although, while she was able to say that she was a married woman, it was the purse of her husband which was to be used by the Crown for the purpose of extracting payment of the tax which was imposed upon the joint income of both husband and wife. It is plain that we must H look at the words of the proviso, and if they do not apply, then the consequence cannot be also applied. I am, for my part, not able to accept a particular construction of words which are plain, because of the difficulties that may arise in certain circumstances. It does not appear to me that it would be a just method of construction to place on an Act, to try to twist words from their plain meaning because in certain circumstances there may be hard cases or difficulties either to the Crown or to the subject in the estima- I tion of the liability of the latter to the former.

It appears to me, for these reasons, that on the words used in r. 16, Mrs. Leitch cannot escape liability. The liability arises in respect of the profits received in 1922, and those profits arising in fact to her can be measured by what happened in 1921, although, if the circumstances had been that her husband had survived, there would have been a different method of both assessment and collection in respect of the profits of 1922. There still remains a standard by which the tax of 1922 can be measured, even though in the years that passed during married life, the profits of the two spouses were to be deemed to be the profits of the husband. The appeal must be allowed.

LAWRENCE, L.J.—I agree. The case is one which deals with income tax falling under Case III of Sched. D. Under r. 1 applicable to that Case, the tax extends to the interest on the investments which belong to Mrs. Leitch for her separate use. It falls to be assessed according to r. 2 applicable to Case III on the amount arising in the year preceding the year of assessment and tax is to be paid on that amount without any deduction. Throughout the year preceding the year of assessment Mrs. Leitch was a married woman living with her husband, and under r. 16 of the All Schedules Rules, the interest on the investments in question was deemed to be the profits of the husband, and they would have been assessed and charged in his name and not in her name. In the year of assessment the husband died, and it is now contended that the effect of the proviso to r. 16 is that the interest on these investments became for all purposes the income of the husband, and that therefore Mrs. Leitch must be treated as not having received any interest on those investments in the year preceding the year of assessment, and consequently that her income for the year of assessment ought to be assessed at nothing.

In my opinion, that contention is not well founded. Rule 16 provides that a married woman entitled to such interest as we have here for her separate use shall be assessable and chargeable to tax as if she were sole and unmarried. Then, turning back to r. 2 of the Rules applicable to Case III, we find that the measure of that charge to tax is the amount of the income on the investments for the year preceding the year of assessment. It is clear, to my mind, therefore, that the married woman is charged to tax in respect of the income for the year of assessment, to be measured by the income from the same investments which belonged to her in the preceding year and which she actually received. The proviso, in my opinion, was not intended to cut down that charge, nor the measure of the tax, but it was intended that the assessment and charge should be made in the name of the husband and to be treated for that purpose as part of the income of the husband. That, to my mind, in no way affects the prior and operative part of r. 16; nor does it, in my opinion, in any way cut down the effect of r. 2 of Case III giving the measure of the tax to which the widow becomes liable to pay in the year of assessment.

For these reasons, I agree that the appeal ought to be allowed, with the result that the Master of the Rolls has stated.

SANKEY, L.J.—I agree, and should not add anything were we not differing from the learned judge in the court below and had not the advantage, if I may be allowed to say so, of a very attractive argument in support of the judgment.

Counsel for the taxpayer says that the interest for the year in question has been stamped for all purposes as the husband's income, and that it is a sort of statutory election, like an election at common law, on which the commissioners cannot go back, and that they cannot now be heard to say that this interest in question was the wife's income, because it had already been deemed to be the income of the husband. Certainly counsel has a dictum in his favour which appeared at first sight to be strong, and that is the words of LORD SHAW in *Bradbury* v. *English Sewing Cotton Co.* (3) ([1923] A.C. at p. 756):

> "Accordingly, when the profits from a trading concern are taxed on the footing that it is an English trading concern, then, ex necessitate, this involves that the taxing authority is committed to that situation, and is, for all purposes of the Income Tax Acts, precluded from placing or reckoning the income so treated under any other category."

I think that those words must be taken to refer to the particular circumstances which fell for determination in that case. Here we are in rather a different area. The word "deemed" introduces an artificial definition which, in my view, is only to be applied as long as the conditions exist to which it is intended to apply. There is some authority for that in the judgment of JAMES, L.J., in *Re Levy, Ex parte Walton* (4) (17 Ch. D. at p. 756):

A "When a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

Founding oneself on those words, one turns to the proviso to r. 16, and it is to be observed that in the proviso the section is dealing with "the profits of a married woman living with her husband." One starts with the assumption that the profits are those of a married B woman living with her husband; and then it says that in that case, where they are the profits of a married woman living with her husband, they shall be deemed to be the profits of the husband and shall be assessed and charged in his name; but they still remain the profits of the married woman living with her husband, because that is the subject with which the proviso is dealing, and it appears to me that they are none the less her profits in one sense, although for the purposes of collection they shall be deemed C to be the profits of the husband and shall be assessed and charged in his name. I think that that assessment and charging in his name obviously only refer to a case where the husband is still alive and the married woman living with him, but if those conditions do not apply, if the conditions on which the artificial "deeming" depends no longer exist, then I think they are still the profits belonging to the married woman. I cannot see, therefore, how one can exclude them for taxation purposes. In other words, I think D that the statutory election, if I may call it so, only applies for the purpose of collection, and when the conditions no longer exist, the sum in question is the profits of the married woman.

For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Jacques & Co.*, for *Hall, Walker & Norton,* E Huddersfield.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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Re AGRICULTURAL WHOLESALE SOCIETY

G [CHANCERY DIVISION (Maugham, J.), April 22, 23, 1929]

[Reported [1929] 2 Ch. 261; 98 L.J.Ch. 396; 141 L.T. 551; 45 T.L.R. 467; [1929] B. & C.R. 54]

Industrial and Provident Society—Company—Winding-up—Issue of loan stock secured by trust deed—Computation of sums due to trustees—Computation of interest—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 207—*Bankruptcy Act*, 1914 H (4 *& 5 Geo.* 5, *c.* 59), *s.* 66 (2) (*b*).

A society incorporated under the Industrial and Provident Societies Acts, 1893–1913, issued loan stock under a loan stock trust deed at 7 per cent. interest with a quinquennial bonus of 2½ per cent. Under the trust deed 7½ per cent. on the par value of the loan stock was to be given to the trustees of the deed to pay the interest and bonus. At the date of an order for the winding-up of the society made I in July, 1924, most of the stockholders had received payment in full of interest at 7 per cent. on the amount of the stock issued up to the end of 1923. The trustees having lodged a proof for cash advanced on loan, this summons was issued by the liquidator asking (i) whether the proof should be rejected as to interest exceeding 7½ per cent. to the date of the commencement of the winding-up; (ii) whether, for the purposes of dividend, interest ought to be calculated at 5 per cent. to the commencement of the winding-up or to the date of the winding-up order; and (iii) whether the Bankruptcy Act, 1914, s. 66 (2) (b), applied to the proof or the dividend in respect of the stock.

Held: (i) the amounts proved for by the trustees were to be computed only to the date of the commencement of the winding-up: *Quartermaine's Case* (1), [1892] 1 Ch. 639, applied; (ii) s. 66 of the Bankruptcy Act, 1914, was not incorporated by s. 207 of the Companies (Consolidation) Act, 1908, so as to apply to the winding-up of an insolvent company, and, therefore, the trustees' proof ought to be calculated at the rate of 7½ per cent.

Notes. The Companies (Consolidation) Act, 1908, s. 207, was repealed by the Companies Act, 1929, s. 381 and Sched. 12; and replaced by s. 262 of the latter Act. Section 262 of the 1929 Act was repealed by the Companies Act, 1948, s. 459 and Sched. 17, and replaced by s. 317 of that Act.

Applied: *Re Wells*, ante, p. 362. Not followed: *Re Bush, B. Lipton, Ltd.* v. *Mackintosh*, [1930] All E.R.Rep. 605; *Re Parent Trust and Finance Co.*, [1936] 1 All E.R. 641.

As to proof for interest in the case of an insolvent company wound up by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 657, 659, and for cases see 10 DIGEST (Repl.) 970 et seq. For the Bankruptcy Act, 1914, s. 66, see 2 HALSBURY'S STATUTES (2nd Edn.) 398; and for the Companies Act, 1948, s. 317, see 3 HALSBURY'S STATUTES (2nd Edn.) 698.

Cases referred to:

(1) *Re London, Windsor and Greenwich Hotels Co., Quartermaine's Case*, [1892] 1 Ch. 639; 61 L.J.Ch. 273; 66 L.T. 19; 40 W.R. 298; 8 T.L.R. 204; 36 Sol. Jo. 185; 10 Digest (Repl.) 1002, *6880*.

(2) *Re Humber Ironworks and Shipbuilding Co., Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643; 38 L.J.Ch. 712; 20 L.T. 859; 17 W.R. 780, L.JJ.; 10 Digest (Repl.) 981, *6750*.

(3) *Re Contract Corpn., Ebbw Vale Co.'s Case* (1869), 5 Ch. App. 112; 39 L.J.Ch. 363; 18 W.R. 222, L.C.; 10 Digest (Repl.) 1037, *7165*.

(4) *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1871), L.R. 11 Eq. 478; 24 L.T. 255; 10 Digest (Repl.) 1121, *7801*.

(5) *Re International Contract Co., Hughes' Claim* (1872), L.R. 13 Eq. 623; 41 L.J.Ch. 373; 26 L.T. 500; 20 W.R. 522; 10 Digest (Repl.) 981, *6751*.

(6) *Re Young, Ex parte Jones*, [1896] 2 Q.B. 484; 65 L.J.Q.B. 681; 75 L.T. 278; 45 W.R. 96; 12 T.L.R. 633; 3 Mans. 213; 4 Digest 483, *4346*.

(7) *Re Herbert, Ex parte Jones* (1892), 8 T.L.R. 685; 9 Morr. 253, D.C.; 4 Digest 306, *2874*.

Adjourned Summons.

The Agricultural Wholesale Society, Ltd. was incorporated under the Industrial and Provident Societies Acts, 1893–1913, and under its rules it had power to obtain loans, among others, by the issue of loan stock. Such a loan was issued in 1920 of £250,000 at 7 per cent. per annum and quinquennial bonus of 2½ per cent. A trust deed was to be executed by which 7½ per cent. on the par value was to be given to the trustees to pay the interest and bonus. The deed was, in fact, executed shortly after the issue of the prospectus, and, by cl. 3, the society agreed, while any of the stock should be outstanding, to pay the trustees in two half-yearly payments a sum equivalent to interest additional at 1½ per cent. per annum on the amount of stock outstanding, the additional sum payable in respect of stock not fully paid for during any half-year to be calculated and paid in the same manner as that on the stock, namely, 7 per cent. A winding-up order having been made on July 29, 1924, it was found that £71,246 stock had been issued, of which £70,101 was fully paid up, and on the remaining £1,145 4s. had been paid, and that interest had been paid in full to most of the stockholders on the amount of the stock issued at 7 per cent. up to the end of 1923. The trustees claimed to prove in the liquidation for £74,726 16s. 7d. for cash advanced on loan and interest thereon. This proof was admitted on principle, and subject to investigation as to how the amount was arrived at, and how the sums payable under cl. 3 of the deed were to be dealt with. This summons was then taken out by the liquidator asking (i) whether he ought to reject

the proof as to interest exceeding 7½ per cent. to the date of the commencement of the winding-up, (ii) whether, for the purposes of dividend, interest ought to be calculated at 5 per cent. either to the date of such commencement or to that of the winding-up order, and (iii) whether s. 66 (2) (b) of the Bankruptcy Act, 1914, applied to the proof or the dividend in respect of the loan stock.

Roxburgh, for the liquidator as applicant, referred to *Warrant Finance Co.'s Case* (2), *Ebbw Vale Co.'s Case* (3), *Re Imperial Land Co. of Marseilles* (4), *Re International Contract Co., Hughes' Claim* (5), *Quartermaine's Case* (1), STIEBEL'S COMPANY LAW (2nd Edn.), vol. 11, p. 1370, as to the incorporation of s. 66 of the Bankruptcy Act, 1914, with s. 207 of the Companies Act, 1908; *Re Young, Ex parte Jones* (6), and *Re Herbert, Ex parte Jones* (7).

Christie for the trustees.

MAUGHAM, J.—I will deal first with the question whether interest is to be calculated to the date of the commencement of the winding-up or to the date of the order for winding-up. In the present case the difference in the number of days is not very great. I have been referred to all the authorities. It is true that, in some cases, the learned judges have used ambiguous language, as, e.g., in *Warrant Finance Co.'s Case* (2), where SELWYN, L.J., says simply "the date of the winding-up," which might mean the date either of the commencement of the winding-up or of the order. Subsequent cases, however, have shown that the date here intended is that of the commencement of the winding-up: see *Quartermaine's Case* (1), where STIRLING, J., clearly showed that he was treating the date of the commencement of the winding-up as the proper date. Moreover, the learned authors of PALMER and BUCKLEY take the same view. In these circumstances, I have no hesitation in holding that the amounts proved for by the trustees in respect of the sums due to them on the loan stock trust deed are to be computed only to the date of the commencement of the winding-up. It should be added that r. 10 of the Companies (Winding-up) Rules, 1909, does not apply.

The third question is one of some general importance, because, in substance, it is the question whether s. 66 of the Bankruptcy Act, 1914, is incorporated by s. 207 of the Companies (Consolidation) Act, 1908, so as to apply in the winding-up of an insolvent company registered in England. If it is so incorporated, there is no doubt that the proof which the trustees of the loan stock trust deed are entitled to make ought to be calculated at the rate of 5 per cent.; if it is not so incorporated, the proof ought to be calculated at the rate of 7½ per cent. It is to be observed that, in the first instance, the incorporation of certain rules in regard to bankruptcy, whenever applicable, was effected by the Supreme Court of Judicature Act, 1875, s. 10, which provides (inter alia) as follows:

> ". . . In the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities, and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive. . . out of the assets of any such company may come in under . . . the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

These were the rules to apply to winding-up. The section is not retrospective. It applies only to any winding-up after the date of the Act. Moreover, the section did not incorporate into winding-up anything like the whole of the rules applicable to bankruptcy. There have been, I suppose, a dozen or more cases in each of which it was decided that the section was limited in its effect by the particular language used. In

1890, the Bankruptcy Act, 1883, was amended, and by s. 23 of the Bankruptcy Act, 1890, it was for the first time provided: A

"Where a debt has been proved upon a debtor's estate under the principal Act [i.e., the Bankruptcy Act, 1883] and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per centum per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full." B

It is to be observed that that is a special provision, concerning, not the sums for which a creditor can prove in the bankruptcy, but the payment of dividend; and it provides that, for purposes of dividend, interest is to be calculated at a rate of not more than 5 per cent. C A section so expressed as is s. 10 of the Act of 1875 must be construed in strictness: and I do not think that it would be proper to hold that a special section as to payment of dividends is included by natural implication in the words "rules . . . as to debts . . . provable."

In 1913 there was a further amendment of bankruptcy law; and by s. 22 of the Bankruptcy and Deeds of Arrangement Act, 1913, there was an amendment of s. 23 of the Act of 1890. D The amendment was:

"In dealing with any proof of a debt to which s. 23 of the Bankruptcy Act, 1890 (which relates to interest on debts), applies, the following rules shall be observed: (a) Any account settled between the debtor and the creditor within three years preceding the date of the receiving order may be examined, and, if it appears that the settlement of the account forms substantially one transaction with any debt alleged to be due out of the debtor's estate (whether in the form of renewal of a loan or capitalisation of interest or ascertainment of loans or otherwise) . . . the account may be re-opened and the whole transaction treated as one; (b) Any payments made by the debtor to the creditor before the receiving order, whether by way of bonus or otherwise, and any sums received by the creditor before the receiving order from the realisation of any security for the debt shall, notwithstanding any agreement to the contrary, be appropriated to principal and interest in the proportion that the principal bears to the sum payable as interest at the agreed rate; (c) Where the debt due is secured and the security is realised after the receiving order, or the value thereof is assessed in the proof, the amount realised or assessed shall be appropriated to the satisfaction of principal and interest in the proportion that the principal bears to the sum payable as interest at the agreed rate." E F G

Between the passing of the Bankruptcy Act, 1890, and the Bankruptcy and Deeds of Arrangement Act, 1913, the Companies (Consolidation) Act, 1908, was passed: and by s. 207 of that Act, s. 10 of the Supreme Court of Judicature Act, 1875, was, in substance, re-enacted. The question now to be determined is whether these complicated rules, which are, in effect, amendments to s. 23 of the Bankruptcy Act, 1890, are imported by s. 207 of the Companies (Consolidation) Act, 1908. H

For the reasons which I have already given in dealing with s. 23 of the Act of 1890, I think that the language of s. 207 of the Act of 1908 is not wide enough to incorporate s. 22 of the Act of 1913. By s. 66 of the Bankruptcy Act, 1914, the provisions of s. 23 of the Act of 1890 and of s. 22 of the Act of 1913 were re-enacted, practically without alteration; and I am of the opinion that neither the first nor the second subsection of s. 66 is, by s. 207 of the Act of 1908, applied in the winding-up of an insolvent company. I I will add that I do not think that the legislature, when the Act of 1908 was passed, could have intended such a result. That Act is a consolidating Act, and it is not in the least likely that it was intended, by s. 207, to extend the bankruptcy rules applicable in a winding-up. Further, the provisions of s. 66 of the Act of 1914 are most inconvenient to be applied to a case such as the present. In the case of a company, which is quite different from that of an individual, a debt may have existed for an enormous length of time, without any obligation to repay so long as the company is a going concern. The introduction of s. 66 of the Act of 1914, in the case of an insolvent company,

would lead to difficulties which would far outweigh any advantage which may result from diminution of interest. For these reasons, I come to the conclusion that s. 66 of the Act of 1914 is not incorporated by s. 207 of the Act of 1908, with the result that the answer to the third question raised by the summons is in the negative.

Solicitors: *Stow, Preston & Lyttleton*; *Patersons, Snow & Co.*, for *Dibb, Lupton & Co.*, Leeds.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

DENNERLEY *v.* PRESTWICH URBAN DISTRICT COUNCIL

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), July 17, 18, 30, 1929]

[Reported [1930] 1 K.B. 334; 99 L.J.K.B. 25; 141 L.T. 602; 94 J.P. 34; 45 T.L.R. 659; 73 Sol. Jo. 530; 27 L.G.R. 618]

Highway—Street—Private street works—Apportionment of costs—Recovery of costs from "owner for time being"—Limitation of time for proceedings—Limitation of time for making demand—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3—*Real Property Limitation Act*, 1874 (37 & 38 *Vict.*, *c.* 57), *s.* 8—*Private Street Works Act*, 1892 (55 & 56 *Vict.*, *c.* 57), *s.* 14.

In 1910 a local authority, having duly made a final apportionment under s. 12 of the Private Street Works Act, 1892, of the expenses of certain private street works, demanded the amount thus apportioned from an owner of land abutting on the street made up. In 1927 the latter sold the land in question to the plaintiff without having satisfied the local authority's demand, and the local authority claimed to set off in an action against them by the plaintiff for certain housing subsidies the amount originally demanded, with accrued interest. The plaintiff pleaded that the counterclaim was barred by the statutes.

Held: (i) time under the Limitation Act, 1623, did not begin to run against the local authority until demand had been made on the plaintiff, for until that had been done he was under no personal liability; the fact that the authority might have lost their right to sue the original owner did not prevent their suing a subsequent "owner for the time being"; and, therefore, the set-off was not statute-barred; (ii) s. 8 of the Real Property Limitation Act, 1874, did not apply to defeat the set-off because the authority had no right to receive from the plaintiff the sum set-off until he became owner of the property and twelve years from that date had not elapsed when the set-off was pleaded, and, further, the debt was not a "sum of money charged on land" within s. 8.

Per GREER, L.J.: The obligations imposed on successive owners by s. 14 of the Act of 1892 created separate causes of action against the owners liable from time to time.

Notes. The Limitation Acts referred to in the judgments have been repealed and replaced by the Limitation Act, 1939, s. 2 (1) of which prescribes a limitation period of six years for "(a) actions founded on simple contract . . . (d) actions to recover any sum recoverable by virtue of any enactment," s. 2 (3) of which prescribes a period of twelve years for an action on a specialty "provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act," and s. 18 (1) of which is (so far as relevant to this case) in similar terms to s. 8 of the Act of 1874.

As to when the cause of action for debt arises, see 24 HALSBURY'S LAWS (3rd Edn.) 213, and as to the limitation period for the recovery of money charged on land, see ibid., 264. As to making up highways under the Private Street Works Act, 1892, see 19 HALSBURY'S LAWS (3rd Edn.) 437 et seq.; and for cases on the subject, see 26 DIGEST

539–547. For the Private Street Works Act, 1892, see 11 HALSBURY'S STATUTES (2nd Edn.) 181, and for the Limitation Act, 1939, see ibid., vol. 13, p. 1159.

Cases referred to:

(1) *Hampstead Corpn.* v. *Caunt*, [1903] 2 K.B. 1; 72 L.J.K.B. 440; 88 L.T. 599; 67 J.P. 344; 51 W.R. 700; 19 T.L.R. 407; 47 Sol. Jo. 452; 1 L.G.R. 507; 26 Digest 499, *2076*.

(2) *Wortley* v. *Vestry of St. Mary, Islington* (1886), 51 J.P. 166, D.C.; 26 Digest 499, *2075*.

(3) *Reeves* v. *Butcher*, [1891] 2 Q.B. 509; 60 L.J.Q.B. 619; 65 L.T. 329; 39 W.R. 626, C.A.; 32 Digest 337, *210*.

(4) *Coburn* v. *Colledge*, [1897] 1 Q.B. 702; 66 L.J.Q.B. 462; 76 L.T. 608; 45 W.R. 488; 13 T.L.R. 321; 41 Sol. Jo. 408, C.A.; 32 Digest 339, *229*.

(5) *Bradford Old Bank* v. *Sutcliffe*, [1918] 2 K.B. 833; 88 L.J.K.B. 85; 119 L.T. 727; 34 T.L.R. 619; 62 Sol. Jo. 753; 24 Com. Cas. 27, C.A.; 32 Digest 333, *182*.

(6) *Barnes* v. *Glenton*, [1899] 1 Q.B. 885; 68 L.J.Q.B. 502; 80 L.T. 606; 47 W.R. 435; 15 T.L.R. 295; 43 Sol. Jo. 366, C.A.; 32 Digest 323, *84*.

(7) *Grece* v. *Hunt* (1877), 2 Q.B.D. 389; 46 L.J.M.C. 202; 36 L.T. 404; 41 J.P. 356; 25 W.R. 543, D.C.; 26 Digest 532, *2316*.

(8) *Aylott* v. *West Ham Corpn.*, [1927] 1 Ch. 30; 95 L.J.Ch. 533; 135 L.T. 424; 90 J.P. 165; 42 T.L.R. 516; 24 L.G.R. 429, C.A.; 32 Digest 321, *65*.

(9) *Sutton* v. *Sutton* (1882), 22 Ch.D. 511; 52 L.J.Ch. 333; 48 L.T. 95; 31 W.R. 369, C.A.; 32 Digest 395, *757*.

(10) *Shaw* v. *Crompton*, [1910] 2 K.B. 370; 80 L.J.K.B. 52; 103 L.T. 501, D.C.; 32 Digest 395, *758*.

(11) *Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q.B.D. 1; 59 L.J.Q.B. 105; 61 L.T. 867; 54 J.P. 391; 38 W.R. 85; 6 T.L.R. 30, C.A.; 26 Digest 537, *2360*.

(12) *Bermondsey Vestry* v. *Ramsey* (1871), L.R. 6 C.P. 247; 40 L.J.C.P. 206; 24 L.T. 429; 35 J.P. 567; 19 W.R. 774; 26 Digest 496, *2044*.

(13) *Cork and Bandon Rail. Co.* v. *Goode* (1853), 13 C.B. 826; 1 C.L.R. 345; 22 L.J.C.P. 198; 21 L.T.O.S. 141; 17 Jur. 555; 1 W.R. 410; 138 E.R. 1427; 32 Digest 394, *753*.

(14) *Shepherd* v. *Hills* (1855), 11 Exch. 55; 25 L.J.Ex. 6; 4 L.T. 742; 156 E.R. 743; 32 Digest 395, *755*.

(15) *Stock* v. *Meakin*, [1900] 1 Ch. 683; 69 L.J.Ch. 401; 82 L.T. 248; 48 W.R. 420; 16 T.L.R. 284, C.A.; 26 Digest 545, *2436*.

Appeal from the decision of SHEARMAN, J., on a Special Case stated for the opinion of the court under Ord. 34.

The plaintiff, the present owner of a house in Brookfield Street, Prestwich, claimed the sum of £136 13s. 2d. as being the balance of a subsidy payable by the defendant local authority to him under the Housing Acts in respect of three houses erected by him in the district of the local authority in the year 1927. The local authority admitted that the sum of £225 had become due from them to the owner in respect of such subsidy, and that they had paid to the plaintiff only the sum of £88 6s. 10d., but claimed to deduct the balance, namely, the sum of £136 13s. 2d., in respect of private street works executed by them on the street. The local authority, having completed the works, duly made a final apportionment of the expenses on Aug. 9, 1910, and demanded £80 12s. 11d. thereof from the plaintiff's predecessor in title. These expenses were never paid. On Feb. 17, 1927, the plaintiff purchased the plot of land in respect of which the expenses had been demanded, and on Dec. 22, 1927, the local authority claimed to deduct this £80 12s. 11d., together with £56 0s. 3d. the interest thereon for 17 years and 133 days at 4 per cent., from the subsidy due to the owner. The plaintiff then brought this action against the local authority, and a Special Case was stated, raising the questions referred to in the judgments.

SHEARMAN, J., held that he was bound by *Mayor, etc., of Hampstead* v. *Caunt* (1), [1903] 2 K.B. 1, and *Wortley* v. *Vestry of St. Mary, Islington* (2) (1886), 51 J.P. 166,

to hold that the limitation period in respect of the local authority's claim for expenses against each "owner for the time being" within s. 14 of the Private Street Works Act, 1892, did not commence to run until a demand was made upon such owner, and that therefore the local authority's set-off was not statute barred and so must be allowed. He accordingly gave judgment for the local authority with costs.

The plaintiff appealed.

R. A. Glen for the plaintiff.

W. E. P. Done for the local authority.

Cur. adv. vult.

July 30. The following judgments were read.

SCRUTTON, L.J.—This appeal raises troublesome questions as to the application of the appropriate statute of limitations to claims by local authorities under the Private Street Works Act, 1892, against the "owner for the time being" of property fronting a street, in respect of which the local authorities have incurred expenses for which there is a charge on the property, and for which the owner for the time being is personally liable. The rights and procedure under the above Act differ materially from those under the Public Health Act, 1875, and the relevant London Acts.

The appropriate sections of the Act of 1892 are ss. 12 and 14. The charge on the property is imposed by s. 13. The material facts in the present case are very simple. In 1910 the local authority executed certain private works on a street called Brookfield and apportioned the cost on the frontagers, one of whom was Richard Fitton. He did not pay his apportioned share. In 1927, the share of expenses on this land being still unpaid, the plaintiff bought this land and erected a house on it under promise of a subsidy from the local authority. When the local authority came to pay the subsidy they set off against it the amount alleged to be due to them from the plaintiff, as owner for the time being of the land, in respect of the charges apportioned on the land. The plaintiff having issued a writ for the balance of the subsidy, a Special Case was stated to raise the question whether in view of the above dates the local authority were entitled to set off such apportioned expenses.

The first question was whether, assuming the Limitation Act, 1623, to be the applicable statute, the claim to set off was out of time. The plaintiff contended that the statute began to run in 1910 when the local authority could have sued Fitton. If so, the six years had, of course, expired before the set-off was paid. The local authority contended that on the above assumption the statute did not begin to run against the authority till demand made on the plaintiff, the owner for the time being. The court made the suggestion that time could not begin to run against the authority till the plaintiff became "the owner for the time being," up to which time he was under no personal liability to the local authority to pay the sum claimed. The statute, by s. 3, makes the period within which actions must be brought six years "after the cause of such actions." LINDLEY, L.J., defines this in *Reeves* v. *Butcher* (3) ([1891] 2 Q.B. at p. 511) thus: "The cause of action arises at the time when the debt could first have been recovered by action": see also *Coburn* v. *Colledge* (4) and *Bradford Old Bank* v. *Sutcliffe* (5). The local authority could not have sued the plaintiff before he became "owner for the time being"; till then he had no relation with them, contractual or statutory. The fact that they might have lost their right to sue Fitton personally does not prevent their suing a subsequent owner for the time being. I can find in the statutes nothing producing this result, and, indeed, it has been decided that the expiry of the six years against the first owner does not prevent the charge on his land from continuing: *Barnes* v. *Glenton* (6). But I am also of opinion that time did not begin to run in favour of the plaintiff until demand had been made on him, for until that had been done he was under no personal liability. I agree with the reasoning of WRIGHT, J., in *Hampstead Corpn.* v. *Caunt* (1). In that case it was argued that if demand had been made on the first owner, no demand need be made on any subsequent owner. The learned judge treated it as ridiculous to suggest that a man could be liable for an amount of which he had never been informed by demand made on him for an ascertained sum, and concluded that

the statute of limitations does not begin to run till demand is made: see also *Grece* v. *Hunt* (7). A

So far, therefore, as the Act of 1623 is concerned, in my opinion, it does not help the plaintiff. This relieves me from deciding the more difficult point whether the statute of limitations really applicable is not the Civil Procedure Act, 1833, s. 3 of which provides a period of twenty years as the period of limitation in actions on any specialty, "specialty" including actions solely statutory. I am inclined to think that, but for the B words in s. 14 of the Act of 1892, "to recover as a simple contract debt," it would be fairly clear that the action was based on a specialty. The relevant cases on the subject are cited in *Aylott* v. *West Ham Corpn.* (8). The Act of 1623 uses the language "all actions of debt grounded on any contract without specialty." It is, however, suggested that the words "to recover as a simple contract debt" turn the apparent specialty under s. 14 into a statutory debt with the six years' period of limitation. It is not C necessary to decide whether this is so, but it appears to me that the footnote of SIR FREDERICK POLLOCK in *Caunt's Case* (1) ([1903] 2 K.B. at p. 3) is probably accurate as to the other street improvement statutes.

So far the plaintiff fails, but a point was raised in this court which does not appear in the Special Case, and which was not, apparently, taken in the court below. It was argued that the Real Property Limitation Act, 1874, by s. 8, provided that no action D to recover money charged upon land should be brought except within twelve years after the present right to receive the same had accrued; that such a right had accrued in 1910, that the charge had, therefore, ceased in 1922, and with the cessation of the charge there had ceased any right to recover the sum charged as a personal liability. For this were cited *Sutton* v. *Sutton* (9), and *Shaw* v. *Crompton* (10), where it was held that in the case of a mortgage or rent-charge when the charge lapsed by the expiration E of twelve years the effect of s. 8 was also to destroy the personal covenant to pay. *Sutton* v. *Sutton* (9) was treated by the Court of Appeal in *Barnes* v. *Glenton* (6) as deciding a very limited point: see per SMITH, L.J. ([1899] 1 Q.B. at p. 888), COLLINS, L.J. ([1899] 1 Q.B. at p. 890), and ROMER, L.J. ([1899] 1 Q.B. at p. 890). The only occasion on which s. 8 has been referred to in street improvement cases appears to be *Hornsey Local Board* v. *Monarch Investment Building Society* (11). In that case there was no F personal liability on the new owner, and the present question, therefore, did not arise. I am of opinion that s. 8 of the Act of 1874 does not apply to defeat a claim against the plaintiff as the owner for the time being, because the local authority had no present right to receive the sum set-off here from the plaintiff till he became owner, and twelve years from that time have not elapsed. A further reason may be found in the provisions of s. 257 of the Public Health Act, 1875, made applicable by s. 13 of the Act of 1892, G under which the amount apportioned may be made payable by annual instalments within a period not exceeding thirty years, recoverable from the owner or occupier for the time being. The twelve years' charge runs from completion of the works. The instalment order may be made at any time thereafter within the thirty years. I find it impossible to fit in this provision with the cessation of all personal liability at the cessation of the charge, on the expiration of twelve years from the completion of the H works. There is no hardship on the owner for the time being, as under s. 13 (2), by consulting the register he can ascertain whether there has been any unsatisfied charge for the apportioned amount. In my opinion, the appeal must be dismissed with costs.

GREER, L.J.—I have had the opportunity of reading the judgment of my Lord before putting my own into writing. I can, therefore, state my concurrences therewith I quite shortly. I agree for the reasons stated by my Lord and on the authority of the decisions cited by him that the cause of action against the owner from time to time does not come into existence before the person against whom the action is brought becomes owner. The amount of the apportionment and interest only become recoverable from a new owner when he has become an owner, and it may be, though I think it is unnecessary to decide the point, only after demand made for payment by such new owner. Section 14 of the Private Street Works Act, 1892, gives the authority a right to recover the apportioned expenses and interest from time to time, from the owner for

the time being, by summary proceedings or by action as for a simple contract debt. The statutes of limitation impose a limitation on the rights of action. Applying these statutes to the rights created by s. 14 of the Act of 1892, the limitation is a limitation on the right to recover by action against the person sued. This cannot be determined by ascertaining whether the right to recover against some other person who was the owner at another time has been determined by lapse of time. If any authority is required for the proposition that the statutory obligations imposed on successive owners have the effect of creating separate causes of action against the owners liable from time to time, it will be found in the judgment of the Court of Common Pleas in *Bermondsey Vestry* v. *Ramsey* (12), a decision on two sections of the Metropolis Management Amendment Act, 1862, which are, in all matters relevant to the point under consideration, similar to s. 14 of the Act of 1892. Therefore, on the facts of this case, apart from the question arising under s. 8 of the Real Property Limitation Act, 1874, the statute of limitations, whether the relevant statute be the Limitation Act, 1623, or the Civil Procedure Act, 1833, affords no answer to the local authority's claim of set-off.

It remains for me to consider the effect of s. 8 of the Act of 1874. That section reads as follows:

> "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent: and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

It will be seen that the twelve years' limitation imposed by the section is a period of time commencing not with the accrual of a cause of action, but with the accrual of a present right to receive a sum of money charged upon land. It was argued that inasmuch as the local authority, when they demanded payment from the person who was owner at the time of the apportionment, had a then present right to recover the money charged on the land, the twelve years began to run from the date of that demand. I think, however, that the section should be read as referring to a present right to receive the sum from the person against whom the action is brought, not a present right to recover the sum from a previous owner. Further, s. 14 of the Act of 1892 gives rise to separate simple contract debts arising on change of ownership from time to time, some of which may not arise until after the expiration of the twelve years which put an end to the charge. This case is not like *Sutton* v. *Sutton* (9), where it was held that s. 8 applied not merely to proceedings in equity to recover money charged on land by enforcement of the charge, but also to a common law action on the covenant. In *Barnes* v. *Glenton* (6), SMITH, L.J., and ROMER, L.J., based their judgment partly on the ground that s. 8 has no application to simple contract debts. It may be said that this was not, strictly speaking, necessary to the decision, but be this as it may, I am of opinion that s. 8 has no application to the simple contract debts imposed on successive owners by s. 14 of the Act of 1892 in addition and without prejudice to other remedies. I agree that this appeal should be dismissed with costs.

It was argued by counsel for the plaintiff that the result of a decision in favour of the local authority would be that a local authority might by not making a claim against anybody for fifty or one hundred years then come down on the then owner for the amount of the apportionment with the accumulated interest. If this should be the inevitable result of our judgment as to the meaning of the relevant statutes, the remedy is with the legislature and not with us. My own view is that the court would in an appropriate case follow the decisions of the Court of Chancery before the Real Property

Limitation Act, 1874, and presume after twenty years that the debt had been paid and satisfied by someone or other of the successive owners: see *Barnes* v. *Glenton* (6). A

SLESSER, L.J.—This is an appeal from the judgment of SHEARMAN, J., delivered on a Special Case stated by consent for the opinion of the court. The issue in the case arises out of the claim of the defendant local authority, the Prestwich Urban District Council, to deduct £136 13s. 2d. from a sum of £225 admittedly due on a housing subsidy from them to the owner. So far as the case is concerned, therefore, we may treat the £136 13s. 2d. as being the amount in dispute between the parties. The local authority in effect make claim to this sum, though by process of deduction, for the following reasons: In 1910, acting under the Private Street Works Act, 1892, more particularly s. 12, the district council, which had completed a private street work, made their final apportionment of the expenses and demanded from one Richard Fitton a sum of £80 12s. 11d., being his share of the expenses. On Feb. 17, 1927, the plaintiff purchased the land in question from Fitton and proceeded to erect a house thereon, and the £136 13s. 2d. now claimed by the local authority by way of set-off is made up of the sum of £80 12s. 11d. with £56 0s. 3d. interest. In substance, the objection of the plaintiff to pay this sum is based on one or other of the statutes of limitation, more particularly the Act of 1623. As has been stated, the land was bought by Mr. Fitton on Aug. 9, 1910, and the plaintiff's contention in the first place is that six years thereafter, namely, on Aug. 9, 1916, the claim of the local authority for these expenses became statute-barred. B C D

To decide this point it is necessary carefully to consider the construction and effect of the relevant sections of the Private Street Works Act, 1892, on which the plaintiff relies. By s. 14 of that Act it is provided as follows: E

> "The urban authority, if they think fit, may from time to time (in addition and without prejudice to any other remedy) recover summarily in a court of summary jurisdiction or as a simple contract debt by action in any court of competent jurisdiction, from the owner for the time being of any premises in respect of which any sum is due for expenses of private street works the whole or any portion of such sum, together with interest at a rate not exceeding £4 per cent. per annum, from the date of final apportionment till payment thereof." F

I read this to mean, omitting irrelevant matter, that the local authority are expressly empowered to recover the sum due together with interest as provided, from the owner for the time being of the premises and that, as each person in turn becomes the owner, the right to recover from him springs into existence. It was argued by counsel for the plaintiff that the most the section could do is to enable the local authority within six years of the origination of liability to recover from any person who happens to be the owner, for otherwise it might have been left in doubt, apart from the statute of limitations, whether a person who was not owner at the time when the original liability accrued could be sued at all. But such a construction does not seem to me to harmonise with the language of the section. The section, it will be noted, provides that the sum due may be recovered as a simple contract debt by action from the owner for the time being, and the words "simple contract debt" and "owner for the time being" indicate to my mind that, as each person becomes the owner, a new notional contract is created by the statute, under which, perhaps in consideration of the street works already done or the benefit therefrom which the new owner may be expected to enjoy, a liability in the nature of a contract to pay between him and the local authority comes into existence. G H I

In the Metropolis Management Act, 1855, as amended by the Metropolis Management Amendment Act, 1862, where provisions similar in many respects obtain, it is provided by s. 77 of the latter Act that the amount shall be recoverable from the present or any future owner of the premises. There is this difference, that by s. 105 of the Act of 1855 it was provided that the owner must pay the vestry on demand, and, according to WRIGHT, J., in *Hampstead Corpn.* v. *Caunt* (1) ([1903] 2 K.B. at p. 4), no liability exists until the demand has been made. In that decision, and on those statutes, it is true

that there is the assumption that a demand is the essence of the liability, but having said that, it does appear that once the necessary demand has been made the statute of limitations, if it runs at all, does begin to run at the date of the demand whoever be the owner: see also *Wortley* v. *Vestry of St. Mary, Islington* (2).

It has been argued by counsel for the plaintiff in this case that, under s. 12 of the Private Street Works Act, 1892, although there is in fact no demand necessary to make the liability accrue (for it is there enacted that the sums approved shall be recoverable in manner provided by s. 14), as the original apportionment is equivalent to a demand, the statute of limitations should run from the date of apportionment or from the completion of the works, but, as against this view, s. 14 of the 1892 Act provides in terms that the urban authority may recover from the owner for the time being the sum due as a simple contract debt, and these words appear to me designedly to create a new liability in the new owner dating not from the period of apportionment but from the time when he became the owner. If this view of a statutory notional contract with the new owner be correct, it follows that in this case he is not protected by the Limitation Act, 1623, s. 3 of which provides (inter alia) that all sections of contract without specialty shall be commenced and sued within six years next after the cause of such action or suit. The sum due, it is here proved, is to be recovered as a simple contract debt from the owner for the time being, and such an action of debt grounded upon contract it is not disputed was commenced and sued upon within six years of Feb. 17, 1927. For these reasons, I am of opinion that the defence based on the Statute of Limitations, 1623, must fail.

It is scarcely necessary, in these circumstances, to deal with the contention that, in any event, so far as this liability is founded upon statute—namely, the 1892 Act—it is not an action for simple debt without specialty. Were it necessary to decide this point account would have to be taken of the fact that the period of limitation might not be six years but twenty, being in respect of an action founded on a specialty: Civil Procedure Act, 1833, s. 3; *Cork and Bandon Rail. Co.* v. *Goode* (13); *Shepherd* v. *Hills* (14). In *Hampstead Corpn* v. *Caunt* (1)—decided under the Metropolis Management Act, 1855—the learned editor of the LAW REPORTS ([1903] 2 K.B. at p. 3) appears to think that in that case the action was so founded, but it is to be observed that in the 1892 statute, unlike the Metropolis Management Act, under which the *Hampstead Case* (1) was decided, it is provided in terms that the sum shall be recovered as a simple contract debt, and this appears to me to negative specialty. In the Land Transfer Act, 1897, s. 7 (7), it is provided as follows:

> "A claim for indemnity under this section shall be deemed a simple contract debt, and for the purposes of the Limitation Act, 1623, the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might know, of the existence of his claim."

The words in the 1892 Act, in my judgment, deal more definitely with the recovery of moneys than do the somewhat ambiguous words of the relevant subsection of the 1897 Act, which seems to state that the claim shall be deemed to be a debt, but in that Act the Limitation Act, 1623, appears to be assumed to be applicable, and this fortifies the view which I have formed that where the sum is said in terms to be recoverable as a simple contract debt it cannot be properly described as specialty.

The second argument of counsel for the plaintiff involves the application, not of the Act of 1623, but of the Real Property Limitation Act, 1874. It is said, alternatively, that this is an action to recover a sum of money charged upon land and so must be brought within the twelve years next after the present right to receive the money has accrued to some person capable of giving a discharge. If this be an action founded on a right to recover a sum of money charged upon land, the charge upon the premises which is created by s. 13 of the Act of 1892 becomes a charge on the premises in respect of which it is apportioned as from the date of the completion of the works: *Stock* v. *Meakin* (15); *Hornsey Local Board* v. *Monarch Investment Building Society* (11). On this view the twelve years from 1909 or 1910 would have run out several years before the cause of action in this case. I do not myself think that this point was ever argued

before the learned judge—it is noticeable that, in the Special Case, the date of the completion of the works, which under *Stock* v. *Meakin* (15) is the first essential date, is not stated—and, in the absence of any such finding or consideration by the learned judge, I am a little doubtful whether the point is here open to argument, but, in any event, I have come to the conclusion that the sum here due as a simple contract debt is not a sum of money charged on land. The personal remedy on a simple contract debt charged on land is still given by the Limitation Act, 1623, and the period of limitation is six years from the accrual of the cause of action: *Barnes* v. *Glenton* (6) distinguishing *Sutton* v. *Sutton* (9).

In my judgment the use of the words "simple contract debt" in s. 14 goes far to solve the nice problems which have been raised in argument and shows clearly that the Statute of Limitations, 1623, and no other can properly be applied in this case.

For the reasons above stated that statute, in my view, runs from the entry of the owner into ownership. I am of opinion, consequently, that the claim of the local authority to set off the sum due from him to them is well founded and that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.* for *Grundy and Jackson*, Manchester; *Routh, Stacey & Castle* for *Orford & Sons*, Manchester.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

CHATHAM CORPORATION *v.* WRIGHT

[King's Bench Division (Lord Hewart, C.J., Avory and Swift, JJ.), November 7, 1929]

[Reported 142 L.T. 431; 94 J.P. 43; 28 L.G.R. 4]

Highway—Street—Private street works—Apportionment of costs—"Unreasonable"—Findings by justices that total cost not excessive and that objectors should contribute, "unreasonable" because contributions of two frontagers excessive—Validity of—Courses open to justices—Private Street Works Act, 1892 (55 & 56 *Vict.*, *c.* 57), *s.* 7 (*d*), *s.* 8.

An urban sanitary authority, acting under the Private Street Works Act, 1892, resolved to execute certain private street works in a street in their district and to contribute a certain portion of the expenses thereof, and that, in settling the apportionment of the balance of the expenses, regard should be had to the greater or less degree of benefit to be derived from the works by the premises of the frontagers. They approved provisional apportionments on the frontagers which were duly served and deposited in accordance with the provisions of the Act. Two of the frontagers having objected to the provisional apportionments on their premises, the justices expressed the opinion that the proposed works were not unnecessary, that the estimated expenses were not excessive, and that the premises of the objectors should not be excluded from the apportionment, and confirmed the provisional apportionments in respect of the premises of all the other frontagers. They stated that they considered the proposed works were unreasonable in that it was not reasonable that the objectors should bear the whole of the amounts shown in their provisional apportionments. Accordingly, they approved the plans, sections, specifications, and estimates of the urban sanitary authority, but quashed in part the apportionments on the objectors' premises, by reducing each of these two apportionments by £100.

Held: the case must be remitted to the justices for further consideration because (i) these findings were inconsistent in that works which were otherwise reasonable, their cost being not excessive and being properly charged on the frontagers, could

not be unreasonable merely because they involved particular frontagers in charges which the justices considered excessive, and (ii) the justices had exceeded their jurisdiction in that they had indirectly tried to compel the local authority to increase the contribution which the local authority had already resolved upon.

Chester Corpn. v. *Briggs* (1) ([1924] 1 K.B. 239) explained and applied.

Per AVORY and SWIFT, JJ. On the further consideration of the case, the justices must adopt one of three courses—increase the apportionments on the other frontagers to satisfy the balance of £200; quash the whole of the apportionment; or adjourn the matter, giving the urban sanitary authority the opportunity of considering whether they would pass a new resolution increasing their contribution by the £200.

Notes. As to making up highways under the Private Street Works Act, 1892, see 19 HALSBURY'S LAWS (3rd Edn.) 437 et seq., and for cases see 26 DIGEST 539–547. For the Private Street Works Act, 1892, s. 7 (d), s. 10, s. 15, see 11 HALSBURY'S STATUTES (2nd Edn.), pp. 186, 189 and 193.

Case referred to:

(1) *Chester Corpn.* v. *Briggs*, [1924] 1 K.B. 239; 93 L.J.K.B. 69; 130 L.T. 221; 88 J.P. 1; 40 T.L.R. 85; 68 Sol. Jo. 276; 21 L.G.R. 807, D.C.; 26 Digest 547, *2447*.

Case Stated by Kent justices at the instance of a local authority, which objected to the reduction by the justices, by £100 each, of the sums apportioned by the local authority on two owners of land under the Private Street Works Act, 1892.

The facts are sufficiently stated in the headnote.

The Private Street Works Act, 1892, provides:

Section 10. In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations: that is to say (a) the greater or less degree of benefit to be derived by any premises from such works; (b) the amount and value of any work already done by the owners or occupiers of any such premises. They may also, if they think just, include any premises which do not front, adjoin or abut on the street or part of a street, but access to which is obtained from the street through a court passage, or otherwise, and which in their opinion will be benefited by the works, and may fix the sum or proportion to be charged against any such premises accordingly.

Section 15. The urban authority, if they think fit, may at any time resolve to contribute the whole or a portion of the expenses of any private street works, and may pay the same out of the district fund or general district rate or other rate out of which the general expenses incurred under the Public Health Act, 1875, are payable.

Scholefield, K.C., and *R. C. Maxwell* for the local authority.

Maurice Fitzgerald for the two owners, objectors.

LORD HEWART, C.J.—This is a Case stated by justices for the county of Kent, sitting at Chatham. The question arose under the Private Street Works Act, 1892. Certain objections had been made by owners of premises adjoining the street in question, the present respondents, to a provisional apportionment of expenses made by the local authority, the Chatham Corporation, the present appellants, as the urban sanitary authority under that statute, in respect of certain private street works proposed to be executed in Wallace Road, within the local authority's district. A portion of those expenses was put upon each of the respondent owners. The justices hearing those objections under the provisions of the Private Street Works Act, 1892, to use their own phrase, "ordered that the provisional apportionment should be quashed in part"; and when one looks to see what that means, it appears that the justices reduced the amount

chargeable upon the premises respectively of each of these two owners by the sum of £100—in all other respects, however, confirming the provisional apportionment.

The attention of the court has been directed to *Chester Corpn.* v. *Briggs* (1). That case differs from the present case in two important respects. In *Chester Corpn.* v. *Briggs* (1), there had been no resolution by the local authority to make a contribution to the expense of the private street works, and what the justices there decided was, by way of amending the apportionment, that the borough council ought to contribute 15 per cent. of the total cost. In the present case the local authority has resolved, acting under s. 15 of the Private Street Works Act, 1892, to contribute a portion of the expenses of these private street works, namely, a sum of £400. Again, in this case, acting under s. 10 of that statute, the local authority has resolved that in the settlement of the apportionment of the expenses of these private street works, regard should be had to the greater or less degree of benefit to be derived by the different premises from such works. Except in those two respects, differentiating these two resolutions by the local authority, this case is very similar to *Chester Corpn.* v. *Briggs* (1). For, what has happened here is this: While the justices have found that the proposed works were not unnecessary and that the estimated expenses were not excessive, they have also found that the proposed works were unreasonable, in the sense that it was not reasonable that the two owners should bear respectively the whole of the amount shown in the provisional apportionment against their respective premises.

The question for this court is whether, on the facts which the justices have found, they came to a correct determination in point of law. It seems to me to be abundantly clear that they have not. They have really produced—I use the word with all respect—an absurdity; they have found that the total is right, and they have found that all the parts which go to make up that total are right except two, and that those two parts are wrong by £100 each—in each case, it is said that apportionment is £100 too much. The proposition, therefore, which they present to us is that in this case the true whole is not the sum of the parts, but the sum of the parts plus £200. It is tolerably clear, when one looks at the findings of fact and the arguments presented on the one side and on the other, that the justices were seeking to do the very thing which it was held in *Chester Corpn.* v. *Briggs* (1) could not be done. It is quite true that in that case there was no resolution on the part of the local authority to make any contribution at all. The words in s. 15 of the statute are:

> "The urban authority, if they think fit, may at any time resolve to contribute the whole or a portion of the expenses of any private street works."

The words "a portion" in this sentence mean, of course, a particular portion, a portion named in the resolution. In this case the local authority by their resolution of Jan. 9, 1929, named as the portion which they resolved to contribute the sum of £400. To say that that figure should be £600 instead of £400 seems to me, except as a mere matter of spelling, to be exactly on all fours with the statement that there ought to be a resolution to contribute more. As yet there is no such resolution on the part of the local authority at all. In my opinion, what the justices here sought to do was to compel the local authority to increase their contribution by the sum of £200 at the risk alternatively of sacrificing the scheme as a whole. It is, I think, clear that this case must go back to the justices. When I look at the finding at which the justices have arrived in the Case, namely,

> "that the proposed works were unreasonable in that it was not reasonable that the owners should respectively bear the whole of the amount shown in the provisional apportionment against their respective premises"

I cannot help thinking that they have confounded two things, which ought to be distinguished. It is quite true that in the *Chester Case* (1), SALTER, J., in the concluding words of his judgment, used this expression ([1924] 1 K.B. at p. 247):

> "In considering an objection under s. 7 (d) that the proposed works are unreasonable, the justices are entitled to consider, among other things, whether the proposed works are reasonable in the sense that it is reasonable that such work should be done at the frontagers' expense"

"frontagers'" being spoken of in the plural. Speaking for myself, I have not the slightest doubt that SALTER, J., by those words intended to convey that the justices in such a case were entitled to consider whether the work was of such a character as that it should be carried out at the expense of the frontagers, speaking of them in the plural. He was not thinking of the case of a particular frontager as distinguished from the rest. When one looks at the provisions of s. 7 (d) of the statute, one finds that the ground of possible objection has been stated in this way: "that the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive." I think there a clear distinction is pointed between two things—the works—that is, the whole of the works—on the one hand, and the expenses on the other hand; and I cannot help thinking that the justices, in the conclusion to which they came with reference to those two particular sets of premises, were confusing those two things. They have found that the proposed works in the plural were unreasonable, in that it was not reasonable that these two owners should respectively bear the whole of the amount shown in the provisional apportionment against their respective premises. It seems to me the beginning of wisdom in this matter is to draw a real distinction between two things: Are the works of this kind in this place reasonable? If they are not, cadit quæstio. If they are, are the expenses or are they not excessive? It is extremely difficult to hold the view that the works considered as a whole are reasonable, and that the expenses are right, but that the works opposite two particular sets of premises are not reasonable, for the reason that they involve those particular premises in what is conceived to be an excessive charge.

I think, therefore, that this case ought to go back to the justices, and that this appeal ought to be allowed; and that the justices, when they come to consider the matter, should bear in mind that the whole must not be more than the sum of the parts, and, secondly, that it is not within their province directly or indirectly to compel the local authority to make a larger contribution than that which the local authority has already for itself determined.

AVORY, J.—I agree that this case must go back to the justices. They have held that the provisional apportionment on the premises of the two respondent owners ought to be reduced by the sum of £100 each, and they have also held that, except as aforesaid, the provisional apportionment should be confirmed. Unless the justices intended or contemplated by their decision that the local authority thereby would be compelled to increase their contributions by the sum of £200, the whole scheme became impracticable: and if they either intended or contemplated that, then, as my Lord has pointed out, they were doing something which they had no right to do as appears from the decision of this court in *Chester Corpn.* v. *Briggs* (1). If the local authority cannot be compelled indirectly to increase their contribution, it appears to me to follow that the justices must do one of three things on a further consideration of this case. If they are still of opinion that the apportionments on the premises of these two owners ought to be reduced, they must consider whether the apportionments on the premises of the other frontagers ought to be increased so as to satisfy the balance of the £200. If they are still of opinion that the apportionment on the premises of the other frontagers ought not to be increased, it appears to me that their only proper course would be to quash the whole of the apportionment, subject to this, that it is open to them to adjourn the consideration of the matter in order to give the local authority the opportunity of considering whether they will, under s. 15, pass a new resolution increasing their contribution by the sum of £200. It appears to me that those are the three courses that are open to the justices, and that they must adopt one or other of them.

SWIFT, J.—It seems to me that on the hearing of these two objections, the justices came to inconsistent conclusions; and I agree that the whole matter should be sent back to them in order that they may put it right in one or other of the ways my brother AVORY has suggested.

Case remitted to justices.

Solicitors: *Gibson & Weldon*, for *E. B. Lee*, Town Clerk, Chatham; *Ince, Colt & Co.*, for *Basset & Boucher*, Rochester.

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

A

WALKLING, LTD. *v.* ROBINSON

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Talbot, JJ.), December 11, 1929]

[Reported 99 L.J.K.B. 171; 143 L.T. 105; 94 J.P. 73; 46 T.L.R. 151; 28 L.G.R. 88; 29 Cox, C.C. 131]

B

Food—Sale—Bread—"Proceedings in respect of alleged deficiency of weight"—Selling, or having in possession for sale, loaves not weighing one pound or an integral number of pounds—Deficiency due to mistake, accident, or causes beyond defendant's control—Defect in machinery—Default of employee—Proceeding against "actual offender"—Acquittal by petty sessions—Right of quarter sessions to reconsider—Sale of Food (Weights and Measures) Act, 1926 (16 & 17 *Geo.* 5, *c.* 63), *s.* 6 (2), *s.* 12 (2), (5).

C

By s. 12 (2) of the Sale of Food (Weights and Measures) Act, 1926: "In any proceedings under this Act in respect of an alleged deficiency of weight or measure or number, if the defendant proves to the satisfaction of the court that such deficiency was due to a bona fide mistake or accident, or other causes beyond his control, and in spite of all reasonable precautions being taken and all due diligence exercised by the said defendant to prevent the occurrence of such deficiency, or was due to the action of some person over whom the defendant had no control, the defendant shall be discharged from the prosecution."

D

Defendants were charged, under s. 6 (2) of the Act, with selling, or having in their possession for sale, loaves of bread which did not weigh one pound or an integral number of pounds.

E

Held: by AVORY, J. (TALBOT, J., dissentiente, and LORD HEWART, C.J., expressing no opinion on the point) that the proceedings against the defendants were not "proceedings in respect of an alleged deficiency of weight" within s. 12 (2).

F

Held: further, by the court, that the subsection applied to cases of mistakes, accidents, or causes beyond the control of the defendant, not being negligence or other conduct of his servants or persons under his control, and did not apply to a case where a defect of the defendant's machinery or the default of an employee under the defendant's control was the cause of the deficiency.

G

On proceedings against bakers under s. 6 (2), the defendants laid an information against one of their employees under s. 12 (5) of the Act, having him brought before the court as the actual offender and tendering evidence to prove that they had used due diligence to enforce the execution of the Act, and that their employee had committed the offence without their consent, connivance or wilful default. At petty sessions, the information against the employee was dismissed, but the defendants were convicted. The defendants appealed to quarter sessions.

H

Held: on the facts stated, the employee was not the actual offender, but (per LORD HEWART, C.J., and TALBOT, J.) in any case, the employee having been acquitted at petty sessions, quarter sessions had no power to enter on the question whether the defendants were entitled to exemption from any penalty under s. 12 (5).

Notes. Section 6 (2) of the Act of 1926 has been suspended during the continuance of the Bread Order, 1953, S.I. 1953, No. 1283. For an equivalent section to s. 12 (5) of the Act of 1926, see s. 113 of the Food and Drugs Act, 1955.

I

Considered: *R. C. Hammett, Ltd.* v. *Crabb, Same* v. *Bedlam*, [1931] All E.R.Rep. 70. Distinguished: *Wolfinden* v. *Oliver* (1932), 96 J.P. 202. Considered: *Cave* v. *Dudley Co-operative Society, Ltd.*, [1934] All E.R.Rep. 534. Not followed: *Melias, Ltd.* v. *Preston*, [1957] All E.R. 449.

As to provisions relating to the weight of food, see 33 HALSBURY'S LAWS (2nd Edn.) 665 et seq.; and as to offences, see 33 HALSBURY'S LAWS (2nd Edn.) 702. For cases, see 25 DIGEST 116 et seq. For Sale of Food (Weights and Measures) Act, 1926, see 26 HALSBURY'S STATUTES (2nd Edn.) 1297.

Case Stated by Middlesex Quarter Sessions.

On April 11, 1929, three informations were preferred by the respondent, the chief officer of the Public Control Department of the Middlesex County Council at a petty sessions held at Hendon, Middlesex, under s. 6 (2) of the Sale of Food (Weights and Measures) Act, 1926, against the appellants, who carried on business as bakers, charging that they, on Mar. 6, 1929, (a) at North Circular Road, Hendon, aforesaid, had in their possession for sale loaves of bread which did not weigh 1 lb. or an integral number of pounds; (b) at North Circular Road aforesaid did unlawfully sell a loaf of bread which did not weigh 1 lb. or an integral number of pounds; (c) at Folkestone House, Brent Street, Hendon, aforesaid, had in their possession for sale loaves of bread which did not weigh 1 lb. or an integral number of pounds. At the same petty sessions three informations were preferred by the appellants under s. 12 (5) of the said statute against one, Frederick Arthur Pearce, their employee, charging that he was guilty as the actual offender of each of the offences with which the appellants were charged as aforesaid. The appellants were duly convicted of each of the said offences and were ordered to pay a fine of 30s. upon each, the informations preferred against Pearce being dismissed. At the Middlesex Quarter Sessions, held on May 27, 1929, and adjourned to June 8, 1929, the appellants appealed against each of the said convictions, and upon the hearing of the appeal the court allowed the appeal and quashed each of the said convictions subject to the opinion of the King's Bench Division of the High Court of Justice, upon the following case.

The following facts were proved at the hearing of the appeal: (a) The respondent was the chief officer of the Public Control Department of the Middlesex County Council. (b) The appellants carried on business as bakers at some seventy-four shops in the London district, including a shop and bakery at Folkestone House aforesaid, hereinafter referred to as the Hendon branch. (c) On Mar. 6, 1929, a baker's roundsman employed by the appellants at their Hendon branch was in the said North Circular Road in charge of a barrow bearing loaves of bread for sale or delivery under contracts of sale to the appellants' customers, when eighteen of the loaves on the barrow, purporting to be 2 lb. loaves, were weighed by one Malachi Samuel Victor Keen, an officer employed in the respondent's department and duly appointed by the Middlesex County Council for the purposes of the Sale of Food (Weights and Measures) Act, 1926. (d) Of the eighteen loaves one weighed slightly more than 2 lb. and seventeen weighed less in varying degree than 2 lb., the total net deficiency being 1 lb. 13 oz. and 7 dr. This was admitted by the appellants to be a material and serious deficiency. (e) After weighing the loaves Keen purchased one of the seventeen which weighed 2 oz. and 11 dr. less than 2 lb. (f) Keen then went to the appellants' Hendon branch and there weighed twelve loaves purporting to be 2 lb. loaves which were exposed for sale. Of these twelve, one weighed ½ oz. more than 2 lb., four were of correct weight and seven weighed less in varying degree than 2 lb., the total net deficiency being 10 oz. and 2 dr. This again was admitted by the appellants to be a material deficiency. (g) All the loaves had been baked at the Hendon branch during the night of Mar. 5/6, 1929, and none of them was overbaked. (h) The appellants employed at all material times at the Hendon branch the said Pearce as manager of the branch together with certain assistants in the shop and a foreman baker and three other men in the bakery. (i) The making of dough and the baking of bread were carried on at the said branch at night during hours when it was not a part of the said Pearce's duty to be present. (j) The dough was divided into loaves by a machine which the appellants had installed at a cost of £250 and which they believed to be the best machine for the purpose which could be obtained. (k) The quantity of dough to be contained in each loaf was controlled by a dial on the machine which required to be properly adjusted and tightly screwed before the machine was set to work and failure accurately to set or adequately to tighten the same would result in errors or variations in the weights of the loaves baked. (l) It was the duty of the foreman baker to set or supervise the setting of the machine, and the errors in the weights of the loaves in question arose either from the failure of the foreman baker to carry out his duty or from the inaccurate working of the machine. (m) Pearce had been instructed by the appellants' managing director that it was his duty to test the weight of the loaves

each morning by selecting and weighing a certain number before exposing them for sale in the shop or delivering them to the roundsman. (n) On the morning of Mar. 6 Pearce failed to test the weights of any loaves. The test, had it been made, would probably, but not necessarily, have disclosed the fact that deficiencies existed. (o) The appellants employed inspectors whose duty it was (inter alia) to superintend the observance in the appellants' shops of the provisions of the Sale of Food (Weights and Measures) Act, 1926, and other statutes. One such inspector, who was in charge of some thirty shops, was in the habit of visiting the Hendon branch on an average once weekly.

It was contended on behalf of the appellants: (a) That the proceedings were in respect of deficiencies in weight; that the deficiencies arose from a bona fide mistake or accident or other cause beyond the appellants' control, and in spite of all reasonable precautions being taken and all due diligence exercised by the appellants to prevent the occurrence of such deficiencies, and that, consequently, they were entitled to be acquitted under s. 12 (2) of the Sale of Food (Weights and Measures) Act, 1926; (b) that Pearce was the actual offender within the meaning of s. 12 (5) of the statute, in that in breach of his duty he had taken the loaves into his possession and had exposed them for sale without having first tested the weights; that they had duly brought Pearce before the court of petty sessions and that they had exercised due diligence to enforce the execution of the Act, and that Pearce had committed the offences in question without their consent, connivance or wilful default; and that Pearce ought to have been convicted and they themselves exempted from any penalty, pursuant to the said s. 12 (5). It was contended on behalf of the respondent: (a) that the proceedings were not proceedings in respect of an alleged deficiency in weight since they were not brought under s. 1 of the Act; that there was insufficient evidence to show whether the deficiency arose from the fault of the machine or from the negligence of the foreman baker or one of his assistants; that negligence of a servant was not bona fide mistake or accident or other cause beyond the control of the appellants; that the appellants had not taken all reasonable precaution nor exercised all due diligence inasmuch as the agents to whom the appellants had delegated the duty of taking precautions and exercising diligence were Pearce and the foreman baker, both of whom were alleged by the appellants themselves to have been negligent; (b) that since Pearce had not been convicted as the actual offender there was no power under s. 12 (5) to exempt the appellants from any penalty; that the said Pearce was not the actual offender, inasmuch as a failure to weigh loaves was not an offence, nor upon the true construction of the section was Pearce in such possession of any of the loaves as to make him independently guilty of the offence of unlawful possession; that so far as the loaves on the barrow were concerned, Pearce was not in possession of them; and that the appellants had not used due diligence to enforce the execution of the Act.

The questions of law arising on the above statement submitted for the opinion of the King's Bench Division were as follows: (i) Were the proceedings in question proceedings in respect of an alleged deficiency in weight? (ii) Was their evidence upon which the court of quarter sessions could hold that the appellants had discharged the burden of proving (a) that the deficiency was due to a bona fide mistake or accident or other cause beyond the appellants' control; and (b) that all reasonable precautions had been taken and all due diligence exercised by the appellants to prevent the occurrence of such deficiency. If the court should be of opinion that each of these questions should be answered in the affirmative, then the decision of quarter sessions was to stand; but if the court should be of opinion that either of the said questions should be answered in the negative, it was desired that the case be remitted to quarter sessions together with the opinion of the court upon the further questions hereinafter set out, to do thereon as the court might see fit to direct. (iii) Had the court of quarter sessions power to exempt the appellants from any penalty under s. 12 (5), having regard to the fact that Pearce had been acquitted? (iv) On the facts proved or admitted was Pearce the actual offender within the meaning of s. 12 (5) of the said statute; (a) in the case of the loaves on the roundsman's barrow; (b) in the case of the loaves at the shop?

The chairman of quarter sessions, in the course of a written judgment, said: We are of opinion that in the case of the first charge against the appellants, though the loaves were in the shop of which the manager conducted the business, the possession of the

loaves was not such personal possession as would constitute him the actual offender. Also that in the case of the second and third charges the manager was not the actual offender, and, therefore, the appellants' contention under s. 12 (5) failed. But it was further contended that, in any event, the appellants were protected by the provisions of s. 12 (2) of the Act, in that the deficiency of weight was due to a cause beyond their control, and in spite of all reasonable precautions being taken and all due diligence exercised to prevent the occurrence of such deficiency, and that, therefore, they should be discharged from the prosecution. Having regard to the evidence before us, especially to the fact that the deficiency in weight of the loaves in question arose from the negligence of the foreman baker adjusting or tightening the screw of the "divider," also that the appellants had provided an automatic divider at a cost of £250, and that they had exercised supervision over their employees by visits of their managing director and inspectors, we are of opinion that the appellants' contention under this subsection succeeds. The appeal is, therefore, allowed, but, as it would appear that the contention of the appellants under s. 12 (2) was not placed before the justices of the Hendon Court, it is allowed without costs. The effect of this judgment is that the three convictions will be quashed.

The Sale of Food (Weights and Measures) Act, 1926, provides:

"Section 1: A person shall not, in selling any article of food by weight, measure, or number, deliver or cause to be delivered to the purchaser a less weight, measure or number, as the case may be, than is purported to be sold.

Section 6: (1) A person shall not sell or offer for sale any bread otherwise than by net weight. (2) A person shall not sell or have in his possession for sale or delivery under a contract of sale any loaf of bread unless its net weight is one pound or an integral number of pounds: Provided that this subsection shall not apply to loaves supplied under contract where the contract provides for the supply for consumption on the premises of the purchaser of not less than half a hundredweight of bread at a time, and for the weighing of the bread on delivery. (3) The foregoing provisions of this section shall not apply to fancy bread or to loaves not exceeding 12 oz. in weight: Provided that the foregoing provisions shall apply to pan loaves, French loaves, and loaves of a similar character, with this modification, that in Scotland any such loaf of the net weight of one and three-quarter pounds may be sold or delivered for sale if the weight is clearly marked either by an impression made in baking or on any printed band or wrapper surrounding or containing the loaf. . . .

Section 12: (1) In any proceedings under this Act in respect of an alleged deficiency of weight or measure of any pre-packed article or of bread, the court shall disregard any inconsiderable variation in the weight or measure of a single article, and shall have regard to the average weight or measure of a reasonable number of other articles of the same kind (if any) sold or delivered by the defendant, or in his possession for the purpose of sale or delivery, on the same occasion, and generally to all the circumstances of the case. (2) In any proceedings under this Act in respect of an alleged deficiency of weight or measure or number if the defendant proves to the satisfaction of the court that such deficiency was due to a bona fide mistake or accident, or other causes beyond his control, and in spite of all reasonable precautions being taken and all due diligence exercised by the said defendant to prevent the occurrence of such deficiency, or was due to the action of some person over whom the defendant had no control, the defendant shall be discharged from the prosecution. . . . (5) Where an employer or principal is charged with an offence against this Act, he shall be entitled on information duly laid by him, and on giving not less than three days' notice of his intention to the prosecution, to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge, and, if after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence in question without his consent, connivance or wilful default, the said other person shall be summarily convicted of the offence,

and the employer or principal shall be exempt from any penalty. Provided that the prosecution shall have in any such case the right to cross-examine the employer or principal if he gives evidence, and any witnesses called by him in support of his charge and to call rebutting evidence. The person so convicted shall, in the discretion of the court, be also liable to pay any costs incidental to the proceedings."

Montgomery, K.C., and *Glyn Jones* for the respondent.
Hilbery, K.C., and *Gilbert Beyfus* for the appellants.

LORD HEWART, C.J.—This is a Case stated by the court of quarter sessions for the county of Middlesex. The matter arises in the following way. At a petty sessions at Gore, Middlesex, on April 11 last three informations were heard and determined which were preferred by the respondent under s. 6 (2) of the Sale of Food (Weights and Measures) Act, 1926, against the appellants, A. Walkling, Ltd. The first information charged that the company on a particular day in March of this year, first of all at North Circular Road, in Hendon, had in their possession for sale loaves of bread which did not weigh 1 lb. or an integral number of pounds; secondly, that at the same place the company unlawfully did sell a loaf of bread which did not weigh 1 lb. or an integral number of pounds; and, thirdly, that at another place, namely, at Folkestone House, Brent Street, Hendon, the company had in their possession for sale loaves of bread which did not weigh 1 lb. or an integral number of pounds. At the petty sessions three informations were preferred by the appellants under sub-s. (5) of s. 12 of the Act, against one Frederick Arthur Pearce, their employee, who afterwards proved to be the manager, charging that he was guilty as the actual offender in the case of each of the offences with which the appellants were charged. The justices, having heard the informations, convicted the appellants and ordered them to pay a fine of 30s. in each case. So far as the informations against the manager were concerned, the justices dismissed them. There followed an appeal to quarter sessions, an appeal in which the appellants appealed against each of the three convictions, and the court of quarter sessions, having heard that appeal, allowed it and quashed each of the convictions, subject to a Case stated for the opinion of this court. It is in those circumstances that this Special Case is stated.

It is found that the appellants carry on business as bakers at some seventy-four shops in the London district, that on Mar. 6 last a baker's roundsman in their employment at the Hendon branch was in the North Circular Road in charge of a barrow bearing loaves of bread for sale or delivery, under contracts of sale to customers of the appellants, and eighteen of the loaves on that barrow purporting, the case says, to be 2 lb. loaves, were weighed by an officer employed by the Middlesex County Council. The case further finds that of those eighteen loaves one weighed slightly more than 2 lb.; on the other hand, seventeen of them weighed, in varying degrees, less than 2 lb. apiece, so that the total net deficiency was 1 lb. 13 oz. 7 dr.—admittedly a material and serious deficiency. The weighing having been completed, the officer bought one of the seventeen light loaves, and that loaf weighed 2 oz. 11 dr. less than 2 lb. Having done so much in the North Circular Road, the officer then went to the appellants Hendon branch and, on the same day, weighed twelve more loaves purporting to be 2 lb. loaves which were, at that time, exposed for sale. Of those twelve loaves, one weighed ½ oz. more than 2 lb., four were of the correct weight, and seven weighed less than 2 lb., in varying degrees—the total deficiency being 10 oz. 2 dr., admittedly a material deficiency. So much as to the weight of the loaves. With regard to their production, the Case finds that Pearce was, at all material times, the manager of the Hendon branch, that he had with him some assistants in the shop, and a foreman baker and three other men in the bakery. The making of the dough and the baking of the bread was carried out at night when the manager was not called upon to be there. As to the division of the dough into loaves, that was done by a machine which the appellants had installed at a cost of £250, and which the Case finds they believed to be the best machine for the purpose which could be obtained. The Case goes on to describe the cutting up of the

dough by means of that machine and the control of the machine. The quantity of dough, it is said, was controlled by a dial on the machine which required to be properly adjusted and tightly screwed before the machine was set to work. Failure to set it accurately, or to tighten it adequately, might result in error or variation in weight. More than that, the Case says it was the duty of the foreman baker to set or supervise the setting of the machine, and the errors in weight of the loaves in question arose, either from the failure of the foreman baker to carry out his duty, or from the inaccurate working of the machine. The manager had been instructed by the managing director of the company that it was his duty to test the weight of the loaves every morning by selecting and weighing a certain number of them before exposing them for sale or delivering them to the roundsmen. On this particular morning the manager had failed to test the weights of any loaves. In those circumstances it was that the justices in quarter sessions came to the conclusion that the convictions were wrong and ought to be quashed, and they came to that conclusion because they accepted the contention of the appellants that they were protected by the provisions of s. 12 (2) of the Act, in that the deficiency of weight was due to a cause beyond their control, and in spite of all reasonable precautions being taken and all due diligence exercised to prevent the occurrence of that deficiency. The question for us is whether the conclusion of the court of quarter sessions was right.

The court of quarter sessions have formulated that question in questions more specific. The first question which we are asked is: "Were the proceedings in question proceedings in respect of an alleged deficiency in weight?" The materiality of that question consists in this. By s. 12 (2) where the proceedings under the Act take place in respect of an alleged deficiency of weight, the defendant has an opportunity of proving certain things, and, if he does prove them, he is to be discharged from the prosecution. This question seems to me to be a difficult question. On the one hand, it is said that if one looks, not merely at s. 6 of the statute, but at the general scheme and framework of the statute as a whole, two things are being dealt with. One is the dishonest selling of articles of food which are of less weight, measure, or number than is represented; the other is, as something no doubt connected with that end, the prohibition against having upon premises for sale goods of particular kinds which are not of certain named standard quantities or weight. The relation between the two is tolerably obvious. In the case of bread, for example, with which this case is concerned, if the baker sells a loaf of bread as being of a certain weight when it is not of that weight, he is obviously guilty of the offence of giving short weight, but if an inspector enters upon his premises and finds loaves of bread of all sorts of weights, different pounds, different ounces, it might be extremely difficult to know what representation, if any, was going to be made about those loaves at the time of sale. Therefore, it seems to be clear that the policy of the legislature is to make it, on the one hand, more difficult to commit the offence of giving short weight, and, on the other hand, more easy to detect it, by providing that it shall be an offence for a person to sell or have in his possession for sale or delivery under contract of sale any loaf of bread unless its net weight is 1 lb. or an integral number of pounds. No doubt in a proper case an information might be laid under s. 1 of the Act for selling bread and delivering a less weight than was purported to be sold. That was not the information or any of the informations here. A different information is an information for having in possession for sale or for unlawfully selling loaves of bread not weighing 1 lb. or an integral number of pounds under sub-s. (2) of s. 6. The question —and it is a nice question—arises whether, although there might be proceedings for deficiency of weight or proceedings for irregularity of weight, nevertheless, as these provisions about irregularity of weight have no real meaning except in the sense that they are ancillary to the provisions about shortness of weight, the true view, even on an information which limits itself to the terms "loaves of bread which did not weigh one pound or an integral number of pounds," is that, although in terms it is attacking an irregularity of weight, it is, in substance, dealing with deficiency of weight. I am bound to say, speaking for myself, that for a long time in the course of this argument I leaned to the view that this was not a case within the meaning of s. 12 (2) of proceedings under this Act in respect of an alleged deficiency of weight. Having listened, however, to the

extremely able argument of counsel for the appellants, I am bound to say that I feel considerable doubt on the point, and I do not propose in the present case to express a decided opinion one way or the other. It does not seem to me to be necessary to do so, because when one comes to the remaining questions, this question seems to me really superfluous.

The second question is this: "Was there evidence upon which the court of quarter sessions could hold that the appellants had discharged the burden of proving (a) that the deficiency was due to a bona fide mistake or accident or other cause beyond the appellants' control; and (b) that all reasonable precautions had been taken and all due diligence exercised by the appellants to prevent the occurrence of such deficiency?" In my opinion, that question ought to be answered in the negative. I think that the view that has been presented of sub-s. (2) of s. 12 is based upon a misconception. Looking at sub-s. (2) and sub-s. (5) together, it appears to me that two contrasted sets of circumstances are being dealt with. Where the case comes under sub-s. (2) the defendant is to be discharged from the prosecution, but, in order that he may be so discharged, he has to prove to the satisfaction of the court that the deficiency was due to a bona fide mistake or accident or other cause beyond his control and in spite of all reasonable precautions being taken and all due diligence exercised by him to prevent the occurrence of such deficiency, or was due to the action of some person over whom the defendant had no control. Those words seem to me to have no relation to a case where it is a defect of the machinery or a default of the persons under the defendant's control which is responsible for the mischief. But when one comes to sub-s. (5) one is dealing with a different state of affairs. That subsection seems to admit, or to presuppose, the overriding responsibility of the employer; but the employer may, if he takes suitable steps, produce the person who is called the actual offender to the court and prove that that person committed the offence in question without the consent, connivance, or wilful default of the employer. In that case the person called the actual offender is to be summarily convicted, but the employer or principal is not discharged from the prosecution; he is merely exempt from any penalty. I think, therefore, in this case, that even if sub-s. (2) be open to these appellants it does not avail them.

The Case goes on to state that, if this court should be of opinion that each of these questions should be answered in the affirmative, then the decision of quarter sessions is to stand. I do not think that these questions are to be answered in the affirmative. I say nothing as to question 1 for the reasons which I have given, but as to question 2, it seems to me it must be answered in the negative. The Case then proceeds: "If the court be of opinion that either of the questions should be answered in the negative, it is desired that the case be remitted to the court of quarter sessions together with the opinion of the court upon two further questions." Those questions are these: "Had the court of quarter sessions power to exempt the appellants from any penalty under s. 12 (5) having regard to the fact that Pearce had been acquitted?" In my opinion, the court of quarter sessions had no such power. The appellants have, indeed, sought to exhibit Pearce as the actual offender. Clearly upon the statement of facts which is before me he was not the actual offender; he was the manager. Before the justices Pearce was acquitted, and I do not think that at quarter sessions it was open to the appellants to argue that Pearce was wrongly acquitted. In order that they might avail themselves of s. 12 (5), it was necessary for them to say that notwithstanding the acquittal at petty sessions, nevertheless in truth and in fact the actual offender was Pearce, and it was he who had committed the offence in question. It seems to me that it was not open to the appellants to attempt to prove that proposition, and, even if it have been, upon these materials they could not prove it.

Finally, the fourth question is: "On the facts proved or admitted, was the said Pearce the actual offender within the meaning of s. 12 (5), of the said statute (a) in the case of the loaves on the roundsman's barrow; (b) in the case of the loaves at the shop?" So far as the loaves on the barrow were concerned, the facts found show that he was not the actual offender. So far as the loaves in the shop were concerned, true, he was the manager of the shop, but he was no more in possession of those loaves than was any other person employed upon those premises. The possession of the loaves in the shop

A was the possession of the appellants. I think, therefore, that this case ought to go back to the court of quarter sessions with an expression of opinion to that effect.

AVORY, J.—I agree entirely with my Lord upon the question which arises under s. 12 (2) of this Act, namely, that the appellants, who were the defendants in the original proceedings, have not proved that the deficiency was due to a bona fide mistake or B accident or to any other cause beyond their control. Until they establish that, the further part of the section is not material, because that is in the conjunctive—it is only, having established that the deficiency was due to a bona fide mistake or accident or to any other cause beyond their control, that they have to go on to show that the deficiency occurred in spite of all reasonable precautions being taken, and all due diligence exercised to prevent the occurrence of such deficiency.

C With regard to s. 12 (5) it is necessary to express an opinion upon that in view of the fact that the case must be remitted to the court of quarter sessions, and I agree that sub-s. (5) of s. 12 is not available to the appellants on the ground that in fact Pearce was not the actual offender within the meaning of that subsection. Therefore, apart from the difficulty which arises from the fact that he had been already acquitted, and that there was not and could be no appeal to quarter sessions from that acquittal, it is D sufficient to say that the appellants cannot avail themselves of that defence under sub-s. (5) without they establish that Pearce in fact had committed the offence. Therefore, it follows that, as they could not establish that, in my view the court of quarter sessions had no power to exempt the appellants from any penalty.

With regard to the question which is really in a sense at the basis of the argument in this case, whether the proceedings were in respect of an alleged deficiency of weight, E although it is not necessary to decide it, I think, in view of the arguments which we have listened to on both sides, that I should not refrain from expressing my opinion that the proceedings in this case were in respect of an alleged deficiency of weight. The charges in the informations, that have already been read, allege that the appellants sold and had in their possession for sale loaves of bread which did not weigh 1 lb. or an integral number of pounds, and in this case, for the purpose of proving that that offence had been F committed, evidence was given that these loaves, which purported to be 2 lb. loaves, did not weigh that integral number of pounds because they were deficient in the weight of 2 lb. The whole basis of the proceedings against the appellants was that there was what is described in the Case as "a material and serious deficiency" in the weight. Although it may be possible on the words of this Act of Parliament to take proceedings against a person who is selling loaves of bread which are above the weight that they G purport to be, I cannot myself conceive that the legislature ever contemplated such a case as that. I think the whole purpose of this legislation was, to prevent loaves of bread being sold which were deficient in weight. Therefore, if the appellants could have brought themselves within s. 12 (2), or s. 12 (5), of the Act I think it was open to them to do so, in view of the nature of the proceedings in this particular case. I agree that the case should be remitted to the court of quarter sessions, with the opinion of the H court that the appellants had no answer in law to the charges that were made against them.

TALBOT, J.—I agree entirely in the conclusion which has been announced. Taking the questions of law submitted for the opinion of this court by the quarter sessions, I am bound to say that, having weighed the arguments which have been addressed to us, I remain of the opinion that these informations were not proceedings in respect of an I alleged deficiency of weight, or measure, or number.

Without going into the matter at length—because it is unnecessary to do so in view of the opinion I have formed on the other points in the case—I should say that what influences me, summarising it very shortly, is principally the frame of the Act and the language adopted in this subsection in view of the frame of the Act. There are at least two totally different matters which are dealt with by this Act. The first is that which is shortly dealt with by the first section, namely, the purporting to sell or deliver articles of food of a certain weight, measure, or number, and in fact delivering articles of food which are of a less weight or measure, or number. That is a simple matter, and

whatever difficulty there may be in proving the facts, in most of the cases there would be no difficulty at all in understanding either the object or the nature of that offence. Then there is quite a different class of offences, of which I can give three examples, though I do not know if that list of three is exhaustive. The one case deals with pre-packed articles of food (see s. 4 (2)), the second with bread, and the third with milk. Those enactments prescribe, it may be for more than one reason, that these particular commodities shall be sold and kept for sale in certain defined quantities—differently described, of course, with relation to the three different classes of goods which are there mentioned. When Parliament came to enact s. 12 they had in view, and must be taken to have had in view, the previous sections of the Act, and they knew that they comprised, first of all, the offence of selling less weight than the article ought to have, and, secondly, the selling or keeping of goods in quantities other than those prescribed. It is quite obvious that those are totally different classes of offences. Though it may be that part of the object of the sections dealing with the second class of offence was to give additional security against the commission of the first, it is quite obvious they are different offences in kind, and the proof necessary in order to establish the second class of offence is quite different from the proof necessary to establish the first. Taking the example of bread, it would be entirely unnecessary for the prosecution on a charge under s. 6 (2) for selling or having in possession for sale or delivery a loaf of bread unless its net weight is 1 lb. or an integral number of pounds, to prove that the loaves in question purported to be loaves of any particular weight. I cannot help remaining of the opinion that when s. 12 (2) of the Act speaks of an alleged deficiency of weight, or measure, or number, it means what it says; it refers to a deficiency which is alleged and a deficiency which is proved, and not to something which is quite different, namely, the existence on the premises of food for the purposes of sale in quantities other than those prescribed by the Act. In my opinion, therefore, if the decision rested with me, I should be prepared to say that these appellants had not brought themselves within s. 12 (2) at all.

But, assuming that they had, I entirely agree that they have not satisfied in point of fact the burden of proof which was upon them, and this is the matter in relation to which the second question is asked by quarter sessions. I entirely agree with the construction which has already been put forward of this subsection taken in relation to sub-s. (5), namely, that this sub-s. (2) deals with mistakes, accidents, or causes beyond the control of the employer, not being negligence or other conduct of his servants, or persons within his control. I think that is shown by a comparison of the two subsections, by the fact that the result to the employer who satisfies the conditions of the subsections is different under the two, and by the fact that the action of persons over whom the defendant has no control is expressly dealt with and made matter of excuse under the second subsection. As has been pointed out, if that construction is not adopted, the collocation of these two subsections becomes meaningless and, indeed, perplexing. The result is, therefore, in my opinion, that both of these preliminary questions must be answered in the negative, and, what is more important, in the case of the second question, that is the opinion of the court.

With regard to the third question, which it then becomes necessary to answer, namely, whether the court of quarter sessions had power to exempt the appellants from any penalty under s. 12 (5), having regard to the fact that Pearce had been acquitted, I agree entirely with what has been said, that the answer must be in the negative. There seems to me to be in any event very great difficulty in applying sub-s. (5) of s. 12 to such an offence as that of having in possession for sale or delivery loaves of bread unless of a certain weight, which is the offence with which we are dealing, and I agree also that the relief which is given by sub-s. (5) is conditional upon the conviction of the person introduced to the court who tried the information as the alleged actual offender. The fourth question asks us whether "on the facts proved or admitted the said Pearce"—that is the manager of the Hendon branch of the appellants' business—"was the actual offender within the meaning of s. 12 (5)?" In my opinion, quarter sessions, speaking entirely without offence to them, had no more right to ask us this question than they had to decide it themselves. It cannot be answered without in fact entertaining an appeal, which the quarter sessions had no right to do, from the acquittal which the petty

sessions had granted to Mr. Pearce. If we were called upon to express any opinion on this question, I certainly should regard it as impossible to say that the petty sessions had come to a wrong conclusion on the question.

Appeal allowed.

Solicitors: *C. W. Radcliffe*; *Edward D. K. Busby.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

LADIES' HOSIERY AND UNDERWEAR, LTD. *v.* PARKER

[CHANCERY DIVISION (Maugham, J.), November 15, 19, 1929]

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), January 14, 15, 1930]

[Reported [1930] 1 Ch. 304; 99 L.J.Ch. 201; 142 L.T. 299; 46 T.L.R. 171]

Landlord and Tenant—Tenancy from year to year—Inference from continuance by tenant in possession after end of tenancy—Payment of rent—Yearly rent.

By a lease of 1838, land behind four houses in King Street, Hammersmith, was demised to F. for eighty-five years. By an underlease of 1906, it was let to one J. until May, 1923. In 1914, it was let by J. to P., the defendant, for three years at £2 a week. There was a shed on the land at the rear of three of the four houses, where P.'s wife, also a defendant, carried on business, P. being the manager thereof. In 1919 the plaintiff company took an assignment of the land behind the houses for the rest of the original term subject to J.'s underlease. In 1920 the Midland Bank obtained the reversion expectant on P.'s tenancy, and later the plaintiff company obtained a lease of one of the houses and the land behind, for fifty years, subject to the original lease. After the end of his tenancy in 1917, P. continued in possession of the land and the shed, paying the rent therefor first to J. and then at his direction to the bank. P. paid no rent to the plaintiff company. In 1926 negotiations took place for the apportionment of the rent between the bank and the plaintiff company, but no concluded agreement was entered into. In 1928 P.'s wife entered into an agreement to purchase the land at the rear of two of the houses from the bank, and her solicitors wrote to the plaintiff company's solicitors asking if the plaintiff company would grant a lease of the adjoining land at the rear of the third house. This the plaintiff company refused to do, and in 1929 issued a writ claiming possession of the land. P. counterclaimed for a declaration that he was a yearly tenant.

Held: by MAUGHAM, J., the plaintiff company was entitled to possession because (i) on the facts, there was no inference that there had been a consensus between the plaintiff company and P. under which P. had become a tenant from year to year of the plaintiff company, although a mere continuance in possession by one who originally took possession under a legal title, with the consent of the person who had become landlord, might lead to an inference of a consensus between the landlord and tenant that the tenant should hold as tenant from year to year: *Doe d. Cates* v. *Somerville* (1) (1826), 6 B. & C. 126, applied; (ii) the inference of a tenancy from year to year drawn from the payment of rent by a tenant after the expiration of his tenancy ought only to be drawn when the payment of rent was by reference to a yearly rent, and P.'s payments of £2 a week after the expiration of the agreement of 1914 were not so paid: dictum of PARKE, B., in *Braythwayte* v. *Hitchcock* (2), (1842), 10 M. & W. 494, applied.

Held: by the Court of Appeal, on the facts no tenancy was created as between the defendants and the plaintiff company.

Notes. Considered: *Swift* v. *Ambrose* (1931), 47 T.L.R. 594; *Covered Markets, Ltd.* v. *Green*, [1947] 2 All E.R. 140. Applied: *Adler* v. *Blackman*, [1952] 2 All E.R. 945.

As to tenancies from year to year and weekly tenancies, see 23 HALSBURY'S LAWS (3rd Edn.) 510 et seq.; and for cases see 31 DIGEST (Repl.) 45 et seq.

Cases referred to:

(1) *Doe d. Cates* v. *Somerville* (1826), 6 B. & C. 126; 9 Dow. & Ry.K.B. 100; 5 L.J.O.S.K.B. 28; 108 E.R. 399; 38 Digest 764, *956*.

(2) *Braythwayte* v. *Hitchcock* (1842), 10 M. & W. 494; 152 E.R. 565; sub nom. *Braithwaite* v. *Hitchcock*, 12 L.J.Ex. 38; 6 Jur. 976; 30 Digest (Repl.) 413, *569*.

(3) *Richardson* v. *Langridge* (1811), 4 Taunt. 128; 128 E.R. 277; 31 Digest (Repl.) 32, *1891*.

(4) *Dougal* v. *McCarthy*, [1893] 1 Q.B. 736; 62 L.J.Q.B. 462; 68 L.T. 699; 57 J.P. 597; 41 W.R. 484; 9 T.L.R. 419; 4 R. 402, C. A.; 31 Digest (Repl.) 59, *2156*.

(5) *R.* v. *Inhabitants of Herstmonceaux* (1827), 7 B. & C. 551; 1 Man. & Ry.K.B. 426; 6 L.J.O.S.M.C. 35; 108 E.R. 828; 31 Digest (Repl.) 46, *2052*.

(6) *Kelly* v. *Patterrson* (1874), L.R. 9 C.P. 681; 43 L.J.C.P. 320; 30 L.T. 842; 31 Digest (Repl.) 54, *2108*.

(7) *Croft* v. *William F. Blay, Ltd.*, [1919] 2 Ch. 343; 88 L.J.Ch. 545; 121 L.T. 18; 35 T.L.R. 556; 63 Sol. Jo. 607, C.A.; 31 Digest (Repl.) 492, *6180*.

(8) *O'Keeffe* v. *Walsh* (1880), 8 L.R.Ir. 184.

(9) *Cole* v. *Kelly*, [1920] 2 K.B. 106; 89 L.J.K.B. 819; 123 L.T. 105; 36 T.L.R. 262, C.A.; 31 Digest (Repl.) 473, *5998*.

Action.

By a lease dated Dec. 22, 1838, a piece of land at the rear of certain premises in King Street, Hammersmith, being Nos. 16, 18, 20 and 22, was demised to one Ferguson for eighty-five years, ending on Sept. 29, 1923. By underlease of 1906, the land was demised to one Jenkins for a term ending May 9, 1923, at the yearly rent of £40. In October, 1914, Mr. Jenkins agreed in writing to let to the defendant Henry Alfred Parker the whole of the land in the rear for three years from Oct. 12, 1914, at a rent of £2 a week, the first payment to be made on Oct. 19, 1914. By a covenant,

> "the tenant agrees to pay the rent as aforesaid, and to keep the premises in a clean and orderly state to the satisfaction of the landlord or his agent, and, at the determination of the said term or sooner determination, will deliver up to the landlord or his agent the premises in as good a state and condition as the same now are in (fair wear and tear and damage by accidental fire only excepted)"

and there was a proviso that the tenant should not make or allow to be made any alterations to the buildings on the land without the written consent of the landlord, a restriction against his carrying on a number of trades, and a provision that he would use the premises "for the trade and business of a general dealer only;" if the rent should be unpaid for seven days next after any day on which it should become due, the landlord could re-enter. The buildings referred to consisted of a shed over the land at the rear of Nos. 16, 18 and part of 20, but not over the land at the rear of No. 22. In December, 1919, an assignment was made to H. P. Newman & Co., who subsequently became the plaintiff company, of all the land for the rest of the term of years comprised in the lease, but subject to, and with the benefit of, the underlease. By another assignment in July, 1920, the Midland Bank, Ltd. acquired the leasehold reversion immediately expectant on the tenancy of Mr. Parker of so much of the land as lay at the rear of Nos. 20 and 22, King Street, and in June, 1925, became the owner also of the freehold reversion expectant thereon. The defendant Mr. Parker continued in possession after the end of his tenancy. Early in 1923, Mr. Jenkins had written to Mr. Parker stating that he had transferred his interest to the bank as from Mar. 25 of that year, and asking Mr. Parker thenceforth to pay all the rent which should become due either to the bank or to someone whom the bank should appoint to receive it. Shortly after the bank

served on him notice to quit, and deliver up before Oct. 12 next, the premises at the rear of Nos. 16, 18, 20 and 22, King Street. By an assignment dated Oct. 6, 1920, the plaintiff company acquired from the owner of the reversion expectant on the lease No. 18, King Street, and the piece of land in the rear thereof, for fifty years from Sept. 29, 1920, subject to the lease, and there was a covenant "not to underlet without the landlord's consent, such consent not to be unreasonably withheld." The defendant Mr. Parker or his wife continued after the period, when the plaintiff company became entitled to the premises at the rear of No. 18, King Street, to pay the rent of £2 a week payable for all the premises; and the bank accepted such payments. About September, 1925, there was an interview between the managing director of the plaintiff company, Mr. Levesley, and Mr. Parker and his wife. Mrs. Parker was then carrying on the business of a general dealer and fruiterer on the premises on the land at the rear of Nos. 16, 18, 20 and 22, King Street, having taken over the business from her husband in the year 1923; he continued to manage the business. Mr. Levesley was at that time unaware that the plaintiff company was the owner of the land at the rear of No. 18. He knew that the bank contemplated rebuilding, and his object was to discover whether the company could acquire a right of way down Bradmore Lane, adjacent thereto.

In December, 1925, the plaintiff company raised the question of the tenancy of the defendants. The company communicated on Dec. 2, 1925, with the bank's architects, and the following correspondence ensued. The first letter, dated April 14, 1926, was from the solicitor to the Midland Bank to the solicitors for the plaintiff company, and was as follows:

"Dear Sirs,—Referring to your letter of the 2nd of December last, addressed to Messrs. Whinney, Son & Austen Hall, I have now had an opportunity of discussing the position with my clients, the Midland Bank, Ltd., who are the freeholders of Nos. 20 and 22 King Street and the land at the rear thereof.

My clients instruct me that they had collected from one Parker certain sums of money a portion of which they are prepared to account for to the owners of the land at the rear of Nos. 16 and 18 King Street on satisfactory proof of their title.

It would appear that by an agreement dated the 10th of October, 1914, one Thomas George Jenkins let to Henry Alfred Parker all that piece or parcel of ground situate and being in the rear of No. 20 King Street and also in the rear of Nos. 16, 18, and 22 King Street for a term of three years from the 12th of October, 1914, at an inclusive rent of £2 per week. This agreement as you see expired long ago, and Parker has apparently continued in possession ever since on the same terms. As this agreement did not apportion this rental of £2 a week between the various pieces of land, it is obvious and necessary that an apportionment should be made, and with a view to getting the matter settled my clients have referred the question of apportionment to Messrs. Whinney, Son & Austen Hall, who have advised them that the rent received from Parker should in their opinion be apportioned as follows: It appears that the total area occupied by Parker amounted until recently to approximately 2,410 feet (sic) divided roughly as follows:

Behind No. 22, 1,088 feet; behind No. 20, 392 feet; behind Nos. 16 and 18, 930 feet.

It would also appear that the portion of land behind No. 22 is all frontage, and Messrs. Whinney are of opinion that the land behind No. 22 is roughly double the value of the remainder of the land, and they advise that the total rent from Parker should be allocated to each portion as follows:

To No. 22, nine-fifteenths of the total;
No. 20, two-fifteenths of the total;
Nos. 16 and 18, four-fifteenths of the total.

In order to effect the apportionment it would appear to be necessary to bring in the owners of the land at the rear of No. 16, and I am endeavouring to get in touch with them, and, as a preliminary inquiry, I should be glad to know whether your clients who claim to be the owners of the land at the rear of No. 18 would be

prepared to agree to an apportionment of two-fifteenths of the total rent of £2 a week in respect of the land they claim to own. A

With regard to the future, my clients instruct me that at the moment they have not decided what course they are going to adopt in relation to the land at the rear of Nos. 20 and 22, and they suggest that

1. An agreement should be come to for the apportionment of the rent payable by Parker, B
2. That for the time being the whole rent should be collected by them, and the proper portions paid over from time to time to the owners of Nos. 16 and 18.

I understand that, in view of the building operations, Parker has for the last few weeks only been paying 6s. per week in respect of such of the premises as he had in occupation. C

I shall be glad to hear from you in due course.

Yours faithfully,

(Sgd.) E. ARTHUR EDMONDS."

On April 21, 1926, the solicitors to the plaintiff company replied as follows:

"Dear Sir,—We have consulted our clients, and they are prepared to accept the suggestion that they should accept an apportionment of the total rents in respect of the land equal to two-fifteenths. D

Perhaps you will now let us have an account of the amounts apportionable.

We shall be glad to hear from you further, in due course, in regard to the future.

Our clients would naturally wish to be consulted in any suggested letting which includes any portion of their premises, but for the moment, we imagine, no arrangements can be made until your client's building operations are completed. E

Yours faithfully,

(Sgd.) BLUNDELL, BAKER & Co."

On Oct. 5, 1926, they again wrote saying they had been expecting to receive an account of the rents apportionable in respect of the back rents and also to hear further in regard to any future letting of the premises. On Oct. 7, the solicitor to the Midland Bank replied: F

"Dear Sirs,—I have been in communication with the owners of No. 16 King Street, Hammersmith—the executors of A. E. Scott dcd.—and their solicitors, Messrs. Gamlen, Bowerman & Forward, inform me that their clients are the freeholders of Nos. 16 and 18, King Street, and also the land in the rear of both premises. No. 16, but not the land in the rear, is leased to a Mr. A. Churchman for a G term expiring 29th September, 1897, and the (sic) No. 18 and the land in the rear is leased to your clients for a term expiring 29th September, 1970, and that their clients have given no licence to your clients to let the land in the rear to Parker, or to grant a way over it, but that they would be prepared to consider the question of granting a tenancy to Parker of the land in the rear of No. 16, also to grant a licence to the lessees of No. 18. H

Before taking up the matter further with Messrs. Gamlen, I shall be glad to have your views, as I do not want to place your clients in an awkward position.

Yours faithfully,

(Sgd.) E. ARTHUR EDMONDS."

On Oct. 28, 1926, the solicitors to the plaintiff company wrote: I

"Dear Sir,—We believe it is true that our clients never obtained any licence to the underletting of part of the land at the rear of No. 18, because they never in fact underlet the same. When they took the lease under which they hold, the land at the rear was already then subject to a lease which has since expired. We shall be glad to hear what is proposed, and also with regard to the share of the back rent to which the plaintiffs are entitled."

On Feb. 1, 1927, the solicitor to the bank further wrote that he understood his clients had been making an endeavour to clear up the position with Mr. Parker to Jan. 1, 1927;

A he had not all the figures before him, but anticipated receiving them shortly. On Mar. 14, 1927, he wrote again as follows:

"Dear Sirs,—Referring to my letter to you of the 10th instant, I have not yet heard from Messrs. Gamlin, Bowerman & Forward, but in pursuance of my promise I beg to give you the following statement of the position to date.

B By an agreement in writing dated the 10th October, 1914, Thomas George Jenkins agreed to let to Henry Alfred Parker

All that piece or parcel of ground situate and being in the rear of No. 20 King Street, Hammersmith, and also in the rear of Nos. 16, 18, and 22 King Street aforesaid, and which said piece or parcel of ground had a frontage on and entrance to and from Bradmore Lane

C for a term of three years from the 12th October, 1914, at the weekly rent of £2 and in that agreement the landlord undertook to pay the head rent together with the rates and taxes imposed upon the said premises.

From the 24th March, 1923, the bank have been collecting from Parker a weekly rent of £2 and allowing him from time to time deductions for general rates and D property tax, being apparently under the impression that this rent related only to the land immediately at the rear of their premises Nos. 20 and 22 King Street.

In the period from the 24th March, 1923, to the 1st January, 1927, the bank have collected from Parker a total sum of £392, and they have allowed Parker,

(a) In respect of the general rates up to the 30th September, 1926, the sum of £111 8s. 5d. Parker appears to be entitled to a further allowance of E £21 6s., for general rates to the 31st March next.

(b) In respect of Property Tax up to the 5th October last, a sum of £34 2s. 6d. Parker will be entitled to a further allowance of £7 16s. in respect of the property tax up to the 5th April next.

Parker does not appear to have been allowed all the property tax to which he F was entitled, no allowances having been made by the bank for the following periods:

1st instalment April to October, 1923.
1st and 2nd instalment, 1925 to 1926.

I am informed that Parker is aware that he has not been allowed certain deductions for property tax, but that he has lost the receipts and does not now propose G to claim a return.

The bank therefore appeared to have received an amount of £246 9s. 1d. From this must be deducted the allowances of £21 6s. and £7 16s. before mentioned—making a total net amount £217 7s.

With a view to arriving at some settlement of possible claims, the bank requested their surveyors, Messrs. Whinney, Son & Austen Hall, to advise them thereon. H These gentlemen suggested an apportionment as follows:

To No. 22 King Street	Nine-fifteenths.
To No. 20 „ „	Two-fifteenths.
To No. 16 „ „	Two-fifteenths.
To No. 18 „ „	Two-fifteenths.

I I understand that your clients Messrs. H. B. Newman & Co. claim to be entitled as lessees of No. 18 King Street to some portion of the net rents received by the bank, but Messrs. Gamlen, Bowerman & Forward's clients claim to be freeholders of Nos. 16 and 18 King Street, and also entitled to some portion of the rents. Until I hear from Messrs. Gamlen, Bowerman & Forward what their views are, it is a little difficult for my clients to come to any settlement with your clients.

The proposal was made some time ago for all parties to join in a lease of the premises to Parker, but this has fallen through, the bank not being prepared to grant a lease.

I will keep in touch with the position, and unless I hear further from Messrs. Gamlen's in a few days, I will write them further.

Yours faithfully,

(Sgd.) E. A. EDMONDS."

On Sept. 22, 1928, the solicitors for the defendants wrote to the solicitors for the plaintiff company:

"Dear Sirs,—Our client, Mrs. Helen Parker, has contracted to purchase from Midland Bank, Ltd., their property in Bradmore Lane, Hammersmith, W.6, which abuts on premises belonging to your client, Messrs. H. P. Newman & Co., Ltd., at 18 King Street, Hammersmith, W.6, of which she at present has the occupation under a tenancy from her vendor bank. It now becomes necessary for Mrs. Parker to make arrangements with your clients direct, and we shall be glad to hear from you on what terms your clients will be willing to let to her."

On Oct. 18 the plaintiff company's solicitors replied:

"Dear Sirs,—With further reference to your letter of the 22nd September, we should be glad to have from you a plan showing the land which your client wishes to take from our clients Messrs. H. P. Newman & Co., and with her proposals in regard to rent. We may say at once that our clients would only consider the question of a tenancy for a short term, and subject to early termination, but before we can go into the question at all, we should like to know exactly what are the suggestions you have to put forward."

On Nov. 22, 1928, the defendants' solicitors wrote to the plaintiff company's solicitors asking them to let the matter stand over for a further period. On Feb. 20, 1929, the solicitors for the plaintiff company wrote to the defendants' solicitors:

"Dear Sir,—With reference to our correspondence with you last year and Mr. Levesley's recent call on you, we have now received our clients' instructions that they require possession of the whole of the premises at the rear of No. 18 and cannot consequently consider any question of a tenancy to Mrs. Parker.

Our clients were the owners of the ground lease of the premises which expired in 1923, and have never granted any tenancy to your client nor recognised her as a tenant. Your client is therefore a trespasser.

We shall be glad to hear that you will advise your client to abandon any occupation of our clients' premises forthwith, or, if she claims to be tenant thereof, give us particulars of the lease or agreement under which she claims, and let us know if you will accept service of process on her behalf.

Yours faithfully,

(Sgd.) BLUNDELL, BAKER & Co."

On Mar. 14 the plaintiff company's solicitors wrote again as follows:

"Dear Sirs,—Referring to your inspection of the lease yesterday (this was in an inspection, at their own request, by the defendant's solicitors of the plaintiff company's lease), our clients are very seriously inconvenienced by your client remaining in possession, as they wish to start building operations immediately.

Will you please let us hear from you forthwith that your client will go out of possession without further delay, otherwise we shall have to issue a writ without further notice.

Yours faithfully,

(Sgd.) BLUNDELL, BAKER & Co."

To this the defendant's solicitors replied as follows on Mar. 18, 1929:

"Dear Sirs,—Referring to the previous correspondence and replying to your letter of 14th inst., our client is lawfully in possession of the above property, and we are certainly not prepared to advise her to vacate the same forthwith as your clients desire.

We are pursuing our inquiries and will let you hear from us with further reference to the matter in due course.

Yours faithfully,

L. O. GLENISTER & SON."

The plaintiff company issued its writ against the defendants, Mr. Parker and his wife, on April 4, 1929, and claimed possession of the land at the rear of No. 18, King Street. The defendants pleaded the agreement of Oct. 12, 1914, alleging that, at the end of the term, Mr. Parker became a yearly tenant of the land at the back of Nos. 16, 18, 20, and 22, King Street. They claimed that rent had been paid to the bank as agents for the owners of (inter alia) the land at the rear of No. 18, King Street, and that the plaintiff company had agreed with the bank to accept its due proportion of the net rent, and was by reason of the interview between the managing director and the defendants of September, 1925, estopped from asserting that the rent was not paid to the bank as its agent, or that Mr. Parker had not a yearly tenancy: and they counterclaimed for a declaration that Mr. Parker was a yearly tenant, under a tenancy determinable only by six months' notice expiring on Oct. 12, in the year when the notice should be given.

Gavin Simons, K.C., and *F. R. Evershed*, for the plaintiff company, referred to *Richardson* v. *Langridge* (3), *Braythwayte* v. *Hitchcock* (2), *Dougal* v. *McCarthy* (4), and *R.* v. *Inhabitants of Herstmonceaux* (5).

Lawrence Tooth, for the defendants, referred to *Kelly* v. *Patterrson* (6), *Doe d. Cates* v. *Somerville* (1), and *Croft* v. *William F. Blay, Ltd.* (7).

Gavin Simonds, K.C., in reply, referred to *O'Keeffe* v. *Walsh* (8), and *Cole* v. *Kelly* (9).

MAUGHAM, J.—This is a case of some importance and not a little difficulty. If it were not for the fact that it is exceedingly desirable that all the parties should know where they stand on my judgment at the earliest possible date, I should have been tempted to put my remarks in writing. But, having regard to the desirability of clearing up the position without delay, I will state now the decision at which I have arrived. I must first state the facts in some detail. [His Lordship stated the facts, and continued:] It may be observed that the notice to quit of Mar. 28, 1923, was in some respects wrong, inasmuch as the bank had acquired only the property in the rear of Nos. 20 and 22, King Street, though it appears possible that it may also have acquired the interest of Mr. Jenkins at some date or dates between Mar. 25 and May 9, 1923—a period of about six weeks. That, however, has not been established before me. I pause here to say that the notice seems to me, as at present advised, wholly inoperative in regard to the premises at the rear of No. 18, King Street. I do not think that a notice to quit premises, to be complied with at a date long after the person giving the notice has ceased to have any interest in the premises, can have any operation.

It will be observed that, under the agreement of Oct. 6, 1920, the plaintiff company became entitled to the premises in King Street known as No. 18, and—as from Sept. 29, 1923—was entitled also to the premises in the rear of No. 18. The position was a little curious, because the premises at No. 18 were so constructed that there was no way to the premises at the back at all. There seems to have been a kind of wall at the back of the front premises; and the plaintiff company seems to have forgotten, shortly after October, 1920, that it had any right to the premises at the back.

The defendant Henry Alfred Parker continued, after Sept. 29, 1923, when the plaintiff company became in law entitled to the premises at the back of No. 18, to pay the rent for all the premises at the back of the four houses in King Street to the bank. The bank began rightly to receive the £2 a week, because, for a short period—having acquired the interest of Mr. Jenkins—it was entitled to it. Its right to it came to an end when Mr. Jenkins' tenancy of the premises at the back of No. 18 came to an end.

In September, 1925, or thereabouts, there was an interview between Mr. C. V. Levesley, the plaintiff company's managing director, who has given evidence in this case, and the two defendants; and I think that I ought now to state shortly the evidence as to the effect of that interview, since it is relied on by the defence as an estoppel.

I will take the defendants' story first. The defendant Mr. Parker says that Mr. Levesley came to see them. He did not know who Mr. Levesley was. Mr. Levesley stated that he wanted to look over the premises at the back of the plaintiff company's premises. Mr. Parker was quite willing to show him, and took him over. Mr. Parker says that he was asked by Mr. Levesley to whom he was paying the rent, and that, in reply, he told him that he was paying £2 a week, and that he paid it to the Midland

Bank. Mr. Levesley then asked for the manager's name and, saying that he would go to see him, went away and returned in a few minutes. The defendant Mrs. Parker was present at the time, and it is alleged that Mr. Levesley said: "Everything is all right, you can carry on." Mr. Parker further said that eighteen months later he again saw Mr. Levesley, who again went to see the back of the premises. The Parkers were still paying the rent to the bank; but on this second visit by Mr. Levesley nothing was said about the rent. Mr. Parker admitted that, on the occasion of the first visit, Mr. Levesley did not leave him with the impression that the land at the back belonged to the plaintiff company, and did not tell him who he was; nor did he, Mr. Parker, know that the £2 a week had anything at all to do with the plaintiff company, or that Mr. Levesley came from the plaintiff company or on its behalf. On the occasion of Mr. Levesley's second visit in 1927, the evidence of the Parkers is that, in substance, all that happened was that Mr. Levesley went to see the premises at the back and made no observation relevant to the present case. Mrs. Parker corroborates her husband, in particular in his evidence as to the statement: "It is all right, carry on." Mr. Levesley, on the other hand, gave evidence of a different character. I think that it is manifest from his evidence, and from the corroboration which has been given by his solicitor, as to how the facts with regard to the title to the property at the rear of No. 18 were ascertained, that Mr. Levesley, when he paid his first visit in or about September, 1925, was quite ignorant of the fact that the property at the back of No. 18 belonged to the plaintiff company as leaseholder. He knew that the bank was contemplating rebuilding, and had served a party wall notice, a sufficient reason for the plaintiff company's managing director to go down and inspect the premises; and I have no doubt at all, from the evidence of Mr. Levesley and of his solicitor, that his object in going down then was partly to consider the matter of the party wall notice and partly to find out whether it was possible for the plaintiff company to obtain a right of way extending from the front premises to Bradmore Lane, which runs down on the west side of the four houses in King Street. That might very easily be done at the time when the bank was rebuilding, and would be of great assistance to the plaintiff company. Mr. Levesley wholly denies that he made any such statement as "It is all right, carry on," and I would observe that, even if he had made such a statement, it could not have been with the reference to the payment of rent to the bank, because it is perfectly clear that, at that time, he did not know that the premises at the back belonged to the plaintiff company and that, therefore, some part of the rent which was being paid by the defendants, or one of them, was being paid in respect of the whole of the land at the back of the four premises, and, therefore, ought in substance to be apportioned and some part of it paid to the plaintiff company. He was unaware of it. I think, on the whole, that it is unlikely that he used such an expression, in the circumstances, as "It is all right, carry on," and I cannot possibly hold that, at that interview, he expressly or impliedly authorised the defendants to continue paying to the bank the rent due to the plaintiff company.

I should add, with reference to the business of the defendants, that it seems that the business of a general dealer or fruiterer, which used to be carried on by the defendant, Mr. Parker, about six years ago, i.e., till about the year 1923, became the property of Mrs. Parker, and still is her property; and it is admitted that Mrs. Parker has taken an assignment of the premises at the back of No. 16, King Street.

While the defendants (or one of them) were continuing to pay the rent of £2 a week to the bank—namely, in December, 1925—the plaintiff company raised the question of the defendants' rights, having then recently ascertained that the premises at the back of No. 18 were its property. On Dec. 2, 1925, the plaintiff company's solicitors communicated with Messrs. Whinney, Son & Hall, the bank's architects, and a correspondence followed. [His Lordship read the letters set out above, and continued:] It is quite clear, I think, that, up to that date (i.e., Mar. 14, 1927), there has been no final agreement for apportionment.

I ought to say here that the question of the defendants' tenancy is in no way affected by the fact that, when the plaintiff company required possession of the land and urgently asked for it, there was plenty of time to give six months' notice, determinable on Oct. 12

A of this year; but it must be observed that the defendants by their solicitors did not set up at that time any yearly tenancy resulting from a holding over of the agreement of 1914, and, accordingly, the plaintiff company, not knowing that any title was being set up, treated the defendants either as trespassers or as tenants on sufferance or as tenants at will, and issued their writ without giving them any formal notice.

I now come to consider the points raised on behalf of the defendants, and the first B thing that I wish to mention is this. On the evidence I must come to the conclusion that no rent was ever paid by the defendants or either of them to the plaintiff company direct in respect of the land at the back of No. 18; secondly, as I have already intimated, I think that there never was an agreement for the apportionment of the £2 paid by the defendants, or one of them, in respect of the land at the back of the four premises in King Street. I have already read or referred to the letters, and I think that they leave C the matter in this way, that, although the plaintiff company is not unwilling to have an apportionment, there is never any definite agreement. In fact, in one of the final letters, the bank's solicitor is still in doubt whether the plaintiff company's title is such that the rent can properly be apportioned, or any part of the rents already collected be paid to it. I will observe that, even if there was an apportionment with the consent of the bank, it was not an apportionment binding the defendants or either of them. Since D there was no apportionment, in my opinion it follows that there was never any ratification of an alleged agency of the bank, treated as agent to receive rent on behalf of the plaintiff company. It is true that the bank, after it knew most, if not all, of the facts continued to receive rent, namely, £2 a week. It is also true that the plaintiff company never objected to that course; but, in my view, that does not establish an agency, and I do not see how there could be such an agency by subsequent ratification, unless it had E first been determined how much was to be deemed to have been received by the bank on behalf of the plaintiff company. I think that these matters were left still in a state of negotiation.

Accordingly, that part of the defence fails, and there comes the question of estoppel based on the interview of September, 1925. I have already given my reasons for thinking that that defence fails on the facts. Nothing that Mr. Levesley could have F said at that time could have justified the defendants or one of them in thinking that they were authorised to continue paying to the bank the rent in respect of the premises at the back of No. 18; nor, in my judgment, did he ever give such an authorisation.

There remains the question whether, in all the circumstances of the case, having regard to the acquiescence by the plaintiff company in the continuance in possession of the defendants, there is to be inferred an agreement or a consensus creating the relationship G of landlord and tenant between the plaintiff company and the defendants, or one of them, on the terms of the agreement of Oct. 10, 1914, so far as those terms are applicable to a tenancy at will. That, in my view, is the substantial point in this case. I have already said that no rent has been, in my opinion, accepted either by the plaintiff company or by any agent on its behalf. On the other hand, it is true that there are strong authorities showing that, from a mere continuance in possession by one who originally H took possession as tenant under a legal title, with the consent of the person who has become the landlord, an inference may be drawn of a consensus between the landlord and the tenant, that the tenant shall hold as a tenant from year to year.

The first case to which I think I need refer is *Doe d. Cates* v. *Somerville* (1). In that case, a rector had demised the rectory and the glebe lands to a trustee for securing an annuity for a term of years "if he"—the rector—"should so long live." That had been I done in December, 1816, the previous incumbent having died in April, 1816. Two persons were then in possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession until after December, 1816, the date of the conveyance by the rector to the trustee. Their title, as a title as tenants under the first rector, had come to an end with his death in April, 1816. The occupiers or late tenants remained in possession, therefore, for eight months in one case and nine months in another case, between the date of the promotion of the new rector, and the grant of the annuity, and they had not been disturbed. It was held by ABBOTT, C.J., who delivered the judgment of the court, that, after such a lapse of time, the new rector

must be presumed to have assented to the continuance of the tenancy of the late tenants under the same terms as before, and that he could not have dispossessed them without a notice to quit, and that, if he could not, neither could any person claiming under him. I confess that I have some little doubt whether the reporter has there informed us as to all the facts which justified the conclusion to which the court came. However, the case has been frequently followed.

I will not go through all the authorities where it has been mentioned, and, apparently, assented to; but in *O'Keeffe* v. *Walsh* (8), the Court of Appeal in Ireland—consisting of LORD O'HAGAN, C., MORRIS, C.J., and DEASY and FITZGIBBON, L.JJ.—had occasion most carefully to consider the whole of the authorities dealing with *Doe d. Cates* v. *Somerville* (1) and deliberately came to the conclusion that the case—which the court below had dissented from—must be taken to be good law, and they determined to follow it. LORD O'HAGAN said,

> "that case was decided fifty-four years ago . . . by some of the most eminent judges who have ever sat on the Bench of England; and I am not aware that it has since been overruled, or seriously called in question."

The fifty-four years have now grown to something over a hundred, and I cannot find that anyone has ever doubted it. FITZGIBBON, L.J., a very eminent judge, says, with regard to the case before him:

> "Now, if there was a contract at all, the presumption is that it was on the terms of the old tenancy—that is, that the defendant offered to hold on as a continuing tenant, and that the plaintiff accepted him as such. The terms of the old tenancy are proved to have been known to the plaintiff, and there being an old tenancy by which to regulate the terms in detail, the matter is reduced to the question whether there was any evidence from which it could be reasonably inferred that there was a consensus between the plaintiff and the defendant to their adopting the relation of landlord and tenant. The plaintiff knew that the tenant was continuing to occupy the land. What but a tenant could the defendant reasonably consider himself to be while, with the plaintiff's knowledge, he continued to occupy?"

And, accordingly, he held—and all the judges held in that case, overruling the court below—that, consistently with the decision in *Doe d. Cates* v. *Somerville* (1), they must come to the conclusion that the continuance in possession of the late tenant, without any objection by the new landlord, who entered on the death of the preceding tenant for life, must lead to the inference that there was a consensus between the plaintiff and the defendant to their adopting the relation of landlord and tenant on the terms of the old tenancy.

The question, therefore, to be determined on this part of this case is one of fact. There are a number of circumstances to be borne in mind in considering the question. In the first place, I think that it is relevant to observe that only a comparatively small portion of the premises comprised in this agreement of Oct. 10, 1914, is the subject of the suggested tenancy, and to note that a tenancy from year to year of the premises at the rear of No. 18 would be one to which the terms of that agreement could hardly apply. The rent, first of all, has to be apportioned, and then the tenant would be quite unable "to deliver up the premises in as good a state and condition" as the same were in 1914, if alterations of premises on other parts of the back land are made either by the tenant or by some third party; in other words, so far as buildings are concerned, the suggested tenancy would be one of a curious slice of a shed, without walls on either side.

In the second place, I think that it is not immaterial to note that the agreement of Oct. 10, 1914, is what may be described as a stale agreement, because the tenancy had come to an end, according to its terms, in the year 1917—no less than eight years before the events which are alleged to have resulted in the consensus which the defendant has to establish; and it is not immaterial, I think, to observe that, in the early part of the period that elapsed after the plaintiff company became entitled to this part of the property, the plaintiff company was quite ignorant of the terms of the agreement of

Oct. 10, 1914, and, indeed, did not know that it existed; in other words, it is not quite like a case where, on the death of a tenant for life or a rector, the new landlord comes into possession knowing that there are tenants with whom his predecessor has made agreements, although he may not know the terms of them.

Thirdly, I do not think that it is irrelevant to remark, even on this part of the case, that the rent is rent payable weekly: and I think that, in ignorance of the terms of the agreement, somebody who knew that there was a weekly rent payable by somebody alleged to be a tenant, would naturally come to the conclusion that, in all probability, the tenancy was one of a weekly character, so that the occupation of the premises could be put an end to by a week's notice.

Fourthly, I think that it must be borne in mind that neither the plaintiff company nor the defendants or either of them conceived that they had entered into an agreement as a result of which there was an existing tenancy from year to year. That appears, I think, from the letter from Messrs. L. O. Glenister & Son, of September 22, 1928—to which I have already referred—and from the answer of Oct. 18 from Messrs. Blundell, Baker & Co.

Next, I think that it is material to note that there was a covenant against underletting contained in the lease of Oct. 6, 1920, to the plaintiff company. It is true that the landlord's consent was not to be unreasonably withheld, but I think that, in considering whether there has been an agreement or consensus such as I have mentioned, it is not immaterial—though I do not place too much stress on it—to observe that the plaintiff company, if such an agreement had been suggested in terms, might well have remembered that its proper course was to obtain the landlord's consent, and that, if it acted in the absence of that consent, it might well be exposed to considerable difficulties with regard to its landlord.

Finally, I think that it is necessary to bear in mind that, although the present suggested tenant is the defendant Mr. Parker, in or about the year 1923 he disposed of his interest in the business, according to his own evidence, in favour of his wife; and it seems to be a little difficult to see how it can be suggested that the subsequent conversation, or the events that have occurred as between the plaintiff company and the defendants since 1923, have resulted in a tenancy's being effected under which the defendant Mr. Parker is the tenant. I think that the history as I have narrated it, coupled with the fact that Mrs. Parker became the owner of the business, would rather tend to establish that, if there had been a tenancy granted to anybody, it would be a tenancy granted to the owner of the business, Mrs. Parker. The question, then, if that were alleged, would be: "When did she become the tenant?" Mrs. Parker has never held over under the agreement of Oct. 10, 1914; and she, as it seems to me, could assert, if the assertion was of any use to her, that, since the year 1923, she has been occupying the premises in the rear of No. 18 under a title adverse to the plaintiff company, an occupation which, if it continued for twelve years, would entitle her, under the statute, to continue to hold the property as against the plaintiff company.

I have endeavoured to summarise, as briefly as I can, the circumstances which I think have to be borne in mind in favour of the plaintiff company on this part of the case.

In favour of the defendants, or such one of them as is alleged to be the tenant, namely, Mr. Parker, it is to be borne in mind that, for between two and three years (since December, 1925), the defendants, or one of them, had been allowed to continue in possession, paying a rent to the bank, in respect of the four properties in the rear of the four houses in King Street, and this without any objection or warning on the part of the plaintiff company. I have to perform the functions of a jury, and to come to a conclusion, on the balance of those considerations, whether I should infer that there has been a consensus between the plaintiff company and the defendant, Mr. Parker, under which that defendant has become a tenant from year to year of the plaintiff company. I have come to the conclusion that I ought to decide that question in favour of the plaintiff company.

That is sufficient to decide the case. But since this case may go further, there is another point with which I ought to deal. The question is whether the holding over

under an agreement in the terms of that of Oct. 10, 1914, with the continuance of the payment of the weekly rent of £2, would create the relationship of landlord and tenant on the terms of a yearly tenancy. The agreement was to let the premises for the term of three years commencing from Oct. 12, 1914, at a weekly rent of £2 to be paid every week, and with a right of re-entry on failure to pay the rent for seven days. It is well known, I think, that "tenancy from year to year" is a tenancy which originally used to be described as a tenancy at will, with a provision that not less than six months' notice had to be given to put an end to it, expiring at the time of the year at which the original tenancy expired. The authorities on that point are referred to in REDMAN'S LAW OF LANDLORD AND TENANT (8th Edn.) pp. 4, 5. At the end of each year, if not determined by proper notice, another year is added to the term. The inference that that is the intention of the parties is an inference drawn from the fact that, in the ordinary case, the payment of rent is by reference to a yearly rent. It is true that the rent may be paid each year, or half-yearly or quarterly, or even weekly; but in those cases, at any rate so far as the authorities are concerned, the rent is always a payment by reference to a year's rent.

There is an old case of *R.* v. *The Inhabitants of Herstmonceaux* (5), where the question arose in a case of settlement. The tenancy there was a tenancy under which the pauper agreed with a Mr. Foster to take a house at twenty guineas a year, the rent to be paid weekly, and the question was argued, under the construction of the relevant statute—the Poor Relief (Settlement) Act, 1825—whether that was a yearly tenancy or not. The proviso for determining the tenancy in the middle of the year, which existed in that case, was immaterial. The decision turned on the view of the court that a taking at an annual rent, though the rent is to be paid weekly, is primâ facie a yearly tenancy. That was stated by BAYLEY, J., delivering the judgment of the court. In the present case, the lease or agreement is one for three years at a rent of £2 per week. It is not a lease for three years at a rent of £104 per annum payable weekly; and it is observable that £2 a week is a rent which, as we all know, is not exactly divisible into the number of days either of an ordinary year or of a leap year. I cannot find, and counsel have been unable to find, any case exactly in point; but I have come to the conclusion that there is no reason for extending the views, which are binding on me, as to the terms which justify the inference that a tenancy is from year to year, and that, in this case, narrow as the distinction is, the holding over of the premises after the expiration of the agreement of Oct. 10, 1914, would have resulted only, and did result only, in the tenant's being a tenant from week to week.

In coming to that conclusion, I derive support from the judgment of PARKE, B., in *Braythwayte* v. *Hitchcock* (2). He says (10 M. & W. at p. 497):

> "Although the law is clearly settled that, where there has been an agreement for a lease and an occupation without payment of rent, the occupier is a mere tenant at will, yet it has been held that, if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding; for in *Richardson* v. *Langridge* (3), a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be a tenant at will only."

My conclusion, therefore, is that when the defendant Mr. Parker, after the expiration of that agreement, paid the sum of £2 a week to his landlord, Mr. Jenkins, he was primâ facie not paying it with reference to a year or an aliquot part of a year, but was paying it with reference to the week in respect of which he made the payment.

In the result the plaintiff company will have a judgment for possession of the premises at the back of No. 18, and the defendants must pay the costs of the action.

The defendants appealed, and the appeal was heard on Jan. 14, 15, 1930, before LORD HANWORTH, M.R., LAWRENCE AND ROMER, L.JJ.

Lawrence Tooth and *R. Fraser Roberts* for the defendants.
Gavin T. Simonds, K.C., and *F. R. Evershed* for the plaintiff company.

The court of appeal dismissed the appeal, holding on the facts that no tenancy was created as between the defendants and the plaintiff company of the land at the rear of No. 18, King Street, on the ground that the plaintiff company were at all material times unaware of the true position, while the defendants were paying wrongly the rent to the Midland Bank, and after September, 1928, when all parties knew the position, the defendants never paid any rent to the plaintiff company and any tenancy which might have been created from that time ceased to exist. Therefore, the plaintiff company were entitled to possession. Having regard to this decision it became unnecessary to deal with the second question decided by MAUGHAM, J., that the holding over of the defendants did not extend their tenancy beyond a weekly one.

Solicitors: *L. V. Glenister & Son*; *Blundell, Baker & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

MAY AND BUTCHER, LTD. *v.* REGEM.

[HOUSE OF LORDS (Lord Buckmaster, Viscount Dunedin and Lord Warrington), February 22, 1929]

[Reported [1934] 2 K.B. 17, n.; 103 L.J.K.B. 556, n.; 151 L.T. 246, n.]

Contract—Unenforceable contract—Uncertainty of term—Agreement for sale of goods at price to be agreed later—No price agreed.

By an agreement in writing contained in a letter dated June 29, 1921, the Disposals and Liquidation Commission, in consideration of the appellants agreeing to deposit with the commission £1,000 as security, agreed to sell, and the appellants agreed to buy, the whole of the old tentage which might become available in the United Kingdom up to Dec. 31, 1921. The price or prices to be paid were to be agreed on from time to time between the parties as the old tentage became available for disposal, and delivery was to be taken in such period or periods as might be agreed on. All disputes with reference to or arising out of the agreement were to be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889. By a letter dated Jan. 7, 1922, the Controller of the Disposals Board, after referring to verbal negotiations which had taken place for an extension of the earlier agreement, confirmed the sale to the appellants of the old tentage which might become available for disposal in the United Kingdom up to Nov. 31, 1923, and, again, the prices were to be agreed on between the parties as the tentage became available for disposal. By letter, dated Jan. 18, 1922, the appellants agreed to these terms. Disputes arose as to the prices to be paid for a large quantity of tentage, and in August, 1922, the Disposals Board said they considered themselves no longer bound by the agreement, and proceeded to sell the tentage by open tender. On a petition of right by the appellants claiming, inter alia, an injunction restraining the commission from disposing elsewhere than to the appellants of the remainder of the tentage,

Held: the price for the tentage not having been agreed on between the parties, there was no binding or concluded contract, and there being a stipulation in the agreement that the price should be agreed, it could not be implied that the price was to be a reasonable price.

Notes. Distinguished: *Hillas* v. *Arcos, Ltd.*, [1932] All E.R.Rep. 494; *Foley* v. *Classique Coaches, Ltd.*, [1934] All E.R.Rep. 88; *National Coal Board* v. *Galley*, [1958] 1 All E.R. 91. Referred to: *British Homophone, Ltd.* v. *Kunz and Crystallate*

Gramophone Record Manufacturing Co., Ltd., [1935] All E.R.Rep. 627; *Scammell* v. *Nephew, Ltd.* v. *Ouston*, [1941] 1 All E.R. 14; *Electric Transmission, Ltd.* v. *Dannenberg* (1948), 65 R.P.C. 439.

As to uncertainty in the terms of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 83–84, para. 144; and for cases see 12 DIGEST (Repl.) 22 et seq.

Cases referred to:

(1) *Von Hatzfeldt-Wildenburg* v. *Alexander*, [1912] 1 Ch. 284; 81 L.J.Ch. 184; sub nom. *Hatzfeldt* v. *Alexander*, 105 L.T. 434; 12 Digest (Repl.) 92, *523*.

(2) *Chillingworth* v. *Esche*, [1924] 1 Ch. 97; 93 L.J.Ch. 129; 129 L.T. 808; 40 T.L.R. 23; 68 Sol. Jo. 80, C.A.; 12 Digest (Repl.) 98, *584*.

(3) *Loftus* v. *Roberts* (1902), 18 T.L.R. 532, C.A.; 12 Digest (Repl.) 58, *320*.

Appeal.

The appellants, May and Butcher, Ltd., who were general contractors carrying on business at Heybridge Basin, Maldon, Essex, claimed that it had been mutually agreed between them and the Controller of the Disposals Board that the board should sell to the appellants the whole of the tentage which might become available in the United Kingdom for disposal up to Mar. 31, 1929. The terms and conditions of sale were set out in letters dated respectively June 29, 1921, and Jan. 7, 1922. The letter of June 29, 1921, written by the controller to the appellants, stated that

> "in consideration of your agreeing to deposit with the [Disposals and Liquidation] Commission the sum of £1,000 as security for the carrying out of this extended contract, the commission hereby confirm the sale to you of the whole of the old tentage which may become available . . . up to and including Dec. 31, 1921, upon the following terms:
>
> (i) The commission agrees to sell and [the appellants] agree to purchase the total stock of old tentage. . . .
>
> (iii) The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the commission for such old tentage shall be agreed upon from time to time between the commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the commission.
>
> (iv) Delivery . . . shall be taken by the purchasers in such period or periods as may be agreed upon between the commission and the purchasers when such quantities of old tentage are offered to the purchasers by the commission. . . .
>
> (x) It is understood that all disputes with reference to or arising out of this agreement will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889."

By the second letter dated Jan. 7, 1922, the Controller of the Disposals Board, referring to verbal negotiations that had taken place for an extension of the agreement between the commission and the appellants, confirmed the sale to the latter of the old tentage which might become available for disposal in the United Kingdom up to Mar. 31, 1923. This letter, which varied in certain respects the earlier terms, stated that

> "the prices to be agreed upon between the commission and the purchasers in accordance with the terms of cl. (iii) of the said earlier contract shall include delivery free on rail at the siding or railway station nearest to the depots at which the said tentage may be lying or loading free into purchaser's vehicles at such depot."

The appellants agreed to the terms of the above letter by their letter dated Jan. 18, 1922. Some time later, disputes arose as to the prices to be paid for a large quantity of tentage, and in August, 1922, the Disposals Board said they considered themselves no longer bound by the agreement and proceeded to sell their tentage by open tender. whereupon the appellants filed a petition of right claiming an injunction restraining the commission from disposing elsewhere than to the appellants of the remainder of the tentage; an account of the total tentage that had become available, and compensation for the damage done to them. By the demurrer, answer and plea, the Attorney-General said that the petition of right was bad in law in that it disclosed no sufficient

and binding contract for the sale to the appellants of any tentage, and, further, that it was a term of the contract (if any) that the appellants should pay a reasonable price for the tentage and that the appellants were not at any material time ready and willing to pay such reasonable price.

ROWLATT, J., held that the letters of June 29, 1921, Jan. 7 and 18, 1922, did not constitute a contract, but only contained a series of clauses to be adopted if and when contracts were made. Such matters as the price, date of payment and period of delivery had still to be agreed. The Court of Appeal (SARGANT, L.J., and EVE, J.; SCRUTTON, L.J., dissenting) affirmed that decision. The appellants appealed.

Stuart Bevan, K.C., James Wylie and *Leon Freedman* for the appellants.

The Attorney-General (*Sir Thomas Inskip, K.C.*), *Sir Boyd Merriman, K.C.*, and *W. Bowstead* for the Crown.

LORD BUCKMASTER.—Consequent on the war, there remained at the disposal of the Government in the years 1920–22, and possibly even at a later date, a considerable quantity of goods which had formerly been required for the prosecution of the war. In order that these goods might be effectively disposed of, a Disposals Board was set up, into whose charge the various departments handed over such of the surplus stock as they from time to time possessed. The Disposals Board then proceeded to deal with those goods by sale to various purchasers of the various classes of goods. The appellants were one of the purchasers of that class of goods that related to the construction and equipment of tents, and called by a word, which has convenience if it has not euphony in its favour, tentage. The first arrangement made between the Disposals Board and the appellants in relation to these goods was as far back as April, 1920. The transactions between them all appear to have taken a similar form. There was an agreement for the sale of the goods; there was an agreement that the price for the goods should be subsequently fixed between the parties and there were provisions with regard to arbitration in the event of dispute. No dispute did in fact arise between the parties up to May, 1922, when there was one of these bargains, dated Jan. 7, 1922, which has been called the contract between the parties, and which has given rise to this dispute. At or about that time, it appears that the control of the Disposals Board was changed; Major Lethaby formerly had charge of it, and Sir Maurice Levy took charge from him. It has been suggested that this caused a difference of relationship between the parties which led to the dispute. Such a suggestion certainly is in no way material to the matter we have to decide, and I am quite unable to find anywhere throughout the whole of these proceedings that Sir Maurice Levy did otherwise than what not only he was entitled to do, but what was his bounden duty to do, namely, take the steps he thought most effective to secure the largest price he could for the goods which were under his charge.

On the former occasions the course of business appears to have been this: as the Disposals Board received from the various departments something in the nature of specifications of the goods that were going to be handed over, these specifications were in turn handed over to the would-be purchaser, who could check them if he liked for himself or, if not, accept them as they were offered. Sir Maurice Levy discontinued this practice. He appears to have said he did not think it was unreasonable on the part of the appellants to ask for the specifications, but he did not deliver them, and I think it is not difficult to understand why, because, if he proceeded to sell by specification instead of selling after inspection, which was always open to the purchaser, he would be bound by the statements in the specification, many of which contained references to the quality and character of the goods which he himself had no opportunity of checking. I cannot help thinking that, as a prudent business arrangement, it was much better he should let the would-be purchaser have the fullest opportunity of inspecting the goods he was going to buy and then make his offer, and that was the course which he in fact pursued. The proposals that were made by the appellants for purchase were not acceptable to Sir Maurice Levy, the parties were unable to come to an agreement, and the matter ended in August, 1922, by the Disposals Board saying that they considered themselves no longer bound by the contract. Negotiations failed, and they declined to deliver any more goods under the attempted bargain. It is that which has

given rise to these proceedings, and the only points that arise for determination are these: Whether or not the terms of the contract were sufficiently defined to constitute a legal binding bargain between the parties in one of three respects. The Crown says, in the first place, that the price was never agreed. The appellants say that, if it was not agreed, then, according to the proper law applicable, it would be a reasonable price; and secondly they say that, even if the price was not agreed and it is not fair to assume that, therefore, a reasonable price was intended, the arbitration clause in the contract was intended to cover this very question of price, and that, consequently, the reasonableness of the price was referred to arbitration under the contract. Finally, they say that, even if they were wrong on these first two contentions, the fact that the whole of the bargain was ended in 1922 was doing them a wrong, because, in any event, they were entitled to have the opportunity of entering into a further agreement for future parcels of the goods which were referred to in the terms of the contract.

Those being the contentions, it is obvious that the whole matter depends on regarding the actual words of the bargain itself. In the first place, the contract is contained in the form of a letter. It is written by Major Lethaby, who was the Controller of the Disposals Board, to the appellants. It was a letter which was based on the payment by the appellants of £1,000 as a consideration for the bargain, and it opens in these words:

> "In consideration of your agreeing to allow the sum of £1,000 (one thousand pounds) now held by the commission to remain on deposit with the commission as a security for the due performance of this extended contract, the commission hereby confirm the sale to you of the whole of the tentage which may become available in the United Kingdom for disposal up to and including the 31st March, 1923,"

on the terms of the earlier contracts. The provision as to price is in these words:

> "The prices to be agreed upon between the commission and the purchasers in accordance with the terms of cl. (iii) of the said earlier contract shall include delivery free,"

etc.; and it is provided that the actual price that has to be paid is to be the subject of further agreement between the parties. That is the result of the terms of one of the earlier bargains incorporated by the reference I have made. There is then a provision that the commission may

> "at any time in their uncontrolled discretion and before it has been dispatched to or collected by or resold by the purchasers, certify that any portion of the said tentage is required by the British Government and the commission shall be at liberty to withhold delivery of such portion,"

while finally there is an agreement as to arbitration, which again is contained in one of the earlier contracts. The arbitration clause may be important, and it is to be found in these words:

> "It is understood that all disputes with reference to or arising out of this agreement will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889."

What resulted was this: It was impossible to agree the prices, and, unless the appellants are in a position to establish either that this failure to agree resulted in a definite agreement to buy at a reasonable price, or that the price had become subject to arbitration, it is plain on the first two points which have been mentioned that this appeal must fail.

In my opinion, there never was a concluded contract between the parties in this case at all. It has been a well-recognised principle of contract law for many years that an agreement between two parties to enter into an agreement by which some critical part of the contract matter is left to be determined is no contract at all. It is, of course, perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to people to agree that they will in the future agree on a matter which, vital to the arrangement between them, has not yet

been determined. The argument suggested, that, as no agreement has happened, the fixing of the price has broken down and that, consequently, a reasonable price must be assumed, depends in part on the terms of the Sale of Goods Act, 1893, which no doubt reproduces, and is known to have reproduced, the old law on the matter. That provides, in s. 8 (1), that "the price in a contract of sale may be fixed by the contract, or may be left to be fixed in the manner thereby agreed, or may be determined by the course of dealing," and, by s. 8 (2), "Where the price is not so determined in accordance with the foregoing provisions the buyer must pay a reasonable price"; while (by s. 9(1)) if the agreement is to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided.

I find myself quite unable to understand the distinction between an agreement to permit the price to be fixed by a third party and an agreement to permit the price to be fixed in the future by the two parties to the contract themselves. In principle, it appears to me to be one and the same thing. But this principle of the law is not without one or two important authorities. I think that PARKER, J.'s decision in *Von Hatzfeldt-Wildenburg* v. *Alexander* (1) really covers the whole of this dispute, although I agree that the comment on it by SARGANT, L.J., in *Chillingworth* v. *Esche* (2) causes the whole position to be more fully and accurately expressed; but the principle that you cannot agree to agree remains entirely unchanged. *Loftus* v. *Roberts* (3) is to the same effect. The only way in which the appellants seek to escape from those authorities is by saying that they all related to another subject-matter. If it could be shown that the different subject-matter was the cause of different principles of contract being applied, that would be an effective and relevant argument, but, apart from the fact that a contract, for example, for the sale of land requires the consideration of a large number of special details that are wholly unnecessary in relation to a contract for the sale of goods, and apart also from the way in which either of those contracts may be regulated either by the Statute of Frauds on the one hand, or by the Sale of Goods Act on the other hand, the general underlying principles of contract are the same in each, and there is no reason why those principles should be in any way varied because of the subject-matter with which they deal. I, therefore, find myself quite unable to accede to the argument that the authorities to which I have referred need in any way to be weakened in their application to the present case because it happens that the subject-matter is not the same.

The next question is about the arbitration clause, and there I entirely agree with the majority of the Court of Appeal and also with ROWLATT, J. The arbitration clause is to refer disputes "with reference to or arising out of this agreement." But, until the price has been fixed, the agreement is not there. The arbitration clause relates to the settlement of whatever may happen when once the agreement has been completed and the parties are regularly bound. There is nothing in the arbitration clause to enable a contract to be made which, in fact, the original bargain had left quite open.

Finally, I cannot take the view that the parties are entitled to an offer for the further parcels, because the opinion I hold is that this agreement is not a binding agreement at all, and the suggestion that the payment of the deposit caused the appellants to be entitled as of right to these offers, and constituted a valid and binding option, is not, to my mind, the true construction of what that deposit was for. That deposit was really for the purpose of securing the carrying out of the terms of the bargain when once it had been made complete. For the reasons I have already stated to your Lordships, such completion never took place. There never was a completed bargain between these parties, and, in my opinion, the appellants should fail.

VISCOUNT DUNEDIN.—I am of the same opinion. This case arises on a question of sale, but, in my view, the principles which we are applying are in no way confined to sale, but are the general principles of the law of contract. The law of contract is that to be a good contract you must have a concluded contract, and a concluded contract is one which settles everything that is necessary to be settled, and leaves nothing still to be settled by agreement between the parties. Of course, it may leave something

which still has to be determined, but then that determination must be a determination which does not depend on the agreement between the parties. In the system of law in which I was brought up, that was expressed by one of those brocards, of which, perhaps, we have been too fond, but which often expresses very neatly what is wanted, and there it is said certum est quod certum reddi potest. Therefore, you may very well agree that a certain part of the contract, if you take sale, such as price, may be settled by somebody else. As a matter of the general law of contract, as I have said, you have to have all the essentials settled. What are the essentials may vary according to the particular contract with which you are dealing. We are here dealing with sale, and, undoubtedly, price is one of the essentials of sale, and, if it is left still to be agreed between the parties, then it is no contract. It may be left, as I say, to the determination of a certain person, and, if it was so left, and that person either would not or could not act, I have no doubt also that there would be no contract because the price was provided between the parties to be settled in a certain way, and it has become impossible to settle it in that way, and, therefore, there is no settlement. No doubt in the matter of goods, the Sale of Goods Act, 1893, says that, if no price is mentioned and settled in the contract in any way, it is to be a reasonable price. The simple answer in this case is that the Sale of Goods Act provides for silence on the point, and here there is no silence, because there is the provision that the two parties are to agree. As long as you have something certain it does not matter. For instance, it is a perfectly good contract as to price to say that the price is to be settled by the buyer. I have not had time, or perhaps I have not been industrious enough, to look through all the books in England to see if there is such a case, but there certainly was such a case in Scotland where, long ago, in 1760, it was settled that a sale of a landed estate was perfectly good, the price being left to be settled by the buyer himself. Therefore, I have only expressed in other words what has been already said by my noble friend on the Woolsack. I think here clearly there was no contract; but, of course, it follows from what I have already said that it would be a perfectly good settlement of price to say that it was to be settled by arbitration by a certain man, or it might be quite good if you said it was to be settled by arbitration under the Arbitration Act, so as to bring in a material plan by which a certain person could be put in motion. The question then arises: Has anything of that sort been done? I think it has clearly not been done, because the general arbitration clause here is an arbitration clause in very common form as to disputes arising out of the arrangements. I do not think that this can, in any proper meaning of the word, be described as a dispute arising between the parties. It is a failure to agree, which is a very different thing from a dispute.

As regards the option point, I do not think it can be more neatly put than it was by ROWLATT, J., when he said:

> "It is an option to offer on terms that are not agreed. An option to offer a contract which is not a contract seems to me not to carry the case any further than the first way of putting it."

For these reasons, I agree in the motion proposed.

LORD WARRINGTON.—I agree. In my opinion, the decision of this case depends on the application of a well-known and elementary principle of the law of contracts, which is that, unless the essential terms of the contract are agreed on, there is no binding and enforceable obligation. In the present case, we have a document which purports to be an agreement for the sale by one party to the other party of certain specified goods at a price to be hereafter agreed on between them. If that price is thereafter agreed, then there is a binding contract within the principle to which I have alluded; each of the essential terms of the contract has then been agreed. If the parties fail to arrive at an agreement, then the price has not been ascertained in the way in which the parties stipulated that it should be ascertained, and there is, therefore, no binding agreement.

It is said that this case is to be treated on the same footing as if there had been no fixing of the price, as if the contract had been silent as to the price, and the law may then imply a reasonable price; but, in the present case, the facts preclude the application of any such principle. To do that would not be to imply something about which

the parties have been silent, but it would be to insert in the contract a stipulation contrary to that for which they have bargained, to give them not the result of their own agreement, but possibly a verdict by a jury, or some other means of ascertaining the stipulated price. To do that would be to contradict the express terms of the document which they have signed.

Then with regard to the application of the arbitration clause, the same considerations apply. In the first place, if I am right in the view I take that, in the events which have happened, there is no binding contract, then the arbitration clause is not binding, and there is no contract out of which, or in reference to which, any dispute can arise. But, more than that, to apply the arbitration clause would be, as in the attempted application of the doctrine as to reasonable price, to substitute the award of the arbitrator for that agreement between the parties, which was the term by which they had originally agreed to be bound.

With regard to the option, I have nothing to add to that which has been said by my noble and learned friends. All I can say is that I think the judgments of SARGANT, L.J., and EVE, J., are perfectly unanswerable, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *E. V. Huxtable*; *Treasury Solicitor.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

PERRIN *v.* DICKSON (INSPECTOR OF TAXES)

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Slesser, L.JJ.), June 18, 19, July 23, 1929]

[Reported [1930] 1 K.B. 107; 98 L.J.:K.B. 683; 142 L.T. 29; 45 T.L.R. 621; 14 Tax Cas. 608]

Income Tax—Annuity—Insurance policy—Annual premium paid to provide for annual payments for limited period—Annual payments representing repayment of premiums with interest—Liability of payments to income tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Rules applicable to Case III, r.* 1.

The taxpayer took out a policy of assurance by which it was agreed that, in consideration of a premium of £90 5s. 10d. payable annually from 1912 to 1917 inclusive, the assurance society would pay to the guardian of the taxpayer's son, M., an annuity of £100 for seven years, the first payment to be made on Sept. 19, 1920, and on each subsequent Sept. 19 up to Sept. 19, 1926, if M. should live so long. It was further provided that on the death of M. the total amount of the premiums paid in respect of the assurance, less any amount that had been received by way of annuity, but without interest, should be paid to the taxpayer or his representatives or assigns. The sums payable under the policy were calculated so as to return to the taxpayer (in the event of M. living) the amount which the taxpayer had paid to the society with compound interest at 3 per cent. The taxpayer, as M.'s guardian, received from the society the sums payable under the policy and assessments for income tax were made on him in respect of those sums. The taxpayer did not dispute that the sums received by him were taxable so far as they represented profit on the payments made by him, but he resisted payment of income tax on the rest.

Held: the payments made to the taxpayer were not annual payments within r. 1 of the Rules applicable to Case III of Sched. D to the Income Tax Act, 1918, but were repayments of capital together with interest, and only the interest was liable to tax.

Scoble v. *Secretary of State in Council for India* (1), [1903] 1 K.B. 494, and *Foley* v. *Fletcher* (2) (1858), 3 H. & N. 769, applied.

Decision of ROWLATT, J. ([1929] 2 K.B. 85) affirmed.

Notes. The Income Tax Act, 1918, Sched. D, Rules applicable to Case III, r. 1, was replaced by the Income Tax Act, 1952, s. 123.

Distinguished: *Sothern-Smith* v. *Clancy*, [1941] 1 All E.R. 111; *Bridges* v. *Watterson*, [1952] 2 All E.R. 910. Referred to: *Brodie* v. *I.R. Comrs.* (1933), 17 Tax Cas. 432; *Minister of National Revenue* v. *Spooner*, [1933] A.C. 684; *Commercial Union Assurance Co.* v. *I.R. Comrs.*, [1937] 4 All E.R. 159; *Beck* v. *Howard de Walden* (1940), 84 Sol. Jo. 369; *Wesleyan and General Assurance Society* v. *I.R. Comrs.*, [1946] 2 All E.R. 749.

As to distinction between annual payments of capital and an annuity, see 20 HALSBURY'S LAWS (3rd Edn.) 248 et seq.; and for cases see 28 DIGEST 62 et seq.

Cases referred to:

(1) *Scoble* v. *Secretary of State in Council for India*, [1903] 1 K.B. 494; 72 L.J.K.B. 215; 88 L.T. 144; 51 W.R. 580; 67 J.P. 106; 19 T.L.R. 244, C.A.; affirmed sub nom. *Secretary of State in Council of India* v. *Scoble*, [1903] A.C. 299; 72 L.J.K.B. 617; 89 L.T. 1; 51 W.R. 675; 19 T.L.R. 550; sub nom. *Scoble* v. *Secretary of State for India*, 4 Tax Cas. 618, H.L.; 28 Digest 65, *337*.

(2) *Lady Foley* v. *Fletcher* (1858), 3 H. & N. 769; 28 L.J.Ex. 100; 33 L.T.O.S. 11; 22 J.P. 819; 5 Jur.N.S. 342; 7 W.R. 141; 157 E.R. 678; 28 Digest 65, *336*.

(3) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 29 Digest 369, *2969*.

(4) *Re Engelbach's Estate, Tibbetts* v. *Engelbach*, [1924] 2 Ch. 348; 93 L.J.Ch. 616; 130 L.T. 401; 68 Sol. Jo. 208; 29 Digest 422, *3288*.

(5) *Chadwick* v. *Pearl Life Insurance Co.*, [1905] 2 K.B. 507; 74 L.J.K.B. 671; 93 L.T. 25; 54 W.R. 78; 21 T.L.R. 456; 28 Digest 66, *347*.

(6) *Jones* v. *I.R. Comrs.*, [1920] 1 K.B. 711; 89 L.J.K.B. 129; 121 L.T. 611; 7 Tax Cas. 310; 28 Digest 108, *667*.

(7) *Gould* v. *Curtis*, [1913] 3 K.B. 84; 82 L.J.K.B. 802; 108 L.T. 779; 29 T.L.R. 469; 57 Sol. Jo. 461; 6 Tax Cas. 293, C.A.; 28 Digest 93, *549*.

(8) *Winter* v. *Mouseley* (1819), 2 B. & Ald. 802; 106 E.R. 558; 4 Digest 298, *2790*.

(9) *Earl Howe* v. *I.R. Comrs.*, [1919] 2 K.B. 336; 88 L.J.K.B. 821; 121 L.T. 161; 35 T.L.R. 461; 63 Sol. Jo. 516; 7 Tax Cas. 289, C.A.; 28 Digest 111, *683*.

Appeal

This was an appeal by the Crown from an order of ROWLATT, J., reported ([1929] 2 K.B. 85) allowing an appeal by the taxpayer on a Case stated by the Special Commissioner of Income Tax.

By a policy of assurance made on Sept. 18, 1912, by the taxpayer, the Right Rev. W. W. Perrin, and the Clergy Mutual Assurance Society, after reciting that the taxpayer was desirous of effecting an assurance with the society for an annuity for and on behalf of his son, Michael Wilcox Perrin, it was agreed that in consideration of a premium of £90 5s. 10d., payable annually upon Sept. 18, 1912, to Sept. 18, 1917 (inclusive), the society would pay to the guardian of Michael Wilcox Perrin an annuity of £100 for seven years, the first payment to be made on Sept. 19, 1920, and on every subsequent Sept. 19 up to and including Sept. 19, 1926, if Michael Wilcox Perrin should live so long. It was further provided by the policy that in the event of the death of Michael Wilcox Perrin the total amount of the premiums paid in respect of the assurance, under deduction of any amount that might have been received by way of annuity, but without interest, should be paid to the taxpayer or his representatives or assigns. A policy in similar terms dated Sept. 12, 1912, was entered into by the taxpayer with the society for an annuity for and on behalf of his daughter, Margaret Roach Perrin, under which policy the annual premium was £33 7s. 6d., payable annually on Sept. 12 for six years from 1912 to 1917 inclusive, and the annuity was £50 for five years payable on Sept. 13 in each year from Sept. 13, 1920, to Sept. 13, 1924. The sums payable under each

of the policies were calculated so as to return to the taxpayer (in the event of the nominee living) the amount which the taxpayer had paid to the society with compound interest at 3 per cent.

The taxpayer as guardian of the two respective nominees received from the society the sums payable under the policies of Sept. 18 and 12, 1912, respectively, and assessments for income tax were made on the taxpayer in respect of the sums so received by him.

It was contended, inter alia, by the taxpayer that: (a) the sums paid to the taxpayer under and by virtue of the policies were not annuities or other annual sums taxable under the Income Tax Acts; (b) the said sums were capital and represented repayments to the taxpayer of sums deposited by him with the society and which in the events which happened became repayable by the society with interest by instalments on certain specified dates; (c) the said sums were not and did not become annuities because they were so described in the policies; (d) in substance and in fact the policies provided for payment to the appellant of two several capital sums of £700 and £250 respectively, or in certain events of lesser sums by equal yearly instalments; (e) the assessments should be discharged.

It was contended by the Crown (inter alia) that: (a) the said sums paid to the taxpayer under the policies were annuities and were assessable in his hands under Sched. D; (b) the assessments were correct and should be confirmed.

The commissioners at a meeting for the special purposes of the Income Tax Acts held on April 16, 1928, heard the appeal of the appellant against the above assessments and held that the payments by the society to the appellant were annuities, and as such were liable to income tax, and they confirmed the assessments under appeal. The taxpayer accordingly required the Commissioners of Income Tax to state this Case for the opinion of the court.

Rowlatt, J., held that the payments received by the taxpayer were not the payment of an annuity purchased by the premiums, but were repayments of capital with interest, and the capital was not taxable.

The Solicitor-General (*Sir F. Boyd Merriman, K.C.*) and *R. P. Hills* for the Crown.

A. M. Latter, K.C., and *Cyril King* for the taxpayer.

Cur. adv. vult.

July 23. The following judgments were read.

LORD HANWORTH, M.R.—In this case the question has to be determined whether the respondent, the Right Rev. W. W. Perrin, is liable to pay income tax on the total sum of £150 which was received by him in each of the five years 1922–1926.

In those years he was paid two sums of £100 and £50 respectively under two contracts which he had entered into on Sept. 12 and 18, 1912, with an insurance company called "The Clergy Mutual Assurance Society." The appellant in this court contends that the respondent is so liable under the terms of the Rules applicable to Case III of Sched. D of the Income Tax Act, 1918. Rule 1 provides:

> "The tax shall extend to any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same, by virtue of any deed or will, or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract."

This Rule reproduces s. 102 of the Income Tax Act, 1842. By r. 2 the tax is to be computed as respects the year of assessment in which the profits or income first arise, on the full amount of the profits or income arising within that year.

It is claimed that the taxpayer received these two sums of £100 and £50 in the years in question as "an annuity . . . by virtue of a contract," and so is liable to tax. The question therefore that we have to determine is whether the total sum of £150 in these years was an "annuity." This question is by no means free from difficulty.

The transaction which is embodied in the two contracts of September, 1912, is of a simple nature. The assured, under their terms, respectively, agreed to pay the assurance society in each of the six years, 1912–1917, £33 7s. 6d. and £90 15s. 10d., and in return

he was to receive in 1920 and in the six subsequent years £50 under the first and £100 under the second contract. These moneys were to be paid to the "nominees" in the schedules to the contracts, who were in fact his daughter and his son, and the purpose of the transaction was to save up and provide for the education of these children.

Both contracts are in like terms, and I will deal more particularly with the later one which secures the larger sum of £100, as that is one which has been chiefly discussed before us. The contract is called "a policy of assurance—temporary annuity," and the society undertakes to pay to the person named in the schedule

> "the annuity therein described on the dates and during the period on and for which the same is expressed to be payable on satisfactory proof being given from time to time on the respective dates, when the said annuity falls due, the nominee on whose life the annuity depends is living and of the title of the person claiming payment of the said annuity."

In the schedule there is a special condition that in the event of the death of the nominee the total amount of the premiums paid in respect of this assurance after deduction of any amount that may have been received by way of annuity, but without interest, will be paid to the assured, or his representatives or assigns.

For the purposes of the revenue the substance of the matter must be regarded. It matters not whether in the contract it is, or is not, called an annuity. If in truth and in fact it is an annuity no dressing of the transaction can alter its character. Stripped of its form, the transaction is a method of saving up money for future use. It is a method whereby on a series of payments being made, provision for the repayment of a series of larger sums at a later date can be secured. We are told in the Case that the sums payable under each of the policies are calculated so as to return to the taxpayer, in the event of the nominee living, the amount which the taxpayer had paid to the society with compound interest at 3 per cent. It is not a transaction which has to be based on actuarial calculations of the expectation of life. If the contract is carried out, the sums paid in at the earlier date are paid out at the later date, with the accretion of the compound interest. If the nominee dies at any time before the conclusion of the deferred payments, the total amount of the premiums paid, subject to a deduction of any sums that may have been paid out by the society, is repaid to the assured. There is no provision in the contracts for the repayment to the assured of any sums that he may have paid, if from any cause whether by death or otherwise, he fails to continue his payments.

The evidence before the commissioners negatives the fact that the possibility of such a failure to continue the payment enters into the calculation; and we were told that in practice, the sums already paid would in such an event be repaid without interest to the assured or his personal representatives. It is clear, however, that if the terms of the contracts are carried out, or if some or all of the payments are made, but the nominee dies, the assured does not lose but receives his capital back. The transaction appears to me to be one that could be as well done by a bank after reference to an ordinary compound interest table, or perhaps more appropriately to a table that gives the rates to be paid for the redemption of capital by annual payments. In figures, under the son's policy which has been most closely scrutinised, the assured pays to the society a sum which in 1917 reaches the total of £544 14s., and receives back in the course of the years of payment, 1920–1926, a total sum of £700.

No protest is raised by the taxpayer against his being assessed to income tax in respect of the margin between those two sums, which may be treated as profit on the payments made by him, and which the learned judge has directed to be assessed to tax in accord with *Scoble* v. *Secretary of State in Council for India* (1), to which I must refer at greater length hereafter.

It has been decided that under such contracts as these, the assured alone is interested. There is no trust in favour of the nominee: see *Cleaver* v. *Mutual Reserve Fund Life Association* (3), and *Re Engelbach's Estate, Tibbetts* v. *Engelbach* (4), and if the assured died before the completion of the contract, the moneys payable under it would fall into the estate.

Has then the assured thus secured for himself an annuity within the rules above quoted? As was said by Stirling, L.J., in *Scoble* v. *Secretary of State in Council for India* (1) ([1903] 1 K.B. at p. 502), the principle laid down in *Foley* v. *Fletcher* (2) "as to the construction of the word annuity has never been departed from." *Lady Foley* v. *Fletcher* (2) was decided in 1858. An interest in certain mines was sold by the plaintiff for a sum, a part of which was to be paid down, and the balance by instalments spread over a number of years. The purchaser claimed to deduct income tax. It was held that these instalments were not chargeable with income tax under s. 102 of the Income Tax Act, 1842, which was the predecessor of the rules now relied on. It was decided that they were not "annuities" or "annual payments payable as a personal debt or obligation by virtue of any contract." The Income Tax Acts were carefully considered, and Pollock, C.B., dealt with the phrases in them as referring to profits in contradistinction from capital, and held that the annuities or annual payments must be read as excluding payments by virtue of a contract to repay a debt. His words are (28 L.J.Ex. at p. 105):

> "All the provisions of this Act taken together announce its meaning, that it is to attach upon profits and not upon the return of capital, or any payment of that kind in any shape unless it is stated to be the purchase of an annuity. If that be really the transaction then no doubt the arrangement falls within the Act."

Bramwell, B., says (28 L.J.Ex. at p. 107) that the presumption is that the payment to be made is partially what may be called principal and partially what may be called interest.

> "Well viewing the case a priori, without reference to the statute which imposes the duty, it would be a reasonable thing to ascertain how much is for interest and how much for principal and then to impose the duty on the former only."

He agrees that cannot be done and he holds that the payment is not charged under the Acts. Watson, B., gives (28 L.J.Ex. at p. 109) his well-known definition—

> "'annuities' means that where the annuity may be purchased with money, the capital is gone and ceases to exist, and consequently the person to be charged is the person receiving the annuity, that is the yearly sum year by year. . . . No capital is taxed there, because the principal has been converted into an annuity and the annuity is chargeable."

In 1903, *Scoble's Case* (1) was decided in the Court of Appeal, who held that the annual payments which represented partly the purchase price of the Great Indian Peninsular Railway, and partly interest on the purchase price remaining unpaid, were not taxable as a whole, but that tax fell only on the part representing interest. It was argued for the Crown that the principal sum had been sunk precisely as in the case of the purchase of an annuity in the market: see [1903] 1 K.B. at p. 500. Vaughan Williams, L.J., says that the mode of payment, though called an annuity, is really the purchase price of the railway by annual instalments plus interest on the amount remaining unpaid. Stirling, L.J., and Mathew, L.J., both say that the transaction is to be looked at. To borrow the words of Stirling, L.J., in *Scoble's Case* (1) ([1903] 1 K.B. at p. 504):

> "It is apparent on the face of the transaction that each instalment covers payment of a principal sum as well as interest, and this case closely resembles that of the repayment by instalments of a loan."

which admittedly were not taxable. In the House of Lords the judgment of the Court of Appeal was affirmed. The difficulties which the argument of Sir R. Finlay presented were acknowledged; but Lord Halsbury felt at liberty to analyse the transaction to see whether the annual sum was partly capital or to be treated as income; and then added ([1903] A.C. at p. 303): "I do not think it was the intention of the legislature to tax capital, and therefore the claim as against part of those sums fails." The result was that it was ordered that only so much of the payments as represented interest was to be taxed. In my judgment the effect of this case is to justify an examination of the annual payment, to ascertain whether it contains capital as well as interest. It allows

what BRAMWELL, B., had indicated in *Lady Foley* v. *Fletcher* (2) (28 L.J.Ex. at p. 107): "It would be a reasonable thing to ascertain how much is for interest and how much for principal."

I agree with ROWLATT, J., that there is no simple touchstone to be applied—such as that there was or was not a pre-existing debt. In *Chadwick* v. *Pearl Life Insurance Co.* (5) ([1905] 2 K.B. at p. 515), WALTON, J., expresses the opinion that it makes no difference whether the contract to make the annual payments is entered into in consideration of money paid, or in consideration of property assigned; and I agree with his observations that there will be cases of difficulty.

This course of ascertaining what the annual payment really is was adopted by ROWLATT, J., in *Jones* v. *I.R. Comrs.* (6), where he decided that sums received in respect of a royalty on the sales of a patented apparatus, in addition to certain specified payments of a capital nature, were income.

In *Gould* v. *Curtis* (7), HAMILTON, J., had to determine whether a premium paid on a policy of insurance was paid in respect of an insurance on life so as to come within the relief from tax given to such a premium by s. 54 of the Income Tax Act, 1853. The policy provided for payment to the assured of £100 on his death within fifteen years and of £200 if he was alive at the end of that period. The premium was calculated actuarially on a series of alternative risks, and the risk was estimated by actuarial calculations based on a recognised table of mortality. On these facts HAMILTON, J., held that it was an insurance on life and not a contract for a deferred payment only. In the course of his judgment he said: "that insurance and annuity are words not of scientific law, but of common business." This statement adds a justification for the examination of the facts to ascertain the nature and business meaning of the contract made.

Another interesting test was suggested by junior counsel for the taxpayer derived from *Winter* v. *Mouseley* (8), which was cited to the House of Lords by Sir R. Finlay in *Scoble's Case* (1). The question was whether a bond was an annuity bond within the terms of 49 Geo. 3, c. 121, s. 17, and BEST, J., said that he understood the meaning of an annuity to be when the principal is gone for ever and it is satisfied by periodical payments.

In the present case, as I have pointed out, the loss of payments by the assured was never taken into account in estimating the terms of the bargain between the assured and the society, and that feature does not obtain here.

For these reasons I am of opinion that the reasoning and judgment of ROWLATT, J., was right and should be affirmed. I do not think that it is right to treat the sums that the assured is to receive in the years 1920–1926 as "salvage." They are payments in respect of the total of his capital sums paid to the society which have never been lost sight of and were never taken as at risk in the terms of the bargain made with him. The analysis or dissection ordered by ROWLATT, J., ought to be made.

The view that I have taken is to follow what I conceive to be the method directed in *Scoble's Case.* (1) Each case must be examined on its own data. I do not feel at all pressed with the observations that the effect of the decision will be to release all annuities for a fixed term of years from income tax. The immunity will be given only in proper cases in which an attempt is being made wrongly to tax capital under statutes which are intended to charge income and income only, for as was said by BRAMWELL, B., in *Lady Foley* v. *Fletcher* (2)—cited by SCRUTTON, L.J., in *Lord Howe's Case* (9) ([1919] 2 K.B. at p. 353)—it cannot be taken that the legislature meant to impose a duty on that which is not profit derived from property, but the price of it. The appeal is dismissed with costs.

LAWRENCE, L.J.—The question in this case is whether certain sums of money paid to the taxpayer under two policies effected by him with the Clergy Mutual Assurance Society were annuities or other annual payments payable as a personal debt or obligation by virtue of a contract within the meaning of r. 1 of the Rules applicable to Case III of Sched. D of the Income Tax Act, 1918. This question is one of general importance as both the policies are in a form which has been in common use for many years in cases where parents with slender means have wanted to make a provision for the education of their children. The Crown has hitherto not claimed income tax on the sums payable

A under policies of this kind and the assurance companies have not hitherto deducted income tax from the payments made thereunder.

In the present case the policies were taken out nearly seventeen years ago. Under the policy effected by the taxpayer for the purpose of providing for the education of his son Michael, the assurance company has made seven yearly payments of £100 each commencing on Sept. 19, 1920 (when Michael attained the age of fifteen) and ending on B Sept. 19, 1926 (when he attained the age of twenty-one). Under the policy effected by the taxpayer for the purpose of providing for the education of his daughter Margaret, the assurance company has made five yearly payments of £50 each, commencing on Sept. 13, 1920 (when Margaret attained the age of thirteen) and ending on Sept. 13, 1924 (when she attained the age of seventeen). The premiums payable by the taxpayer under his son's policy were six yearly sums of £90 15s. 10d. each in the years C 1912 to 1917, making a total sum of £544 15s., and under his daughter's policy six yearly sums of £33 7s. 6d. each during the same period, making a total sum of £200 5s. The amount of the annual payments assured to the taxpayer was calculated on the basis of returning to him the sums which he had paid in premiums with compound interest at 3 per cent. per annum.

The Crown now seeks to assess the taxpayer under Sched. D to income tax in respect of D the sums paid to him by the assurance company under both policies during the five years ending April 5, 1926, with the result, if the Crown's claim be well-founded, that long after the taxpayer has expended the money received by him under the policies on the education of his children he will have to pay a tax which exceeds in amount the compound interest on the money which he paid to the assurance company. Thus the taxpayer, and all other parents in a similar position, would have been far better off if they E had not effected any such policies at all, but had kept the money expended in premiums in a safe or deposited it in a bank. This result is said by the Crown to have been brought about by the form in which these policies are framed. The importance of the question is apparent, because if the contention of the Crown be right, it is entitled to make similar claims against a large class of subjects who, relying on the practice not to charge income tax which has prevailed for upwards of twenty years, have adopted this method F of making what they believed to be an economic provision for the education of their children. Whatever may be the result, however, it is the duty of the court to give effect to the claim now made by the Crown if it is justified by the provisions of the Act.

The case presented by counsel on behalf of the Crown is extremely simple. They contended that the effect of the contract, as expressed in each policy, was that the taxpayer for a money consideration agreed to purchase a deferred annuity for a fixed term, and G that, as (according to the decision of *Re Engelbach's Estate*, *Tibbetts* v. *Engelbach* (4)) such annuity was payable to the taxpayer for his personal use, it became chargeable with income tax.

Counsel for the taxpayer on the other hand, whilst not challenging the effect of the decision in *Re Engelbach's Estate* (4), contended that the substance of the contract was that the assurance company undertook to re-pay to the taxpayer the amount paid by H him in premiums together with compound interest thereon at the rate of 3 per cent. per annum in instalments at certain fixed dates, and that, therefore, he was only liable to be assessed to income tax in respect of so much of each instalment as represented interest, the balance of such instalments representing repayments of capital, which were not chargeable with income tax.

I It is clearly settled that not every annual payment payable as a personal debt or obligation by virtue of a contract is "an annuity or annual payment" within the meaning of r. 1 of the Rules applicable to Case III. For instance, if a creditor were to agree with his debtor to accept payments of an existing debt by annual instalments, such annual instalments would not be "annual payments" within the rule. Further, *Lady Foley* v. *Fletcher* (2) and *Scoble* v. *Secretary of State in Council for India* (1) show that, even although there may be no debt antecedent to the contract creating the obligation to pay the annual instalments, yet the court will inquire into the nature of the transaction, and, if the true result of the contract be that the instalments represent payments of

capital as well as interest, only so much of each instalment as represents interest will be charged with income tax.

In *Lady Foley* v. *Fletcher* (2), part of the purchase money for an estate was agreed by the conveyance to be paid by annual instalments of fixed amount extending over a period of thirty years, and it was held that such instalments were not chargeable with income tax as "an annuity or other yearly payments." In the course of his judgment WATSON, B., said (28 L.J.Ex. at p. 109):

> "Why, 'annuities' means, that where an annuity may be purchased with money the capital is gone and ceases to exist . . . the principal has been converted into an annuity."

In *Scoble's Case* (1) the purchasers of property were given an option to satisfy the purchase money by the payment of an annuity (eo nomine) of fixed amount extending over a long period, and the contract showed on its face that in calculating the amount of the annuity a certain rate of interest was to be used. The House of Lords, affirming the decision of the Court of Appeal held, that only so much of each half-yearly payment of the annuity as represented interest was chargeable with income tax.

The principle on which both these cases were decided is that it never was the intention of the Income Tax Acts to tax capital as if it were income, with the result that even although a contract may provide for the payment of annual sums of fixed amount and may call such payments "an annuity," the court will in each case inquire into the real nature of the transaction, and if it appears that in fact part of such sum represents payment of capital such part will not be chargeable with income tax. Both these cases, however, distinctly recognise that in the case of a simple purchase of an annuity in consideration of a money payment the full amount of the annuity is chargeable with income tax. The distinction which is apparently drawn in these cases is between a purchase of an annuity for a fixed term in consideration of the payment of a sum of money and a contract to pay an annuity in consideration of the conveyance of land or other property, although the money value of such land or other property is by the contract agreed on between the parties. Moreover in *Scoble's Case* (1) stress was laid on the fact that on the face of the contract it appeared that the amount of the annuity was calculated so as to cover the purchase price together with interest on so much thereof as should from time to time remain unpaid.

I agree with the view expressed by WALTON, J., in *Chadwick* v. *Pearl Life Insurance Co.* (5), that the distinctions thus drawn are fine, and I confess to having some difficulty in appreciating any logical reason for distinguishing between the acquisition of an annuity in consideration of a money payment and the acquisition of an annuity in consideration of money's worth, or between the case where the contract on the face of it shows that the amount of an annuity is calculated on the capital value of the consideration with interest at an agreed rate, and the more usual case where the calculation of the amount does not appear on the face of the contract, but is in fact made and agreed to between the parties. However that may be, I think that the cases referred to afford ample authority for the proposition that the court will in each case look at the real nature of the transaction, whatever may be the form in which it is expressed, and will if the circumstances warrant it dissect a payment, even though it be called an annuity, so as to prevent so much of it as represents capital from being charged with income tax.

That brings me to the question what was the real nature of the contract in the present case. On the one hand, it is clear that there was no antecedent debt nor any sale and purchase of real estate or other property, while on the other hand it is, I think, equally clear that this is not the case of a simple purchase of a deferred annuity for a term of years, owing to the provision in the contract that in the event of the purpose for which the policy was effected failing either wholly or partially, the assurance company agreed to repay to the taxpayer the whole or part (as the case might be) of the money paid by him.

Taking the son's policy, the substance of the bargain (ignoring for a moment the form of the policy), is that (i) if the son dies before he attains the age of fifteen the assurance company agrees to repay to the taxpayer without interest the whole of the money paid

by him; (ii) if the son dies between the ages of fifteen and twenty-one the assurance company agrees to repay to the taxpayer without interest the balance of the money paid by him after deducting therefrom any payments already made by the assurance company under the policy; and (iii) if the son lives to attain the age of twenty-one the assurance company agrees to repay to the taxpayer the whole of the money paid by him with compound interest at the rate of 3 per cent. per annum by seven annual instalments. If the contract had been expressed in these terms the Crown could not, in my opinion, have supported its present contention. In such a case the taxpayer would only have been assessable to income tax on the 3 per cent. compound interest payable by the assurance company. Does the form of the contract preclude the court from giving effect to what I conceive to be the true nature of the bargain? I confess that I have felt considerable difficulty in making up my mind on this point. There is much force in the contention of the Crown that if the court is at liberty to dissect the payments in the present case there is no logical reason why the same process should not be adopted in every case of the purchase of a deferred annuity for a fixed term of years. The present case, however, differs substantially from a simple purchase of such an annuity. On the face of the policy there is an obligation imposed on the assurance company to repay the premiums in the event of the failure of the purpose for which it was effected, and although in the present case that purpose has not failed, yet this obligation, coupled with the fact that the amount of the so-called temporary annuity, which was in fact paid, was calculated by agreement between the parties so as to return to the taxpayer the premiums which he had paid with 3 per cent. compound interest, in my opinion shows that the real nature of the transaction was closely analogous to that of the deposit of money in a bank or of the loan of money, to be returned in any event to the person making the deposit or loan either without or with interest according to whether a certain event might or might not happen.

The mere fact that the policy does not expressly provide for the return of any premiums in the event of the failure of the taxpayer to pay them all does not in my opinion alter the nature of the transaction. It was stated that it was the practice of the assurance company in such cases to repay the premiums without interest, but even if that were not so, the only effect would be that the obligation undertaken by the assurance company to repay the money paid by way of premiums would only arise when all the premiums had been paid, but that fact would not alter the nature of the obligation when once it had arisen.

On the whole, though not without much hesitation, I have come to the conclusion that the decision of ROWLATT, J., was right and that this appeal fails.

SLESSER, L.J.—This is an appeal from the judgment of ROWLATT, J., reversing the findings of the Commissioners for Special Purposes of the Income Tax Acts, in which he held that certain payments made to the Right Rev. William Wilcox Perrin, Bishop of Willesden, as guardian of his son and daughter, under agreements with the Clergy Mutual Assurance Society, were not taxable annuities within the meaning of Case III of Sched. D, r. 1, of the Income Tax Act, 1918. For the purpose of this judgment, we may take the case of one of the children, the son; the annuity for the daughter raises no different question of principle and falls to be similarly treated.

Assessment under Sched. D in the sum of £100 paid to the taxpayer in respect of the son has been made for each of the years ending April 5, 1922–26. From this assessment the taxpayer unsuccessfully appealed to the commissioners who confirmed it; but, on further appeal, as the result of ROWLATT, J.'s judgment, the assessment was disallowed, subject to a revision of the commissioners for a dissection as between the various sums of £100 paid under the policy and the taxable liability on the interest accruing therefrom. As regards the liability for tax on this interest no question arises before us.

The question which has to be considered in this case resolves itself into whether the moneys paid under the policy of assurance ought or ought not properly to be held to be taxable annuities, and, in effect, the answer must depend on the nature of the transaction entered into between the bishop and the assurance society. In the policy of assurance, under which the moneys were paid, the description is that of a temporary annuity, but

this fact is inconclusive of the true nature of the agreement, and, if in fact it be not an annuity, as that word is to be understood in the appropriate provisions of the Income Tax Acts, the authorities are clear that the mere description of the agreement between the parties as a policy for a temporary annuity will not determine the matter. I have come to the conclusion, after consideration of the actual arrangement between the parties, that though in description the payment is an annuity, in reality the money paid to the bishop, as guardian of the nominee, his son, was the repayment of the bishop's own capital, which had been advanced under the form of premiums, for the following reasons.

The contract between the parties, so far as it is material to this case, provided that, in consideration of the assured paying his first premium in respect of this child, and provided that the further premiums were duly paid to the society—as in fact they were—the assurance society would yearly from Sept. 19, 1920, until Sept. 19, 1926, pay the sum of £100, if the nominee, being the bishop's child, lived so long, to the bishop as guardian. The instrument contained a further provision that:

> "In the event of the death of the nominee the total amount of the premiums paid in respect of this insurance, after deduction of any amount that may have been received by way of annuity, but without interest, will be paid to the assured or the representatives or assigns of the assured."

The argument which was presented on behalf of the Crown that the payments were in fact taxable annuities, resolved itself into this: According to *Lady Foley* v. *Fletcher* (2), the word "annuity" may properly be used where the alleged annuity has been purchased for money and the capital has gone and has ceased to exist (per WATSON, B., 28 L.J.Ex. at p. 109), and counsel for the Crown urges that in the case now under consideration, the original capital of the assured, as represented by the premiums paid, has so gone, and that the subsequent payments to him, which were admittedly annual, were taxable as annuities; for the taxpayer, on the other hand, it was contended that the transaction was in the nature of a loan to the insurance company, and that the assured merely received back his own money in the form of annual payments, and counsel for the taxpayer relies on the provision of the policy which I have already quoted, that, in the event of the death of the nominee, the total amount of the premiums paid in respect of the insurance, after deduction of any amount which may have been received by way of annuity, but without interest, would be paid back to the assured. In the case where the nominee does not die, as was happily the case before us, para. 5 of the Case Stated admits that the amount which the taxpayer had paid to the society is to be returned to him together with compound interest of 3 per cent.

Were the contention of the Crown well founded, there is no doubt, on the authorities, that counsel for the Crown could successfully maintain that this was an annuity, for, other things being equal, the word "annuity" will be given its natural meaning—as we were informed the word appears in other parts of the Income Tax Acts; but regard must be had to the number of cases in the books which decide without any ambiguity that, where the substance of the transaction is in the nature of a loan, although the money is paid back by equal annual instalments with interest to the lender, yet, if his capital has not gone the mere fact of the repayments being annual does not make such annual payments taxable under the Income Tax Acts.

In the words of VAUGHAN WILLIAMS, L.J., in *Scoble* v. *Secretary of State in Council for India* (1) ([1903] 1 K.B. at p. 501):

> "This mode of payment, though called an annuity, is really the purchase of the railway by annual instalments, plus the interest on the amount remaining unpaid."

The decision of the Court of Appeal in *Scoble's Case* (1) was affirmed in the House of Lords and LORD HALSBURY said ([1903] A.C. at p. 302):

> "Looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words) it is a case in which, under powers reserved by a contract, one of the parties agrees to buy from the other party what is their property, and

A what is called an 'annuity' in the contract and in the statute is a mode of making the payment for that which had become a debt to be paid by the Government. That introduces this consideration: Was it the intention of the Income Tax Acts ever to tax capital as if it were income? I think it cannot be doubted upon the language and whole purport and meaning of the Income Tax Acts, that it never was intended to tax capital—as income at all events."

B It is not necessary, for the purpose of my judgment, further to consider the cases which have held on consideration of the substance of the transaction that to treat the annual payments as annuities would result in the taxation of capital—the principle is clear and, in my judgment, the present case falls within that class. Although the liability to repay to the taxpayer depends on the duration of other lives as to the time and method of C repayment, in any event, whether the nominee survives or not, equally the capital as represented by the premiums is to be returned to the assured.

Finally, we were pressed with the argument that this was not a case of loan but of true insurance, because the capital of the assured, as represented by the premiums, was in risk of loss until such time as all the premiums are paid—for the policy contains a proviso that further premiums, after the first, are to be paid to the society at the times D specified in the policy, and it is suggested that if they be not paid, the earlier premiums which had been paid would be lost, but, on consideration, I do not think that this argument is at all conclusive. If the nominee die before the obligation to pay the premiums has ceased, the money paid is to be returned to the assured equally as in the case where the nominee dies after the liability to pay the premiums has ceased or the annual payments back to the assured have begun—so that it is only in the case where, the nominee E being still alive, the assured fails to pay his premiums; a case which amounts to a breach of the conditions under which he makes the instalments of his premiums, that the right to the return of his money is imperilled, and such a risk, on failure to complete his contract, is but a term of the agreement and does not interfere with the essential nature of the transaction which is the advance of his capital.

I am, therefore, of opinion that the sum of money which has been paid under the F policy is not a taxable annuity, and, consequently, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Druces & Atlee.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL *v.* QUIXLEY

[KING'S BENCH DIVISION (Rowlatt, J.), January 16, 17, 1929]

[Reported 98 L.J.K.B. 315; 141 L.T. 288; 45 T.L.R. 191]

B [COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Sankey, L.JJ.), May 1, 2, 1929]

[Reported 98 L.J.K.B. 652; 141 L.T. 288; 93 J.P. 227; 45 T.L.R. 455; 27 L.G.R. 693]

Estate Duty—Passing—Property deemed to pass—Competency to dispose—Gratuity payable to teacher on death—Liability to duty—Finance Act, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 2 (1) (*a*), *s.* 22 (2) (*a*)—*School Teachers (Superannuation) Act*, 1925 (15 & C 16 *Geo.* 5, *c.* 59), *s.* 5 (1).

On April 11, 1927, a school teacher died and her legal personal representative became entitled to receive a "death gratuity" under the School Teachers (Superannuation) Act, 1925, s. 5 (1). On Aug. 11, 1927, the gratuity was paid, and estate duty was claimed in respect of it.

Held (by the Court of Appeal): the gratuity was property of which the teacher D was "competent to dispose" within the meaning of the Finance Act, 1894, s. 22 (2) (a), and, therefore, estate duty was exigible in respect of it by virtue of s. 2 (1) (a) of that Act.

Decision of ROWLATT, J. (infra), affirmed.

Notes. Referred to: *A.-G.* v. *Dickinson and Baron*, [1937] 2 All E.R. 485.

As to property of which the deceased was competent to dispose, see 15 HALSBURY'S E LAWS (3rd Edn.) 12 et seq.; and for cases see 21 DIGEST 8–9, *29–33*.

For the Finance Act, 1894, s. 2 (1) and s. 22 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 350, 382.

Information by the Attorney-General. The information alleged that Margaret Louis Quixley, of 28, Wemyss Road, Blackheath, in the County of Kent, spinster, died intestate F on April 11, 1927, and letters of administration to her estate were, on July 5, 1927, granted to her sister, the defendant, out of the Principal Probate Registry. The deceased was at the time of her death in the service of the Girls' Public Day School Trust as a secondary school teacher at the Blackheath High School, and had been in such service for a period of upwards of five years. Such service was "recognised service" within the meaning of the School Teachers (Superannuation) Acts, 1918 to 1925, and "contributory service" within the meaning of the School Teachers (Superannuation) G Act, 1925, and the contributions prescribed by the School Teachers (Superannuation) Acts, 1922, 1924 and 1925, were duly paid by and in respect of the deceased down to the time of her death. In the above circumstances a death gratuity became payable by the Board of Education to the defendant as the legal personal representative of the deceased under the School Teachers (Superannuation) Act, 1925, s. 5 (1), which (so far as material) H provides as follows:

"(1) Subject to the provisions of this Act the board shall grant to the legal personal representatives of a teacher who has been employed in service which is recognised or contributory service for periods amounting in the aggregate to not less than five years, of which not less than the prescribed part has been after the 31st March 1919 and who dies while in contributory service a death gratuity of a I sum not exceeding an amount equal to the average salary of the teacher after deducting from such average salary the amount of any additional allowance or short service gratuity previously paid to him . . . or of a sum not exceeding an amount equal to the amount of the additional allowance which the board might have granted to him if he had at the date of his death become permanently incapable of serving efficiently as a teacher whichever shall be the greater."

On Aug. 11, 1927, the Board of Education duly paid to the defendant as legal personal representative of the deceased a death gratuity of £429 17s. 11d. in pursuance of the

provisions of the School Teachers (Superannuation) Act, 1925, s. 5 (1). The informant charged that the said sum of £429 17s. 11d. must, for the purposes of estate duty, be deemed to have passed on the death of the deceased either under the Finance Act, 1894, s. 2 (1) (a), as being property of which the deceased was at the time of her death competent to dispose, or under s. 2 (1) (d) of that Act as being an interest purchased or provided by the deceased in concert or by arrangement with another person, and that in either alternative the said sum of £429 17s. 11d. was liable to estate duty and was aggregable with the other property passing on the death of the deceased for the purpose of determining the rate of duty.

The said death gratuity was mentioned, but not included in the Inland Revenue affidavit leading to the grant of administration to the defendant, and such affidavit comprised only personal estate of the net value of £822 4s. 9d. Estate duty at the rate of 2 per cent. on the said sum of £822 4s. 9d. (being the rate applicable under the Finance Act, 1925, to estates exceeding £500, but not exceeding £1,000 in value) was duly paid by the defendant. Estate duty also became payable on the death of the deceased on the value of one moiety of a freehold house held in joint tenancy by the deceased and a stranger, and the value of the entirety of such house had been agreed for the purposes of estate duty at £350. In the above circumstances the appropriate rate of duty payable in respect of the said sum of £429 17s. 11d. on the footing that it was aggregable with the rest of the deceased's property, was 3 per cent. (being the rate applicable under the Finance Act, 1925, to estates exceeding £1,000, but not exceeding £5,000 in value) and by reason of such aggregation further duty at the rate of 1 per cent. was payable on the said sum of £822 4s. 9d., on which duty at the rate of 2 per cent. only had been paid. The informant further charged that by virtue of the Finance Act, 1896, s. 18, as amended, simple interest at the rate of 4 per cent. per annum was payable on the amount of estate duty remaining unpaid from the date of the death of the deceased until payment thereof.

The informant, on behalf of His Majesty, prayed inter alia first that it might be declared that on the death of the deceased estate duty became payable under the provisions of the Finance Act, 1894, on the said sum of £429 17s. 11d., and that for the purpose of ascertaining the rate of duty thereon and on the rest of the deceased's estate such sum was aggregable with the deceased's estate; and secondly, that the defendant might be ordered to pay to the Inland Revenue Commissioners estate duty at the rate of 3 per cent. or other appropriate rate on the said sum of £429 17s. 11d., and further estate duty at the rate of 1 per cent. or other appropriate rate on the said sum, together with interest thereon at the rate of 4 per cent. per annum from the date of the death of the deceased until payment, and that if necessary an account might be directed to ascertain the amount of the estate duty and interest so payable.

The defendant contended that no duty was payable in respect of the said sum of £429 17s. 11d., and that in any event such sum was not aggregable with any other property of the deceased for the purpose of determining the rate of duty.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *J. H. Stamp* for the Crown.
Konstam, K.C., and *Cyril King* for the defendant.

ROWLATT, J.—In this case, which I have found by no means free from difficulty, it is sought to recover estate duty on the death of a lady, who was a teacher in a school, in respect of a death gratuity, as it is called, which became payable to her personal representative. This lady was a teacher under circumstances which under the School Teachers (Superannuation) Act, 1918, entitled her to the prospect of—I use the word "entitled," but what she was entitled to was only a prospect—or brought her within the ambit of a power in the Board of Education to grant a gratuity of this kind on her death. She had no right, she made no contribution, but there was a power conferring a gratuity. Then the effect of the School Teachers (Superannuation) Act, 1922, was that she remained without any further advantage than being in the category of persons who might receive such a grant, but she was compelled to make a contribution. Under the School Teachers (Superannuation) Act, 1925, matters were carried a step further because she or her executors or administrators were given in return for the compulsory contribution a right to receive this gratuity.

Counsel for the defendant says that the deceased was given no right because at every turn the decision of the Board of Education is final, but I do not conceive that that affects her position as having a right. The Board of Education are bound to determine, as I understand it, judicially and properly, and she certainly has a right to a determination of that kind and a right to the money, and the determination of the board ought to be in her favour and the board are to decide. Under those circumstances is this property which passes on her death? Reference has been made to the Finance Act, 1894, s. 2 (1) (a) and (d). Section 2 (1) (d), which comprises the common case of provisions being made by insurance, does not very readily fit this case, because an annuity or other interest purchased or provided by the deceased does mean something which she has voluntarily purchased or provided, and if it is imposed on her, I feel very great difficulty in saying that she has provided it by herself. If she had been left to herself, it is the last thing in the world that she would have done. I cannot say that she has done anything by concert or arrangement with any other person when she has not had a chance of refusing or concerting, or arranging anything. But I do not think the difficulty arises, because I am in favour of the Crown on s. 2 (1) (a), by virtue of the definition of competency to dispose. Reading sub-s. (1) (a) alone,

> "property passing on the death of the deceased shall be deemed to include property of which the deceased was at the time of his death competent to dispose,"

I should not be prepared to hold that that included property in the form of posthumous right to have money paid to her executors of which she could, of course, by will dispose prospectively after her death. I think that so far the mere words in para. (a) point to a disposition which a man can make at the time of his death in the sense of effectively while he is still alive and till the moment of death when the breath leaves his body—in other words, at his disposition inter vivos. But when I look at the definition in s. 22 (2) (a) of the Act of 1894 the matter is carried further, because the definition says:

> "A person shall be deemed to be competent to dispose of the property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of the property as he thinks fit whether by will or appointment."

In my judgment, taking those wide words, unless the expression "authority" can be limited to some specific authority, it seems to me that this case must be within them. The word "authority" is the widest word that can be found in the language for the purpose; "donee" is a technical word and "holder" is the very widest word to describe the person enjoying this authority. That must include the general authority which a person has by direction in his will to dispose of property to his executors or administrators. On those grounds this estate duty is payable in respect of this property as property which passes on the death.

Now comes the question whether it is aggregable, and that depends on s. (4) of the Act of 1894, i.e., whether it is property in which the deceased had an interest. I am bound to say that I think the deceased quite clearly had an interest. This is a case where money is payable by a government department, but for the purpose of testing whether she had an interest in it let us suppose that a right precisely of this kind was a right which a private body was bound to implement and was bound to hold security for to enable them to implement, and they said in the lifetime of the deceased that they repudiated their obligation and were bound to dissipate the security. There is not the least question, in my judgment, that a person standing in this position could maintain an action for a declaration and injunction to secure the maintenance of his posthumous right. Therefore it cannot be said that the deceased had not an interest during her lifetime. I do not think that s. 4 relates merely to an interest in possession or enjoyment, but includes an interest in the widest possible sense that could be used.

In those circumstances, therefore, I give judgment for the Crown on both points.

The defendant appealed.

Konstam, K.C., and *Cyril L. King* for the defendant.
The Attorney-General (*Sir Thomas Inskip, K.C.*) and *J. H. Stamp* for the Crown.

LORD HANWORTH, M.R.—This case raises an interesting little point under the Finance Act, 1894, by which death duties are charged on property. The facts are that the deceased died intestate, having been a school teacher, and she was ultimately at the time of her death interested in a sum which is called a death gratuity. She had been a teacher for some years. By the School Teachers (Superannuation) Act, 1918, a system was established for the profession with respect to the grant of superannuation allowances and gratuities to their legal personal representatives, and by s. 3 it was provided that death gratuities should be paid to the representatives

> "of any teacher who has been employed in recognised service for a period amounting in the aggregate to five years . . ."

But, under that Act, by s. 6, it is declared that

> "Nothing in this Act shall give any person an absolute right to any superannuation allowance or gratuity, and, except as in this Act provided, the decision of the board on any question which may arise as to, or which may affect, the application of this Act to any person . . . shall be final."

So far, while her service was continued, under the Act of 1918 she had no absolute right to a death gratuity to be paid to her legal personal representatives. The School Teachers (Superannuation) Act, 1922, made contributions compulsory, and an Act of 1924 enlarged the period during which the contributions were to be paid under this statutory power. But in 1925 there came an important Act which we have to consider, because it is under that Act, the School Teachers (Superannuation) Act, 1925, that the gratuity becomes payable to the deceased's representatives. There it is laid down in Part II, which deals with "Permanent provisions," the sorts of services in respect of which these gratuities may be granted, and one of those is contributory service, as defined by the Act. By s. 5 (1) it is declared:

> "Subject to the provisions of this Act, the board shall grant to the legal personal representatives of a teacher who has been employed . . . and who dies while in contributory service . . . a sum not exceeding an amount equal to the amount of the additional allowance which the board might have granted to him if he had at the date of his death become permanently incapable of serving efficiently as a teacher in contributory service, whichever is the greater."

It should be observed that that imposes a duty on the board; equally, there is a right on the part of the board to enforce the payment of the contributions. By s. 9 (4)

> "All sums payable by way of contributions under this section shall be paid to and recoverable by the board."

From and after, therefore, the operation of that Act there was a definite right on the part of the school teacher who fulfilled certain conditions—as this particular teacher did, by dying at the time when she was still in contributory service—to be paid a sum which is to be estimated and calculated under the provisions of the statute and of the regulations which are made in pursuance of it. That statute, therefore, gave at once a right to the person who fulfilled the conditions of service, and equally a right to the board to insist on the contributions being paid, and they were paid. I observe that, by the Board of Education Act, 1899, s. 7, it is provided that "The Board of Education may sue and be sued and may for all purposes be described by that name." In the Act of 1925 it is provided that this Act is to be read with the Act of 1918, and by the Act of 1918 "the Board" is defined as "the Board of Education."

It is quite clear, after consideration of all the various statutes, that the deceased was bound to make her contributions and, equally, she had a right to have paid to her personal representatives a sum which was called a death gratuity. No doubt the payment of that sum depended on the fulfilment of conditions. I have mentioned one condition, that she must have died in what is called, and defined as, contributory service, and there are others. These conditions would have to be fulfilled, or that right would not

have become absolute. In fact, in the present case, the conditions all were fulfilled, and her right at the time of her death was an absolute right to be paid. How much she was to be paid was a matter which was subject to the calculation to be made by the Board of Education, and subject to a maximum limit which could not be exceeded. The Board of Education had a duty and a right to determine absolutely what the sum was, but they had to determine it in accordance with rules and regulations which prescribed the calculation to be made. The result was that £429 17s. 11d. was awarded by an award of the board, dated Aug. 4, 1927. She had died on April 11, 1927, intestate, leaving an estate of some £800, and, on July 5, letters of administration of the estate had been granted to her sister. The Crown have claimed that this sum of £429 17s. 11d. is subject to estate duty. No question arises as to the £800. By the Finance Act, 1894, s. 1, there is charged to estate duty "All property, real or personal, settled or not settled, which passes on the death of such person." It is said, rightly, that if that section stood alone this sum of £429 would not be charged to the estate duty. For the purpose of fulfilling the word "passes," it has, I think, been decided in cases—and it would seem decided in accordance with common sense—that there must be at the death the property in existence which, on the death, continues and passes on to the successor. In this case there was a right, but it is difficult to say that the right had become and was, in the hands of the deceased teacher, a sum or property which actually passed on. Section 1, however, does not stand alone. It is interpreted to embrace wider words, which are found in s. 2. By s. 2 (1) it is provided:

> "Property passing on the death of the deceased shall be deemed to include the property following, that is to say: (a) Property of which the deceased was at the time of his death competent to dispose."

First of all, the point is raised that, at the time of the death of the deceased, she was not possessed of anything which falls within the word "property." Counsel for the defendant says she had an interest in what I may describe as the possibility of the receipt of a death gratuity. But she had an interest, and no more; an interest which might fail if certain conditions had not been fulfilled, e.g., if she had not died in the contributory service, and, more, it was an interest in a sum which was thereafter to be ascertained and which could not be definitely determined as of a particular value. Counsel says that the charge by s. 1 is "upon the principal value ascertained as hereinafter provided of all property" and that, in this case, she had a right of unascertained value to a sum, the quantum of which could not be determined until after her death.

It appears to me that that argument confuses the clear words of the sections. Counsel is compelled to admit that she had an interest and, I think, an interest, which he also admits, she could dispose of by will, but I will deal with that in a moment. She had an interest in a sum to be received by her personal representatives, of which the value was not known and which would have to be determined according to rules to which, so to speak, the deceased lady was no party. But, first of all, if the interest that she had falls within the term "property," we can leave outside, for the moment, the other matters brought into consideration in the argument. It appears to me that from and after the operation of the Act of 1925, whereby it was laid down that the board shall make a grant to the legal personal representatives of a teacher, that interest was not only an interest in an uncertain amount, but was a right which was within the term "property."

The fact that it was not determined in what sum her right would be quantified does not appear to me to offer any guide to the solution of the question, because the charge is on the principal value of all property ascertained as provided in the statute; it is not the principal value taken at its face value in figures, but it is as ascertained as provided in the statute. The statute will provide the mode of ascertainment of the value, but the primary question is: Is this right under the section a piece of property? In my view it is, and, being such, it primâ facie comes within the enlarging words in the Finance Act, 1894, s. 2 (1) (a). Be it observed that what we have to do is not to take the ordinary meaning of words, but we have to interpret "shall be deemed." Therefore, what might not at once appear to be rightly called "property passing on the death," is still to be property passing on the death, and as such, includes property of which the deceased was

A at the time of her death competent to dispose. It was, in my judgment, property. The other words "of which the deceased was at the time of his death competent to dispose," have been relied on for this reason: Section 7 (2) of the Act of 1918 provided that

> "Every assignment of or charge on and every agreement to assign or charge any superannuation allowance or gratuity shall be void, and on the bankruptcy of a person entitled to any such allowance or gratuity the allowance or gratuity shall not pass to any trustee or other person acting on behalf of the creditors."

B

Therefore, inter vivos, that section provided what may be called a protective clause in the case of bankruptcy. That section does not cover the question whether she was, at her death, competent to dispose. Those words are interpreted in s. 22 (2) (a) of the C Act of 1894 which provides:

> "A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property . . . and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exerciseable by instrument inter vivos or by will."

D

Counsel for the defendant was compelled to admit that the deceased could dispose of a sum ultimately to be received, or could dispose of this interest by her will, although he said she could not raise any money on it in the sense that there could not be an assignment of it while she was alive, but it would appear to me that to suggest that the deceased had no power to dispose of this sum by will would be to take away half the E merit of the gratuity on her decease. If and when it is received it must be subject to her will, and her absolute right is of benefit and of comfort to her, because she is, by means of that knowledge and that competence to dispose of it, able to make some provision for those who are the objects of her disposing power. It appears to me, therefore, that in view of the right which this lady had, she had power to dispose of the sum by will, and thus, when one looks at s. 1, the charging section of the Act of 1894 and s. 2, F which I have referred to as a section which sweeps into the charge under s. 1 property which is to be deemed for the purpose of s. 1 to be property passing on the death, and when one looks at the wide interpretation under s. 22 (2) (a), it is clear that this £429 17s. 11d. falls within the charge imposed by s. 1 of the Act of 1894. The difficulty that the amount was determined at a date after the deceased's death, when the award was made, does not appear to me to make any difference at all. Id certum est is the G old maxim, and, just as where a man is possessed of freehold property which is devastated by fire just before his death, but, being fully assured, he enables his executors to receive under a contract of fire insurance a sum which is to be estimated by an award made as a condition precedent to liability, so also here the mere ascertainment of the amount at a later date does not alter the nature of the right which the deceased had or prevent that right falling within the term "property," and, as such, chargeable to estate duty.

H For these reasons I think the judgment of Rowlatt, J., was right, and the appeal must be dismissed with costs.

LAWRENCE, L.J.—In my judgment the decision of Rowlatt, J., is right. The Finance Act, 1894, s. 1, imposes estate duty on all property which passes on the death. In order that the estate duty may be payable under that section, the property must I have a continuous existence before and after the death, and the possession or enjoyment of the property must pass from one person to another on the death. Section 2 deals with property which does not in fact pass on the death, and enacts that for the purposes of liability to estate duty that property shall be deemed to pass. In order that estate duty may be payable in respect of property under that section it is not necessary that there should have been a continuous existence of that property, nor is it necessary that it should pass from one person to another on the death. It would include property which comes into existence for the first time on the death of a person. Amongst the property which is so deemed to pass under s. 2 is "Property of which the deceased

was at the time of his death competent to dispose": (see sub-s. (1) (a) of s. 2). The words "competent to dispose" are further defined by s. 22 (2) (a), which enacts, so far as material for this case, that a person shall be deemed competent to dispose of property if he has such an interest therein or such general power as would enable him to dispose of the property, and the expression "general power" to dispose of the property is further defined in the second part of the same subsection, and it

> "includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument, inter vivos, or by will."

The sole question arising in this case is whether the death gratuity payable to the deceased was property of which the deceased was, at the time of her death, competent to dispose within the meaning of s. 2 (1) (a), and s. 22 (2) (a) of the Finance Act, 1894. Counsel for the defendant admitted, rightly, that the deceased was competent to dispose of this property by will as she might think fit. It seems to me that that admission carries the contention of the Crown the whole length. It is true that he has strenuously contended that this gratuity received from the Board of Education was not property at all. The difficulty I have in following that argument is that if it was not property at all she could not, by any possibility, have disposed of it by her will. The real truth of the matter is that it was property, the value or quantum of which could not be ascertained until after the Board of Education had decided the amount of the gratuity. Section 5 (1) of the Act of 1925 imposes an obligation on the Board of Education to make a death gratuity on conditions which, in this case, were fulfilled. The learned judge was, in my opinion, right in saying that there existed a right in the deceased to have paid to her legal personal representatives after her death a sum of money, and I think the learned judge was further right in holding that that sum of money, when so paid, was property and, being property, it was property of which the deceased was entitled to dispose as she thought fit by her will.

For these reasons I am of opinion that the appeal fails and ought to be dismissed with costs.

SANKEY, L.J.—I agree. The question to be answered here is: had the deceased at the time of her death such an interest in property as enabled her to dispose of the property by will? In my view the answer must be—that, indeed, I gather was admitted by the defendant—in the affirmative. She had such an interest, and she had power to dispose of it by will, but counsel for the defendant took a point in limine which savours rather more of metaphysics than of law; he contended that, at the teacher's death, no property in fact existed, but only a conditional right or interest which had not been ascertained or quantified. I think this is a fallacy. It must be remembered that the definition of "property passing on the death" is an artificial one; see the Finance Act 1894, s. 2 (1): "Property passing on the death of the deceased shall be deemed to include," and see also s. 22 (2) (a) of the Act. The deceased had an absolute right to be paid £x under the Teachers' Superannuation Act, 1925, s. 5, a right which she was given in return for compulsory contributions. The fact that the quantum remains to be ascertained does not make the right any the less property within the artificial meaning of "property passing on the death" laid down in the Finance Act.

I think the learned judge's judgment was correct, and this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Reynolds, Sons & Gorst; Solicitor of Inland Revenue.*

[*Reported by* J. H. G. Buller, Esq., *and* Geoffrey P. Langworthy, Esq., *Barristers-at-Law.*]

A

Re KING'S THEATRE, SUNDERLAND. DENMAN PICTURE HOUSES, LTD. *v.* THOMPSON AND COLLINS ENTERPRISES, LTD.

B [CHANCERY DIVISION (Astbury, J.), January 11, 17, 18, 1929]

[Reported [1929] 1 Ch. 483; 98 L.J.Ch. 109; 140 L.T. 463]

Copyhold—Enfranchisement—Vesting of legal estate—Law of Property Act, 1922 (12 & 13 *Geo.* 5, *c.* 16), *Sched. XII, para.* (8) (*b*)—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sched. I, Part II, para.* 3.

C By a surrender and admittance dated July 5, 1802, B.A. and W.B. were admitted to certain copyhold land, on trust to raise and pay to H., his heirs and assigns the annual rent of £7 10s. and subject thereto in trust for W., his heirs and assigns. B.A. survived W.B., and on B.A.'s death his grandson, H.C.A., became his customary heir. The land was divided into three parts, called, A, B and C. In 1902 and 1904 H.C.A. was admitted tenant of A and C, but there had been no D admittance to B since 1802. H.C.A. died in 1923, having appointed his wife D.A. his executrix. The equitable title to the whole land had become vested in 1919 in T. and C. as joint tenants subject to the rentcharge. The equitable title to the rentcharge had become vested in G.A. as tenant for life. On Jan. 1, 1926, the land was enfranchised under the provisions of the Law of Property Acts, 1922, and 1925. T. and C. on Mar. 24, 1927, conveyed the land to a company in fee simple, E subject to the rentcharge and any manorial incidents. The company agreed to sell the land in fee simple, but the purchasers objected that the legal estate in the land was vested not in the vendor, but as to A and C in D.A., as executrix of H.C.A., and as to B in the customary heir of B.A.

Held: although by virtue of para. (8) (b) of Sched. 12 to the Act of 1922 on the enfranchisement of the land D.A. was the person in whom primâ facie land A and C F would vest, and the customary heir of B.A. would have land B vested in him, such vesting was merely transitory, and under the Law of Property Act, 1925, Sched. I, Part II, para. 3, the legal estate in all the land vested in T. and C., displacing the vesting under the Act of 1922. The company, therefore, could pass a good title to the purchasers, subject to the rentcharge, which from the commencement of the Act of 1925 constituted a legal interest vested in G.A.

G **Notes.** As to the transitional provisions of the Law of Property Act, 1925, see 27 HALSBURY'S LAWS (2nd Edn.) 619–637, paras. 1091–1114; and as to the general statutory enfranchisement of copyhold land, see 8 HALSBURY'S LAWS (3rd Edn.) 340–351, paras. 637–650.

Adjourned Summons by Denman Picture Houses, Ltd., the purchasers of a piece of H land at Sunderland on which the King's Theatre, Sunderland, had been erected, for the decision of the court whether, under the effect of the enfranchisement of copyholds by the Law of Property Acts, 1922, 1924 and 1925, a good title to the piece of land had been shown by the vendors, Thompson and Collins Enterprises, Ltd. The piece of land was formerly copyhold of the manor of the Rectory of Bishops Wearmouth, of which manor the Ecclesiastical Commissioners for England and Wales were the lords.

I The agreement between the vendors and the purchasers for the sale of the piece of land was dated Mar. 14, 1928. On delivery of the abstract the question at issue on this summons was raised by the purchasers. As both parties were willing that the purchase should be completed at once, the piece of land was conveyed to the purchasers on July 25, 1928, on the understanding that this summons should be issued, and that, if the purchasers' contention was upheld by the court, the vendors would do all that was necessary to complete a good title, and that the costs of the summons should be borne by the party against whom the decision was made.

The facts, and the questions at issue in the summons, are set out in the judgment.

Harold Christie for the plaintiffs, the purchasers. A

J. M. Baily for the defendant vendors.

F. D. Morton for the defendant Mrs. Abbs, the person in whom the legal title to part of the piece of land was vested.

McAndrew for the defendant George Aylmer, the equitable tenant for life of a rent-charge on the land.

Donald Cohen (*W. F. Waite* with him) for the Ecclesiastical Commissioners, the lords B of the manor.

Christie in reply.

ASTBURY, J.—This is an application by purchasers of property at Sunderland in the county of Durham, in the nature of a vendor and purchaser summons, taken out under a provision in the recent Law of Property Acts, for the purpose of ascertaining whether the C vendor defendants, Thompson and Collins Enterprises, Ltd., have made a title, subject to certain manorial incidents and rights, to the property sold by the vendors to the purchaser. The property was originally copyhold property which has been enfranchised under the new statutes, and the summons raises or involves the construction of a considerable number of sections in the Law of Property Acts, 1922, 1924 and 1925, which are by no means easy to construe; in fact it leads to one of the many mazes D created by these statutes. In order to attempt to construe the relevant sections of these statutes, it is necessary in the first place to appreciate exactly how the title to this property stood prior to the coming into operation of these statutes.

The land in question has for the purpose of convenience been divided into three portions, which are referred to upon the plan which has been put in, and marked A, B and C. I will first attempt to deal with the legal estate in this property down to the E date of the commencement of these statutes, or, in other words, down to the date when the statutes came into operation. By a surrender of July 5, 1802, the whole of those three plots, A, B and C, were surrendered to one Bryan Abbs and one William Bell on trust to pay thereout a perpetual annual sum or rent of £7 10s. to one John Harrison, his heirs and assigns, with powers of mortgage and sale thereof, and subject thereto on trust in effect for one John Wilson, his heirs and assigns. The document under which F Bryan Abbs and William Bell were entered on the court rolls of the manor declared that the land should be on the trusts and to and for the intents and purposes thereinafter declared, that is to say on trust that they the said Bryan Abbs and William Bell and the survivor of them and the heirs and assigns of such survivor should out of the rents and profits of the land, or by mortgage or sale, or by distress and sale of goods, or by all or any of the same ways and means raise and levy and pay to John Harrison, his heirs and G assigns, for ever the annual rent or yearly sum of £7 10s., and, subject and without prejudice to the trusts thereinbefore declared, the same piece or parcel of land should be on such trusts and to and for such intents and purposes as John Wilson, who had agreed to purchase the property, by his last will and testament in writing should direct or appoint, and in default of such direction or appointment and in the meantime until the same should be made and take effect, in trust for John Wilson, his heirs, sequels in right H and assigns. William Bell predeceased Bryan Abbs. Bryan Abbs then died leaving two sons, George Cooper Abbs, who died intestate without issue on Mar. 28, 1878, and Cooper Abbs, who died intestate on Feb. 19, 1872, leaving Henry Cooper Abbs his eldest son. From 1802 there has been no admittance on the court rolls of the manor of the plot B which formed part of the land the subject-matter of the first surrender, but by an admittance in 1902 Henry Cooper Abbs was admitted as customary heir of Bryan Abbs I to the property marked A on the plan. In the case of this admittance there was no reference made to the trusts on which the property was held. By a further admittance in 1904 Henry Cooper Abbs, as such customary heir of Bryan Abbs, was admitted to plot C, and in the case of that admittance it was made subject to the trusts of the document of 1802. By his will dated Feb. 28, 1912, Henry Cooper Abbs appointed the defendant, Mrs. Abbs, his sole executrix; he died on Dec. 14, 1923, and his will was proved in 1924. Apart from the new legislation, the property would descend, in the circumstances that I have mentioned, to the customary heir on admittance. That is

A all that is known with regard to the legal estate in the plot consisting of the portions marked A, B and C on the plan.

With regard to the equitable interest in the land, the interest of John Wilson is traced in the evidence as to all three plots, A, B, and C, to George Black and Alfred Black as tenants in common, who by deed dated Nov. 1, 1919, conveyed their equitable interest in the plots A, B and C to Messrs. Thompson and Collins and their heirs as joint tenants
B subject to the £7 10s. rentcharge. On Mar. 24, 1917, Thompson and Collins conveyed this estate to the vendors, Thompson and Collins Enterprises, Ltd., and on July 25, 1928, the vendors conveyed the property to the plaintiffs, subject again to this annual rentcharge, and it is in respect of this last conveyance, among other things, that the question of title to this property, subject to the rentcharge, depends.

With regard to the rentcharge, the equitable title to this rentcharge has been traced,
C and is now in the defendant, George Aylmer, as tenant for life, in respect of which a vesting deed has been executed and Settled Land Act trustees appointed. So that, as far as this property is concerned, apart from the new property Acts, the legal title to the plots A and C is in Mrs. Abbs as sole executrix of Henry Cooper Abbs, and the legal title to plot B is in the customary heir of Bryan Abbs whoever he may be. The equitable interest in the property is now in the plaintiffs subject to the rentcharge, the equitable
D title to which is in the defendant Aylmer for life. In these circumstances the plaintiff purchasers have taken out this summons, and the defendants to the summons are the vendors, Thompson and Collins Enterprises, Ltd., Mrs. Dagmar Abbs as the personal representative of Henry Cooper Abbs, George Aylmer the equitable tenant for life of the rentcharge prior to the Acts, and the Ecclesiastical Commissioners for England and Wales, who are the lords of the manor.

E Apart from these "simplifying" statutes the matter would be perfectly plain, but it is now necessary, having regard to the effect of the recent legislation, to ascertain whether a proper title has been made of the land, subject to the rentcharge, to the plaintiffs, or whether some further or other title can be required by them in order to complete their legal estate. The application is made under the proviso to para. (8) of Sched. XII to the Law of Property Act, 1922. Before attempting to deal with the sections of the
F statutes, principally 1922 and 1925, which would appear to govern the question which I have to decide, it is perhaps convenient to refer to certain general provisions of these statutes in order to be better able to understand the more relevant sections on which this matter depends. By s. 207 (c) of the Law of Property Act, 1925, it is provided that

> "References in any document to any enactment repealed by this Act shall be construed as references to this Act or to the corresponding enactment in this Act,"

G and that would appear to result in this, that in respect of the repealed provisions of the Act of 1922 the corresponding enactments in the Act of 1925 are to be regarded. By s. 202 of the Act of 1925 it is provided:

> "For giving effect to this Act, the enfranchisement of copyhold land . . . effected by the Law of Property Act, 1922, as amended by any subsequent enactment, shall be
H deemed to have been effected immediately before the commencement of this Act."

That refers to s. 128 of the Act of 1922, which provides that:

> "As from the commencement of this Act, every parcel of copyhold land shall by virtue of this Act be enfranchised and cease to be "copyhold, and the land so enfranchised is referred to as 'enfranchised land.'"

I Then, in sub-s. 2 of that section, there is a proviso that nothing in the Act shall affect certain manorial incidents therein referred to. So that now the land becomes freehold, subject, however, to the old manorial incidents, including the mineral rights. This land, therefore, which is the subject-matter of this summons, and which is of very considerable value, was freehold land at the time when it was conveyed to the defendant vendors. I will now attempt, whether successfully or not I do not know, to ascertain what effect these two statutes or the Law of Property Acts generally had from the date of their coming into operation on the title to this property, solely with the view to attempting to decide whether the plaintiffs have already received a sufficient title, a

good title, subject to the rentcharge, and if not, in whom the title necessary to complete their rights is now vested. In Sched. XII to the Act of 1922 it is provided, in para. (2):

> "The enfranchisement shall not, except as in this Act mentioned, affect the rights or interests of any person in the enfranchised land under a will, settlement, mortgage or otherwise by purchase, but those rights and interests shall (subject to the provisions of Part I of this Act) continue to attach upon the land enfranchised in the same way as nearly as may be as if the freehold had been comprised in the instrument or disposition under which that person claims, and accordingly the enfranchised land shall (save as expressly provided by this Act) be subject to the same or corresponding trusts, powers, executory limitations over, rights and equities (if any) and to the same or corresponding incumbrances and obligations as affected the land immediately before the commencement of this Act,"

and by sub-s. 5 of the same Schedule,

> "An enfranchisement by virtue of this Act of any land (including any mines or minerals hereinafter mentioned) shall not affect any right of the lord or tenant in or to any mines, minerals, &c., whether in or under the enfranchised land or not"

and so on.

Those being the general provisions with regard to the enfranchisement of copyhold lands, I now turn to the sections of the two Acts relied on by the vendors and purchasers in this case. By para. (8) (b) of Sched. XII to the Act of 1922 it is provided as follows:

> "If there is no copyholder in fee [and that was the case in the present matter at the relevant date] the freehold estate in fee simple shall (subject as provided in this schedule) vest in the person who, immediately before the commencement of this Act, had the best right to be admitted as copyholder in fee, otherwise than as mortgagee, but such person shall (save as hereinafter provided) be personally liable to pay the fines and fees which would have been payable by him on admittance."

Thereafter where, at the date when the Act came into operation, there was no copyholder in fee, as was the case here, the land is to vest in the person who, immediately before the commencement of the Act, had the best right to be admitted as copyholder in fee subject to the qualifications. If the clause had ended there, that person would have been, as I presume, in this case Mrs. Abbs as the representative of Henry Cooper Abbs as to plots A and C, and the customary heir of Bryan Abbs, if and when he could be found, as to plot B, but the clause does not end there, because it proceeds:

> "and if the last person who was admitted as copyholder in fee (being a trustee) has died before the commencement of this Act (whether or not having disposed of the land by will), his personal representative, if any, shall be deemed to have had a better right to be admitted than the devisee or customary heir."

I think that on the true construction of that clause it means that if the person who had the best right to be admitted happens to have been a trustee (which was the case here) then his personal representative, if any, shall be deemed to have had a better right to be admitted than the devisee or customary heir. That, I think, has the effect that with regard to A and C Mrs. Abbs, as the legal personal representative of Henry Cooper Abbs, had a better right to be admitted than the customary heir of Bryan Abbs, but, as there is no personal representative of Bryan Abbs with regard to the portion of the land marked B on the plan, there being no personal representative having a better right, the person entitled to be admitted within this section would, I think, be the customary heir of Bryan Abbs. If I am right about this, the effect of para. (8) (b) of Sched. XII to the Act of 1922 is that in the circumstances of this case, on the enfranchisement of this land by the statute, Mrs. Abbs was the person having the best right to be admitted as copyholder in fee, she being a trustee with regard to plots A and C, and the customary heir of Bryan Abbs, if and when he could be found, was the person having the best right to be admitted as copyholder in fee, again as trustee, with regard to plot B.

If the matter stopped there, it would be simple enough, but this vesting in these trustees under sub-s. (b) appears to me, having regard to the later provisions of these statutes, to be a merely transitory vesting, for the purpose of bringing into operation other sections of the Acts. Under para. (8) (d) of Sched. XII it is provided:

> "Where at the commencement of this Act the copyhold land was subject to interests affecting or derived out of the fee simple which are under this Act capable of subsisting at law, but immediately after such commencement were not capable of being overreached by virtue of a subsisting trust for sale or a settlement, the persons entitled shall . . . take legal estates in the enfranchised land corresponding to their former equitable or other interests."

It is contended by the vendors that under this subparagraph the vendors took a legal estate in the enfranchised land subject to the rentcharge, and that the owner of the rentcharge took a legal interest in his rentcharge. There is a good deal to be said for this view. I am inclined to think that this rent was an interest "affecting or derived out of the fee simple" because it becomes a fee simple under the Act "capable of subsisting at law," and that it was not capable of being overreached by virtue of a subsisting trust for sale or settlement. If that is so, the rentcharge became vested in the defendant Aylmer as legal tenant for life on the coming into operation of these statutes, but I feel a difficulty in holding that this subparagraph operated so as to transfer the legal estate in the land subject to a rentcharge to Thompson and Collins in the events which I have stated. Having regard to subsequent sections which I shall have to refer to, I am inclined to think that under para. (8) (b) of Sched. XII the land therein dealt with will not finally vest in the person having the best right to be admitted within the meaning of that paragraph, unless this right brings him, either by beneficial ownership or otherwise, within the class of persons who are to take the fee simple as provided for in Part II of Sched. I to the Act of 1925. Turning now to Part II of Sched. I to the Act of 1925, which deals with the vesting of legal estates, para. 3 of Part II provides as follows:

> "Where immediately after the commencement of this Act any person is entitled, subject or not to the payment of the costs of tracing the title and of conveyance, to require any legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in him, such legal estate shall, by virtue of this Part of this Schedule, vest in manner hereinafter provided."

Immediately after the commencement of this Act, if para. (8) (b) of Sched. XII of the earlier Act applies, Mrs. Abbs and the customary heir of Bryan Abbs became entitled under the operation of that paragraph to be admitted as copyholders in fee in trust, with the result that the section vested the property in them but they were not, and never had been, trustees for sale, and under the provisions of para. 3 of Part II of the Act of 1925 it appears to me that immediately after the commencement of the statute Thompson and Collins, who were the beneficial owners as joint tenants of the land subject to the rentcharge, were the persons entitled, within the meaning of this paragraph, to require a legal estate which was not vested in any trustees for sale to be conveyed to or otherwise vested in them.

The purchaser, who only wants a good title in this case, suggests that that is not so, because he contends that Thompson and Collins were not entitled, in the circumstances, which I have attempted to detail, to require the estate of their trustees to be vested in them. Let me consider this for a moment. From 1802 this property has been dealt with consistently and from time to time by the beneficial owners of these interests, that is, beneficial owners of the rentcharge and the beneficial owners of the property subject to the rent; the people who held as trustees for them, one of whom was admitted so far back as 1802, and the others of whom were admitted in 1902 and 1904, were mere trustees without any duties to perform, if and provided that the persons for whom they held were entitled to obtain absolute legal interests. If these Acts had not been passed these trustees would, I think, still have held the land in trust, but the effect of these

statutes seems to me to be that the owner of the rentcharge became entitled to be clothed with the legal estate in his rentcharge, and the owners of the land subject to the rentcharge similarly became entitled to be clothed with the legal estate of that land, and if that is so, and I think that it is so, then as soon as that effect comes about they would be entitled to call for any outstanding legal estate in their trustees, who no longer have any trusts to perform. I agree that there are difficulties in arriving at this conclusion, just as there are many difficulties in arriving at conclusions under many other sections of these "simplifying" Acts, but on the whole I have come to the conclusion, and it seems to me to be the one which carries out the legal and beneficial rights of these parties in the most direct and best manner, that under para. 3 of Part II of Sched. I to the Act of 1925 Thompson and Collins became entitled, having regard to the many other provisions of these statutes, and in the events which happened, to require the legal estate outstanding in their trustees prior to the time when these Acts operated to be conveyed to or vested in them as soon as they had obtained their rights under this statute, which they obtained on its coming into operation. If that is correct then the statute itself vests such legal estate in these people and displaces the estate in their trustees which was obtained, but only transitorily obtained, under para. (8) (b) of Sched. XII to the Act of 1922.

With regard to the rentcharge, para. 4 of Part II of the same Sched. I to the Act of 1925 provides:

> "Any person who, immediately after the commencement of this Act, is entitled to an equitable interest capable of subsisting as a legal estate which has priority over any legal estate in the same land, shall be deemed to be entitled for the foregoing purposes to require a legal estate to be vested in him for an interest of a like nature."

That, coupled with para. 3, seems to me to have the effect that the owner of this perpetual rentcharge, which took priority over the interest of the owners of the land subject to the rentcharge, was entitled to an interest capable of subsisting as a legal estate with priority over any legal estate in the same lands, and that he became entitled to require the legal estate to be vested in him, which the Act in consequence vests in him accordingly. With regard to this legal estate I am not perfectly clear in my own mind whether the now legal interest of the owner of the rentcharge ought to be deemed to be secured to him under sub-para. (8) (a) of Sched. XII to the Act of 1922, or under para. 3 and para. 4 of Part II of Sched. I to the Act of 1925. I do not think that it matters; in either event he has become, in my judgment, entitled to a legal rentcharge which the Act vests in him.

If that is right, and I feel a little optimistic that it is, then the title which has been given to the plaintiffs is a sufficient title to the land subject to the rentcharge, and I understand that they have made arrangements with the owner of the rent to pay him out and get rid of him, taking the land free from any such charge. But it now remains for me to attempt, if I can, to deal with the purchasers' answer, if it be an answer, to the contention of the vendors which I have attempted to set out and explain. Under s. 36 of the Act of 1925 it is provided:

> "Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity."

As applied to the facts of this case, that is an extraordinarily difficult section to construe. It does not appear as part of the transitory provisions of this statute. It is a section standing by itself and of general application, and as applied to the present case it might possibly apply in respect of this property to three different points of time: First, to the point of time immediately before the commencement of the Act; secondly, to the point of time after para. (8) (b) of Sched. XII to the first Act had vested the property in the trustees, or, thirdly, to the point of time after Part II of Sched. I to the Act of 1925 had taken the property out of those trustees and vested it beneficially in the parties

beneficially entitled. I do not think that the section can be held to apply to the first point of time, nor do I think that it can be held to apply so as to prevent the operation of Part II of Sched. I to the Act of 1925 to do the work that the schedule provides that it shall do—namely, to effect the final vesting in this case of the property in the beneficial owners as distinct from the transitory trustee owners under para. (8) (b) of Sched. XII of the Act of 1922. If this is right, the effect of Sched. XII to the Act of 1922 and Part II of Sched. I to the Act of 1925 was, in the present case, to give the legal estate in the rentcharge to the defendant Aylmer, the life tenant, and to give the legal estate in the freehold in fee to Thompson and Collins in the way I have tried to explain. If that is so, it seems to me only reasonable to read s. 36 as applying to property in respect of which the Act has done its work, and if that is so, then in the present case, on the construction that I have felt bound to give to these statutes, the legal estate, not being settled land, was beneficially limited to Thompson and Collins as joint tenants, and as such was held by them "on trust for sale in like manner as if they had been entitled as tenants in common." As they were absolute owners of the freehold of this property the owner of the rentcharge having his independent legal estate in his rentcharge, the fact that Thompson and Collins under s. 36 are to hold the land after the commencement of this Act on trust for sale can mean nothing more than this, that they have a trust for sale in respect of property in which they are absolutely interested, and in which no other person or persons has or have any right, interest or estate, the legal estate in the rentcharge being something paramount to and independent of the legal estate in the land. If that is so, Thompson and Collins were still further able to make a title, as they have purported to make, to their purchasers, the present vendors, which they of course in that case could pass to the plaintiffs. But the plaintiffs contend, and I am not sure that I quite follow it, that by reason of s. 36 and in the events which have happened the legal estate in this land was held in trust for Thompson and Collins under s. 36. That could only be so if the effect of para. (8) (b) of Sched. XII to the Act of 1922 vested the property in Mrs. Abbs and the customary heir of Bryan Abbs, without what is in effect the divesting provisions of Part II of Sched. I to the Act of 1925. I have already expressed my view that that is the effect of the Act of 1925, and that the legal estate given by para. (8) (b) of Sched. XII is a mere transitory vesting, which the Act itself provides shall pass on to the beneficial and rightful owners. Therefore, I do not agree with the purchasers' contention that this land was, after the Act came into operation, ever held in trust for Thompson and Collins within the meaning of s. 36. In my opinion they got the legal estate vested in them under Part II of Sched. I to the Act in which this section appears.

Then the purchasers contend that in some way or another Part IV of Sched. I to the Act of 1925 is brought into operation, having regard to the language of s. 36. I am unable to agree with that contention. Part IV says, in s. 1:

> "Where immediately before the commencement of this Act land is held at law or in equity in undivided shares vested in possession."

then the following provisions which occur shall take effect. In my judgment, having regard to the construction I have placed on these provisions, this land was never held "at law or in equity in undivided shares vested in possession," and that being so, in my opinion, Part IV does not apply.

I ought to add one further remark with regard to plot B of this land. As to plots A and C the person in whom they were vested is known. As to plot B the person in whom that was legally vested before the commencement of this Act was the customary heir of Bryan Abbs, and he is not known. It seems to me quite immaterial whether he is known or can be found or not, because he only comes in, as Mrs. Abbs comes in, under para. (8) (b) of Sched. XII to the Act of 1922 as a conduit pipe to enable the interest in the property to be vested in somebody else the moment the interest of the person under para. (8) (b) is ascertained and arises. That being so, I am of opinion that on this summons the question must be answered substantially in accordance with para. 1 (a) of the summons, and I will declare that on the coming into force of these property Acts

and, subject to the manorial incidents affecting the land and to the rights reserved and preserved by para. (5) of Sched. XII to the Act of 1922, the defendant George Aylmer became entitled to a legal rentcharge of £7 10s. charged upon the land in question, and that subject thereto the land vested as freehold in Thompson and Collins as joint tenants for a legal estate in fee simple. I do not think any further questions need be answered.

Solicitors: *Laurance Messer & Co.*; *Sharpe, Pritchard & Co.* for *Charles Shortt & Co.*, Newcastle-upon-Tyne; *Crossman, Block, Matthews & Crossman*, for *McKenzie & Co.*, Sunderland; *Sayer, Ledgard & Smith*, for *Wilsons*, Durham; *Mills, Jennings, White & Foster.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

GOWERS *v.* WALKER

[Chancery Division (Eve, J.), December 19, 1929]

[Reported [1930] 1 Ch. 262; 99 L.J.Ch. 138; 142 L.T. 404; 46 T.L.R. 150; 74 Sol. Jo. 41; 15 Tax Cas. 165; [1929] B. & C.R. 125]

Income Tax—Company—Receiver—Assessment of tax after appointment—Preferential payment of one year's assessment—"Assessed . . . up to April 5"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 60), *s.* 107, s. 209 (1).

On Nov. 15, 1927, a bank appointed a receiver of a company's property under an instrument whereby the bank was entitled to a floating charge on some of the company's assets and a specific charge on others as security for advances by the bank. On May 1, 1928, assessments were made on the company to income tax for five years from April 6, 1922, to April 6, 1927, and the commissioners claimed that under the Companies (Consolidation) Act, 1908, s. 107 and s. 209, one year's assessment (that for 1923–24) ought to be paid in priority as a preferential debt.

Held: the commissioners were entitled to the priority which they claimed, because the words "assessed on the company up to April 5" in s. 209 (1) of the Act of 1908 did not mean "before April 5," and so require the assessment to be made before that date, but related to the period in respect of which the income tax was assessed, whether the assessment were made before or after that date.

Notes. The Companies (Consolidation) Act, 1908, s. 107 (1) and s. 209, were re-enacted by the Companies Act, 1948, s. 94 (1) and s. 319.

Applied: *Re Cockell, Jackson* v. *A.-G.* (1932), 76 Sol. Jo. 495; *Re Pratt, Ex parte I.R. Comrs.* v. *Phillips*, [1950] 2 All E.R. 994.

As to the preferential payment of income tax in liquidations, see 20 Halsbury's Laws (3rd Edn) 713, and ibid, vol, 6, p. 662. For the Companies Act, 1948, s. 94 and s. 319, see 3 Halsbury's Statutes (2nd Edn.) 532, 694.

Special Case stated for the opinion of the court under R.S.C., Ord. 34.

The following facts are taken from the judgment:

On Nov. 15, 1927, the defendants, the District Bank, under the powers contained in an instrument of charge dated Aug. 8, 1924, whereby the defendant company, Bagley and Wright Manufacturing Co. (1919), Ltd., charged as security for advances by the bank by way of specific security certain hereditaments and premises, and by way of floating charge its undertaking goodwill, uncalled capital, and other general assets, appointed the defendant, Vernon Walker, receiver of the defendant company's property, and he accordingly took possession thereof on the same day. On May 1, 1928, assessments were made on the defendant company for income tax for five years from April 6, 1922, to April 6, 1927, and the commissioners claimed that under ss. 107 and 209 of the Companies (Consolidation) Act, 1908, one year's assessment, that for the year 1923–24, ought to be paid in priority as a preferential payment.

The receiver had moneys in hand sufficient to make the payment, but disputed the claim on the ground that no right to priority existed in a case where the tax had not been already assessed at the date when the receiver was appointed or possession was taken. He supported this attitude by a reference to s. 209. That section fixed the payments which in a winding-up were to be made in priority to all other debts, and s. 107 extended its provisions to cases where there was no winding-up, but where a receiver had been appointed or possession had been taken on behalf of creditors entitled to a floating charge. The receiver's point was that the expression "income tax assessed on the company up to the 5th April" must be read as referring to tax actually assessed before the date mentioned, and not as extending to tax for the period up to that date, if assessed subsequent to that date.

The Companies (Consolidation) Act, 1908, s. 209, provides:

"(1) In a winding-up there shall be paid in priority to all other debts: (a) All parochial or other local rates due from the company at the date hereinafter mentioned and having become due and payable within twelve months next before that date and all assessed taxes, land tax, property or income tax assessed on the company up to April 5 next before that date and not exceeding in the whole one year's assessment . . . (5) The date hereinbefore in this section referred to is (a) In the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily the date of the winding-up order; and (b) in any other case the date of the commencement of the winding-up."

The Attorney-General (*Sir W. Jowitt, K.C.*), *J. H. Stamp*, and *R. P. Hills* for the plaintiffs. The amount deducted for income tax in 1923–24 was the property of the Crown although not actually ascertained until 1928. It, therefore, never passed to the receiver. The words "assessed up to" relate to the period ending on the relevant date.

Jenkins, K.C., and *S. C. Agnew* for the defendants. The amount could not be sued for at the date when the receiver took possession. There is no debt for assessed taxes before assessment so that there can be no preferential payment in such a case.

Stamp replied.

Cur. adv. vult.

Dec. 19. **EVE, J.,** stated the facts and continued: This contention seeks to impose on the expression "up to the 5th April," a construction equivalent to that which it might bear if the word "before" were substituted for the words "up to." I can see no good grounds for supporting this view. The expression "up to" is a well-known one in accountancy, and when books are said to be written up, balances to be struck and accounts to be vouched up to a particular date no implication arises that any of the operations were completed before or even on the particular date, the true meaning being that the particular date is the one up to which the state of account has been ascertained. So here, income tax assessed up to a particular date is not in my opinion confined to the tax actually assessed before that date, but includes all tax assessed up to that date, whether the assessment was made before or after that date. Nor can I see anything in the provisions of s. 209 to lead to the conclusion that anything else was intended. The section is an exhaustive enumeration of preferential payments, qualified in each case by reasonable limitations on the quantitative amount that is to be preferred. Thus under para. (a) of sub-s. (1), parochial or other local rates, land tax, and property or income tax are all to be treated preferentially. The same observations apply under para. (b) to all wages and salaries of clerks and servants, and under para. (c) to all wages, whether payable for time or piece work to any workman or labourer, but in each case a moderate restriction is imposed on the amount for which priority can be asserted. In the case of rates only so much as remains unpaid on the date fixed by sub-s. (5) of rates which became due and payable within twelve months next before that date, and in the case of income tax, not more than one year's assessment of the tax assessed on the company up to the end of the financial year next before that date In the case of wages and salaries the limitations are twofold, in that the services must have been rendered within a fixed time before the relevant date and the wages or salaries must not

exceed a prescribed sum. The income tax is the only item in the ascertainment of which a special date is substituted for the relevant date and the reason for this is obviously to avoid the necessity for apportionment.

Except the statutory limitation, I can detect in the section nothing which reduces the right of priority in respect of income tax to income tax actually assessed before the date up to which it is to be assessed and, accordingly, I answer the question submitted in the affirmative.

Solicitors: *Solicitor of Inland Revenue*; *Hickson & Parish*, for *Salter, Heelis, Sandbach, Marriott Smiths & Irvine*, Manchester.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

MILLS *v.* JONES

[COURT OF APPEAL (Lord Hanworth, M.R., Greer and Russell, JJ.), November 1, 2, 1928]

[Reported 140 L.T. 183; 45 T.L.R. 31]

[HOUSE OF LORDS (Lord Buckmaster, Viscount Dunedin, Viscount Sumner, Lord Blanesburgh and Lord Atkin), December 9, 1929]

[Reported 142 L.T. 337; 46 T.L.R. 118; 14 Tax Cas. 769]

Income Tax—Annual payment—Royalties—Patent—Payment for past, present and future user—Whether whole payment taxable—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D.*

The taxpayer was the patentee under letters patent relating to the Mills bomb. The bomb was manufactured by the British Government on a large scale during the war of 1914–18, and the Royal Commission on Awards to Inventors awarded to the taxpayer £37,000 "in respect of all user, past, present and future, by or for the purposes of His Majesty's Government (including user by way of selling for use, licensing or otherwise dealing therewith)." The Crown claimed that the sum awarded to the taxpayer was liable to income tax as constituting annual profits or gains within the Income Tax Act, 1918, Sched. D. On the taxpayer's appeal, the commissioners found that "the amount of future user included in the [payment] was negligible," and confirmed the assessment. On the taxpayer's further appeals,

Held (by the Court of Appeal): the award dealt only with the past, present and future user of the taxpayer's inventions; the payment was not in respect of the capital value of the taxpayer's interest in the inventions; and the assessment was correct.

Decision of ROWLATT, J. (1928), 140 L.T. 183, affirmed.

Held (by the House of Lords): in view of the commissioners' finding of fact that the amount of future user covered by the award was negligible, the case was covered by the decision in *Constantinesco* v. *R.* (1) (1926), 11 Tax Cas. 730, and the commissioners had properly confirmed the assessment.

Notes. The Income Tax Act, 1918, Sched. D, was re-enacted by the Income Tax Act. 1952, s. 122. Considered: *I.R. Comrs.* v. *Longmans' Green & Co.* (1932), 17 Tax Cas. 272; *Handley Page* v. *Butterworth* (1935), 19 Tax Cas. 328. Explained: *I.R. Comrs.* v. *British Salmson Aero Engines, Ltd.*, [1938] 3 All E.R. 283. Considered: *Withers* v. *Nethersole*, [1948] 1 All E.R. 400. Referred to: *Beare* v. *Carter*, [1940] 2 K.B. 187; *Margerison* v. *Tyresoles, Ltd.* (1942), 25 Tax Cas. 59; *Rustproof Metal Window Co.* v. *I.R. Comrs.*, [1947] 2 All E.R. 454.

As to income tax in respect of patent royalties, see 20 HALSBURY'S LAWS (3rd Edn.) 184, 365; and for cases see 28 DIGEST 19. For the Income Tax Act, 1952, s. 122, see 31 HALSBURY'S STATUTES (2nd Edn.) 112.

Case referred to:

(1) *Constantinesco* v. *R.* (1926), 42 T.L.R. 383; 11 Tax Cas. 730; 28 Digest 19, *97*.

Appeal by the taxpayer from a decision of ROWLATT, J. (1928), 140 L.T. 183, on a Case Stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Hemlingford in the county of Warwick pursuant to the provisions of s. 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

The Case Stated was as follows:

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Division of Hemlingford on Oct. 7, 1926, at 159, Great Charles Street, Birmingham, Sir William Mills, hereinafter called the appellant, appealed against surcharges made upon him under s. 126 of the Income Tax Act, 1918, in the sum of £24,000 for the year ended April 5, 1921, and in the sum of £3,750 for the year ended April 5, 1922. The sole question at issue in these appeals is whether the appellant was liable to be charged in respect of the sums of £24,000 received by him on Mar. 30, 1921, and £3,750 received by him on Aug. 3, 1921, in the circumstances hereinafter set out. No question arises as to the validity of the surcharges which it was admitted were correct in form. It was also admitted on behalf of the Crown that no question of any treble rate of tax under s. 137 (6) (b) arose as there was reasonable cause of doubt or controversy on the part of the appellant on the subject-matter of the appeal.

The appeal arose out of certain payments made by the British Government in respect of a hand grenade known as the Mills bomb. A bomb or hand grenade known as the Roland bomb had been invented in Belgium and the appellant had effected certain improvements upon the Roland bomb, which improvements were the subject-matter of certain patents taken out by the appellant. The government under the provisions of s. 29 of the Patents Act, 1907, used the said inventions and authorised a large number of manufacturers throughout the United Kingdom to manufacture the said bombs or hand grenades according to the letters patent taken out by the appellant. The total number so made during the war was 75,131,962.

A Royal Commission on Awards to Inventors was established by Royal Warrant on Mar. 19, 1919, to deal with the question, inter alia, of the payments to be made to inventors whose patents were made use of by H.M. Government during the war.

In consequence of the fact that the patents taken out by the appellant were improvements upon the Roland bomb, a number of persons claimed to have a right to a share in any payment made by H.M. Government in respect of the Mills bomb. In order to avoid confusion before the Royal Commission and a conflict of interests a deed was entered into by which Lieut.-Col. William Stephen Tunbridge should make a claim to the Royal Commission on behalf of Leon Roland, Jules de Laminne, the Compagnie Belge des Munitions Militaires Société Anonyme, Albert Dewandre, all resident in Belgium, and William Mills, the appellant. In accordance therewith Lieut.-Col. Tunbridge made a claim on July 31, 1919, to the Royal Commission asking for royalties in respect of the user by the Crown during the late war of the aforesaid patents. In reply to such particulars of claim a counter-statement on behalf of H.M. Government was filed on Aug. 10, 1920.

The Royal Commission heard the claim on Jan. 17 and 24, 1920, and an award was made on Mar. 11, 1921, of £37,000 in respect of all user past, present and future by or for the purposes of H.M. Government (including user by way of selling for use licensing or otherwise dealing therewith) of all hand grenades known as the Mills bomb (including such of the said grenades as were manufactured in accordance with the said letters patent or any of them) the total number of such grenades being 75,131,962. Out of this £37,000 a sum of £5,000 was to be retained by the War Office pending the investigation of a claim made by another party.

The division in accordance with the terms of the deed mentioned above of the amount so awarded between the various parties was as follows: The appellant

received three-quarters (£27,750) and Lieut.-Col. Tunbridge on behalf of the applicants resident in Belgium received one-quarter (£9,250). The sum of £24,000 was paid to the appellant on Mar. 30, 1921, and the sum of £3,750 on Aug. 3, 1921. The said sums were paid by H.M. Treasury and no deduction in respect of income tax was made upon payment. No assessment or additional assessment was ever made upon the appellant in respect of the said sums, but on July 13, 1926, the inspector of taxes made the surcharges referred to above.

With regard to any user of the patents, in respect of which the claim was made, subsequent to the date of the award it was improbable in view of the large stocks of Mills bombs which were on hand at the time of the armistice that any further manufacture of bombs in accordance with the patents mentioned above would take place prior to the expiration of the patents taken out by the appellant. The commissioners, therefore, held that the amount of future user included in the said payments was negligible.

It was contended on behalf of the appellant that the said payments were of a capital nature and that the real nature of the said award and payment was the acquisition by the Crown of the rights of the appellant, for a lump sum, and that therefore the appellant was not chargeable in respect thereof.

It was contended on behalf of the Crown inter alia: (i) The sums received were the total sums paid for the actual user of the patents and were in the circumstances of the present case annual profits or gains chargeable under Sched. D in the hands of the appellant. (ii) The reference in the award to future user had no effect to stamp the payments made with the character of capital payments. (iii) Although the award in its terms referred to future user the possibility of future user was so remote that the whole sum awarded should be taken to have been paid in respect of past user. (iv) If the commissioners were of opinion that any part of the payments made was to be regarded as made in respect of future user and that such part was a payment in the nature of a capital payment it was open to them to reduce the amounts of the surcharges respectively. (v) The surcharges were correct in principle and in amount and should be confirmed.

The commissioners after hearing the facts proved and the contentions of the parties held that the said sums awarded were annual profits or gains chargeable to income tax under Sched. D and accordingly confirmed the certificates of surcharge.

On behalf of the appellant dissatisfaction was expressed with the finding of the commissioners as being erroneous in point of law and a case for the opinion of the High Court of Justice was stated.

ROWLATT, J., held that the case was governed by *Constantinesco* v. *R.* (1) by which the court was bound, and gave judgment for the Crown.

Stewart Bevan, K.C., and *J. F. Eales* for the taxpayer.
The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the Crown.

LORD HANWORTH, M.R.—This is an appeal from a decision of ROWLATT, J., who confirmed the decision of the commissioners, which was as follows:

> "After hearing the facts proved before us and the contentions of the parties, we held that the said sums awarded were annual profits or gains chargeable to income tax under Sched. D, and we accordingly confirmed the certificates of surcharge."

The question that is the subject of the surcharge is a sum paid to Sir William Mills (hereinafter called "the taxpayer") under an award made by the commission which was appointed for making awards to inventors in respect of the inventions and patents which had been provided by them during the course of the war. A considerable sum was paid to the taxpayer, a sum in which he was not interested alone, but in company with others. The sum was £37,000. The point that is now raised is this: That sum was paid over in consequence of an award which is dated Mar. 11, 1921, and at the time when the payment was made no deduction was made in respect of income tax. By the Finance Act, 1923, s. 29, the time in which assessments may be amended and additional assessments and surcharges made was much increased. Section 29 provides:

A "Subject to the provisions of this section, an assessment, an additional first assessment, or a surcharge in respect of income tax chargeable for the year 1920–21, or any subsequent years of assessment may be amended or made, as the case may be, under s. 125 of the Income Tax Act, 1918, or s. 126 of that Act, at any time not later than six years after the end of the year to which the assessment relates or the year for which the person liable to income tax ought to have been charged."

B Under the powers of that section a surcharge was made on the taxpayer in respect of the receipt in 1921 of this sum of £37,000 in consequence of the award made of that date. I confess that some human sympathy is engaged on behalf of the taxpayer, for the powers of that s. 29, which I have read, enable a matter to be re-opened after a long interval of time. The taxpayer had been in possession of the sum paid to him without deduction of income tax, as it could have been deducted under r. 21; and it C was not until five years later that this surcharge was made on him, at a time when he may have made definite and, perhaps, unrecallable dispositions of the sum.

Agreeing that the powers of the commissioners were to make a surcharge, the point that is taken on behalf of the taxpayer is this: It is true that there was an award, and it is true that it was an award for the user of the hand grenades known as "Mills bombs" D which, it is common knowledge, were widely used in the various theatres of war; but it is not merely for the user, so it is claimed, that this award was made; it is for something more. The terms of the award are as follows:

"The commission have settled the terms of user of this invention as follows, that is to say, the applicant is to be paid the sum of £37,000 in respect of all user, past, present and future, by or for the purposes of His Majesty's Government (including E user by way of selling the use, licensing or otherwise dealing therewith) of all hand grenades known as Mills bombs, including such of the said grenades as were manufactured in accordance with [certain letters patent which are numbered and stated] or any of them, the total number of such grenades being approximately 75,132,000."

It is claimed that inasmuch as the sum paid represents a user in the future, the possibility of "licensing or otherwise dealing therewith," what has been handed over to the F government, is a slice of the capital possessions belonging to the taxpayer under his patents; in other words, that the government have become the holder and owner of an aliquot portion of the patent rights, and thus that the taxpayer is being paid not merely for something which is in the nature of annual profits and gains or income, but represents a capital sum.

The history of such a payment is this: By the Patents Act, 1907, s. 29, a new provision G was made whereby a patent was declared to have, to all intents, the like effect as against His Majesty the King as it has against the subject; but there was a proviso that:

"Any government department may by themselves, their agents, contractors or others, at any time after the application, use the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed upon, with the approval of the Treasury, or, in default of agreement, as may be settled by H the Treasury."

Thus, rights were given as against the Crown to patentees. That power, so given, in the proviso, to government departments was, of course, exercised during the Great War and, in consequence, after the war was over, there was a commission set up, which was known as the Royal Commission on Awards to Inventors, and they were empowered,

I "in the case of user, or alleged user, of any patented invention for the services of the Crown by any government department and in default of agreement as to the terms of user, the commissioners, upon the application of the patentee and agreement to accept their determination, may proceed to settle and may settle the terms of user in lieu and place of the Treasury."

There was another clause which also may be referred to as germane to the subject. The commission therefore sat under that power, and they had to determine the user. At the time when the commission sat, it was stated that the number of hand grenades that had been either used or were still in stock totalled 75,132,000; and the question arose as to

whether the commission should deal only with the user up to date or with the possible user in the future. It was said that there might be a certain user for practice purposes, but it was contemplated, in words which were used before the commission, the shorthand note of which is attached to the Case, that the probability of any large user was remote. Further, according to the statement made to the commission, there was an agreement or arrangement made whereby the commission were to deal with what is called the whole matter once for all. The chairman asked Mr. Hunter Gray, "But can we take it as covering future user as well as the past?" (Mr. Hunter Gray): "Yes." The representative of the Attorney-General was not able at the moment to give his adhesion to that course, but later on he said: "We prefer that it should be wholly disposed of." He also said: "But it has to be remembered that we have in store many more grenades than we are likely to use in years of practice," and so on. But it appears clear that what was considered there was that it was covering future user as well as the past. That evidence is attached to the Case. The practice is not a convenient one, because it is for the commissioners to find the facts, and I am inclined to agree with an observation that was made by GREER, L.J., in the course of the argument, that we have to look at the award which was reached on that evidence rather than to the observations that were made before the award was reached, because it would appear that what is included in the award in its terms covers future use. If and in so far as it is a question as to what the award includes, it is important to observe that in para. 9 of the Case the commissioners say:

> "With regard to any user of the patents, in respect of which the claim was made, subsequent to the date of the award it was improbable in view of the large stock of Mills bombs which were on hand at the time of the Armistice that any further manufacture of bombs in accordance with the patents mentioned would take place prior to the expiration of the patents taken out by the appellant. The commissioners therefore held that the amount of future user included in the said payments was negligible."

We turn back to those facts to consider what does this award cover? Does it cover the transfer of capital rights, or does it deal with matters of gains and profits in respect of the business of the making and the selling of these hand grenades? Looking carefully at the words, it appears to me that the commission have settled the terms of user of this invention, and they award a sum to be paid in respect of all user, past, present and future, of the taxpayer's hand grenades, including user by way of selling, which means that His Majesty's Government could dispose of some of their stock, "selling the use, licensing or otherwise dealing therewith." That appears to me to refer to the bombs which are totalled to 75,132,000; and, although the word "licensing" is used, it seems to me that that word is brought forward from the passage which has already been read in argument, and is not to be deemed to be a substantive portion or a new portion of the award so as to justify a claim that in this award there were capital rights transferred to the government. From the terms of the warrant the commission had no power to deal with capital rights. The award does not set out any agreement showing that, by agreement, some further power has been given to them. The award purports to settle the terms of the user of this invention, past, present and future.

In my judgment, I think that the commissioners were right in holding that what was dealt with by the award was this right of user, not only as to the past, but in respect of the whole of the bombs which might be, after the date of the award, manufactured and made use of by the government; but the closer contemplation of the parties was in respect of the stock which they had before them. The commissioners hold that the said sums awarded were annual profits or gains chargeable to income tax under Sched. D as they could be within r. 21. I find it impossible, in the terms of this award, to find a payment in respect of a capital sum, and it appears to me that the award is made in respect of matters which were profits and gains and ought to be included in the income of the taxpayer for the year 1921.

Under these circumstances I think the case falls exactly within the decision of *Constantinesco* v. *R.* (1). That decision is binding on us; but, more than that, it was upheld

in the House of Lords. Therefore we must follow it. In my view, this case cannot be distinguished from the *Constantinesco Case* (1), and therefore the appeal fails. ROWLATT, J.'s judgment was right, and the appeal must be dismissed with costs.

GREER, L.J.—I have come to the same conclusion, after some hesitation and doubt in the course of the argument. The question to be determined is whether the taxpayer's share of the £37,000, awarded to Col. Tunbridge on behalf of the taxpayer and others by the decision of Mar. 11, 1921, is to be treated as a payment in respect of royalties, and therefore liable to be treated, as royalties always are, as part of the annual gains of the patentee, or whether it is to be treated as the price of the taxpayer's interest in the patents.

If one looks at the Patents and Designs Act, 1907, s. 29, one sees that the government is empowered

> "by themselves, their agents, contractors or others, at any time after the application, to use or exercise the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled by the Treasury after hearing all parties interested."

I cannot avoid the conclusion that it would be open to the Crown and the patentee, under the terms of s. 29, or to the authority which, in the absence of agreement, is to determine the question, to say that the patent shall be used on a payment of royalties consisting of a lump sum, say, divided into two or more parts, payable at the end of the third year, at the end of the sixth year, at the end of the ninth year, at the end of the fourteenth year of the patent, or payable in advance in respect of any period of the patent. If that agreement were made in clear terms so that it was determined that the payments were in respect of royalties, even though the agreement covered the whole fourteen years, or, it may be, the sixteen years, of the patent, the payments would be none the less payments in respect of royalties, and therefore liable to be charged with income tax.

For a number of years, down to 1921, or down at any rate to the end of the war, the government had been using the patents which belonged to the taxpayer and his fellow patentees without any arrangement having been made under the provisions of s. 29, and under those circumstances the patentees were entitled to go to the Royal Commission appointed by Warrant and, under s. 1, ask them to fix the terms of user of the patents in question. It seems to me that they were in the same position as the authority provided for by s. 29, and they might fix the terms of user, not only so far as regards the past, but they might fix the terms of user so far as regards the future. Having heard what both sides had to say to them, the commission made the award, and now that the matter has been argued I have come to the conclusion that the award is no more than this: the fixing of a sum which is to cover royalties which were due in respect of the user in the past and anything that might become due though possibly very small in amount, in respect of royalties for user in the future. I think it is quite clear that, whatever may have been the effect in practice of the award, it does not, by its terms, deprive the patentees of any of their rights in the patents, but only gives the right of use, including the right of user by way of selling the use, the right to license for use, and the right of otherwise dealing in any way with the patents, but not the exclusive licence, excluding the patentee. The patentee, I think, was perfectly right in his assumption that if he could, under the Customs Act, have got a licence to export, he could have made Mills bombs and could have exported them to Greece for use by the Greek army. But, of course, his trouble arises from the fact that there is such a provision as that which is in the Customs Act, and it does not arise from the fact that he has parted with his whole interest in the Mills bombs. Under these circumstances, it is impossible to say that the award was in respect of the capital value of the taxpayer's interest in the patents. It was, on the other hand, in my judgment, an award in respect of royalties payable in the past, with a sum sufficient to cover any royalties which might be incurred in the future, as well as those which were due in respect of past user.

For these reasons, I think the judgment below was right and should be confirmed. A

RUSSELL, L.J.—I am of the same opinion. I feel myself quite unable to read this award as a document assessing the sum to be paid as the purchase price of the patentee's interests in the patents as from the date of the initial user of them by the Crown. I feel quite unable to do so for various reasons. One is that the commission had, under their warrant, no power to make any such order of award. Secondly, the document itself, B throughout its length, calls itself over and over again an "award"; and, thirdly, if the suggestion was accurate that the parties had agreed to confer on the commission this jurisdiction, and the commission was purporting to exercise a jurisdiction which they could only exercise by virtue of the parties' agreement, one would have expected to find on the face of the document a clear statement of that consent, and such a statement is conspicuous by its absence. In my opinion, the award—and I agree that we ought to C construe the document apart from any reference to the shorthand notes of what passed before the commission—is one which awards a sum by way of remuneration in respect of the user of the invention, partly and mainly in respect of past user, but partly, and to a small extent, in respect of future possible user during the continuance of the patents. But the whole payment is a payment, whether for past or future user, of royalties, or moneys in the nature of royalties, and, as such, are properly assessable as profits and D gains.

Appeal dismissed.

The taxpayer appealed to the House of Lords.

Stewart Bevan, K.C., and *J. F. Eales, K.C.*, for the appellant.

The Solicitor-General (Sir James Melville, K.C.) and *R. P. Hills*, for the respondent, were not called on. E

LORD BUCKMASTER. In this appeal the appellant has been surcharged with income tax for the sum of £24,000 received by him on Mar. 30, 1921, and for £3,750 received on Aug. 3, 1921. He alleges that he was not liable in respect of either of those sums. The moneys were paid to him in the following circumstances: In the years 1915 and 1916 the appellant had effected certain improvements in a bomb known as the Roland bomb, and had taken out patents for the protection of those improvements. At F that time the government enjoyed, by virtue of the Patents and Designs Act, 1907, s. 29, the right to acquire and use patents on terms that are there provided. Section 29 provides:

> "A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject: Provided that any government department may, by themselves, their agents, contractors, or others, at any time after the application, G use the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee."

In order to ascertain the payments that ought to be made by the government in respect of the user of such patents during the war, a commission was set up on Mar. 19, 1919, H under a warrant which empowered the commissioners in case of user or alleged user of any patented invention for the services of the Crown and in default of agreement as to terms to settle what the amount might be for the user in lieu and in place of the Treasury, subject to certain provisions and exceptions, which are not material. This particular question was then placed before the commission and they accordingly made an award in the following terms: I

> "The commission have settled the terms of user of this invention as follows, that is to say, the applicant is to be paid the sum of £37,000 in respect of all user, past, present and future, by or for the purposes of His Majesty's Government (including user by way of selling for use, licensing or otherwise dealing therewith)."

It appears that some 75,131,962 bombs had been made under these patents, and it also appears that the commission, whether by virtue of a power inherent in their original warrant or by agreement between the parties—a matter on which it is unnecessary to express an opinion—did in fact consider, in framing their award, the sum which should

be paid, not only in respect of the use of the invention that had already taken place, but also of such user, if any, as might be anticipated in the future, and the £37,000 covered both. This £37,000 was apportioned into two sums—£27,750 belonged to the appellant, and £9,250 belonged to the others; the £27,750 is represented by the two sums of £24,000 and £3,750 that were paid to the appellant respectively in March and August, 1921. Income tax was not deducted when the moneys were paid, and subsequently surcharges were made in respect of such tax. The appellant appealed to the commissioners against such surcharge, and the commissioners found that the surcharge was justified and dismissed his application. ROWLATT, J., and the Court of Appeal have affirmed the finding of the commissioners. The real ground on which the appellant complains of those judgments is this: He says that the award itself shows that part of the sum was in effect payment for the right to use the invention for the future, which means that there were capital moneys involved in the £37,000 which are in no way distinguished from the income, and that, as they have not been distinguished and cannot at present be distinguished, a surcharge cannot properly be made for the total sum and, consequently, the surcharge was wrong and ought to be discharged.

I am greatly impressed by the fact that the commissioners have made a definite finding of fact which, unless there is some special reason to the contrary, is binding on us. The statement that they make is this:

> "With regard to any user of the patents, in respect of which the claim was made, subsequent to the date of the award it was improbable in view of the large stocks of Mills bombs which were on hand at the time of the armistice that any further manufacture of bombs in accordance with the patents mentioned above would take place prior to the expiration of the patents taken out by the appellant."

The commissioners, therefore, held that the amount of future user in the said payments was negligible. It appears to me that there was sufficient information before the commissioners to reach that conclusion. The shorthand notes of what took place before the commission on awards to inventors appear to have been before them, and I can find nothing in the Special Case to show that objection was taken to their being considered; indeed, had objection been taken to their consideration it must have had a limited application, for it is clear that, in order to understand what had taken place before the award was given, certain proceedings must have been looked at, for instance, the claim must have been considered, and the answer, and, in case of ambiguity as to the meaning of the judgments, the conversations that had taken place between Bench and counsel could also, in my opinion, be properly regarded. I can see no reason why these matters should have been excluded from the commissioners; but, even if they were, it still appears to me that it was the duty of the commissioners, with the best material they had at their hands and forming the best judgment that was in their power, to determine whether or not these sums did include a sum for future user and, if so, what that sum ought to be. They found that it was negligible and that conclusion appears to me, not only to be justified after considering what took place when the award was made, but also to be in accordance with the reasonable probabilities of the case. If once that be accepted, then counsel for the appellant find themselves unable to escape from the *Constantinesco* v. *R.* (1); indeed, on the hypothesis that I have made, distinction between this case and that is quite impossible. I, therefore, move your Lordships that the appeal be dismissed with costs.

VISCOUNT DUNEDIN.—I agree. I think the finding of fact is conclusive.

VISCOUNT SUMNER.—I agree.

LORD BLANESBURGH.—I agree.

LORD ATKIN.—I agree.

Appeal dismissed.

Solicitors: *Nash, Field & Co.*, for *Docker, Hosgood & Co.*, Birmingham; *Solicitor of Inland Revenue.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., and EDWARD J. M. CHAPLIN, ESQ., *Barristers-at-Law.*]

A

KINCH *v.* WALCOTT AND OTHERS

[PRIVY COUNCIL (Viscount Sumner, Lord Carson and Lord Blanesburgh), December 3, 4, 1928, March 19, 1929]

[Reported [1929] A.C. 482; 98 L.J.P.C. 129; 141 L.T. 102]

B

Estoppel—Estoppel by record—Consent order on settlement of action—Withdrawal of charges by plaintiff—Subsequent action by plaintiff repeating charges—Practice—Plea of estoppel tried as preliminary issue.

An order made by consent of the parties on the settlement of an action between them, not discharged by mutual consent and remaining unreduced, is as effective to give rise to an estoppel as an order of the court made otherwise than by consent and not discharged on appeal. Such a consent order can only be set aside in a proceeding directed to that special end.

C

In an action by a company against the appellant the company obtained judgment directing that certain accounts between them and the appellant should be re-opened and that the appellant should pay to them such sum as was then found to be due. In June, 1925, the amount payable by the appellant was agreed between him and the respondents acting on behalf of the company. In August, 1925, the appellant wrote letters to the company asserting that his agreement to pay the amount determined in June had been obtained by the coercion, threats, and "blackmail" of the respondents. In June, 1926, the respondents brought an action for libel against the appellant in respect of those statements; the appellant pleaded justification in that action and began proceedings against the company claiming rescission of the agreement of June, 1925. On Nov. 16, 1926, both actions were settled, consent orders being made under which the appellant withdrew all his allegations against the respondents. In March, 1927, the appellant brought an action against the respondents claiming the repayment of a sum paid by him to a third party under the agreement of June, 1925, and repeating the allegations which he had made and withdrawn against the respondents in the libel and rescission actions. The respondents pleaded that he was estopped as against them from raising the matters so withdrawn. At the trial this issue was argued as a preliminary point and decided in favour of the respondents.

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Held: (i) the learned judge at the trial was right in directing that the question of estoppel raised by the respondents should be tried as a preliminary issue; (ii) the decision of the learned judge was right.

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Notes. As to estoppel by record, see 15 HALSBURY'S LAWS (3rd Edn.) 176 et seq.; and for cases see 21 DIGEST 140 et seq.

Cases referred to:

(1) *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; 66 L.J.Ch. 684; 77 L.T. 57; 45 W.R. 675; 13 T.L.R. 540; 41 Sol. Jo. 675, C.A.; 35 Digest 94, *34*.

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(2) *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673; 65 L.J.Ch. 432; 74 L.T. 193; 44 W.R. 540; 12 T.L.R. 270; 40 Sol. Jo. 354; Digest Practice 622, *2591*.

(3) *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.*, [1926] A.C. 761; 95 L.J.P.C. 197; 135 L.T. 645; 42 T.L.R. 686, P.C.; Digest Practice 627, *2621*.

Appeal from two orders made by FURNESS, C.J., of the Court of Common Pleas, Barbados.

I

The appellant brought an action against the respondents for damages for conspiracy based on certain allegations which he had withdrawn under a consent order made in an action of libel in which the respondents were plaintiffs and the appellant was the defendant. The respondents pleaded that by reason of the consent order the appellant was precluded as against them from again raising the matters withdrawn by him, and the appellant filed an amended reply pleading that the consent order was obtained by the respondents by the fraudulent concealment of a material fact and was a nullity, namely, their concealment from and/or omission to disclose to him the determination

of one of the respondents to prosecute the appellant for perjury contained in an affidavit embodying the same charges. The case came before FURNESS, C.J., who ordered that the question of estoppel be tried and determined prior to evidence being heard on the merits of the case. On Dec. 2, 1927, judgment was given by FURNESS, C.J., who held that the appellant was precluded from alleging or proving the allegation pleaded by him in the libel action and withdrawn by him under the consent order. He further held that the respondents were under no duty to communicate to the appellant the determination that had been arrived at to prosecute the appellant for perjury.

D. N. Pritt, K.C., and *S. P. J. Merlin* for the appellant.

C. J. W. Farwell, K.C., and *G. R. Blanco White* for the respondents.

Mar. 19. **LORD BLANESBURGH.**—Before proceeding to define with particularity the issue which on this appeal their Lordships must determine, it may be well for clearness sake to set forth, as succinctly as possible, the somewhat involved story which leads up to it.

All the parties live in Barbados. The appellant is a merchant there; the respondent Walcott a barrister-at-law, and the respondent Hutchinson a solicitor, both practising in the island. The respondent Taylor is a commercial agent who was for some time in the employment of the appellant. For many years prior to 1925 the appellant had acted as agent on commission for a Newfoundland firm of Monroe & Co., and in later years for that firm's successors in business, the Monroe Export Co., Ltd. The appellant's agency was concerned mainly with the sale on commission of fish consigned by the Monroes to him in Barbados, and with the purchase in the island, also on commission, of molasses on their account.

In 1925 disputes arose between the Monroe company and the appellant with reference to his transactions, and in March, 1925, the company instituted against him in the Barbados Chancery Court a suit claiming full accounts on allegations, inter alia, that profits had been improperly withheld from the company in connection with his purchases of molasses, and that the appellant was suppressing the books in which his transactions on behalf of the company were recorded. In that suit, to be referred to as the suit for accounts, the respondent Walcott acted as counsel, and the respondent Hutchinson as solicitor for the company, the appellant being duly represented by counsel and solicitors of his own. In the result, on June 5, 1925, after a long trial, a decree in the suit adverse to the appellant was pronounced by the Acting Vice-Chancellor, who directed the accounts of the appellant's transactions to be re-opened and ordered him to make payment together with the costs of suit of the amount found due on these re-opened accounts when taken. A stay of execution was, however, upon terms, granted to enable the appellant, if so advised, to appeal. Thereupon, indeed, within a few days, negotiations were on foot for a settlement. These were conducted by the respondents Walcott and Hutchinson on behalf of the company with the appellant direct, that is to say, without the intervention of any legal advisers on his behalf. As a result of them a deed prepared by the respondent Hutchinson was, on June 18, 1925, executed by the appellant. It bore that he had settled the company's claims against him on all accounts by a payment in British currency of $15,000 thereby acknowledged to have been received, and by a mortgage thereby made of specified properties of his own to secure an additional sum the equivalent of $25,000 with interest. All further proceedings in the suit for accounts were to be discontinued. This deed contained recitals which, apparently, the respondent Hutchinson now agrees were not in complete accord even with his own intent at the time and were less favourable to the appellant than they should have been. But the complaints of the appellant with reference to the transaction went far beyond any such matters of detail and as ventilated by him in correspondence and in legal proceedings to which reference must later be made were that he was left to act in the matter without legal advice; that, so far as the deed was a mortgage deed, he executed it without understanding, and, indeed, being misinformed as to, its nature; and that his execution of a deed at all was in effect the result of the pressure of the respondents Walcott and Hutchinson, who threatened that, if he did not pay the $15,000 and execute the deed as presented to him, criminal proceedings

would be taken for alleged misdeeds in relation to his purchases of molasses as agent for the company. A

Nor did the appellant keep to himself these charges of his against these respondents. In two letters, one of Aug. 2, 1925, and the other of Aug. 19, 1925, addressed to Mr. Monroe, the managing director of the Monroe company, he asserted in substance that it was as a result of blackmail on their part that he had been coerced to put up what he described as the guarantee. These letters with their grave charges against them of personal and professional misconduct having come to the knowledge of Mr. Walcott and Mr. Hutchinson they, on June 8, 1926, joined as plaintiffs in an action for libel against the appellant. In it they each claimed $5,000 damages. On June 29, 1926, the appellant put his defence. He pleaded justification in terms which included his allegations already referred to, and on the next day, June 30, he followed this up by commencing in the Chancery Court of the island a suit against the Monroe company—to be referred to as the rescission suit—claiming that the settlement and mortgage deed of June 18, 1925, should be set aside by reason, inter alia, of the matters pleaded by him in his plea of justification. On the same day he made an affidavit in the rescission suit in support apparently of an application to restrain a threatened sale of his property mortgaged to the Monroe company by the deed he was therein seeking to impeach. In that affidavit he repeated in effect in relation to the settlement his allegations against the two respondents to which reference has already been made. B C D

The respondent Hutchinson deeply resented these sworn imputations upon his personal and professional conduct, and it is now his own avowal that he thereupon resolved and remained determined to institute against the appellant, at the earliest convenient opportunity, a prosecution for perjury for having made them. His intentions in that matter, however, he, it is asserted, kept to himself, more particularly during the negotiations for the settlement of the libel action and the rescission suit which was reached by consent orders made in each on Nov. 16, 1926, and the provisions of which are, on this appeal, all important. The terms of the consent order in the libel action were that upon the appellant by his counsel withdrawing all allegations of fraud and duress pleaded in his defence and upon his expressing regret at having pleaded justification and withdrawing the plea, and upon the respondents Walcott and Hutchinson undertaking not to bring any fresh action in respect of the subject-matter of that action it was by consent ordered that the respondents should be at liberty to discontinue the action and that the appellant should pay them the sum agreed on by counsel for their costs of suit. In the consent order in the rescission suit the appellant by his counsel unreservedly withdrew all charges of fraud, malpractice, and duress against the respondents Hutchinson and Walcott contained in the bill of complaint and affidavits therein, the company, on the other hand, stating that it made no charge in that suit against the appellant of having suppressed the books of account in the pleadings mentioned. For the rest, the settlement of June 18, 1925, was in effect set aside; the properties thereby mortgaged to the company were to be re-conveyed to the appellant at his expense; the accounts were to be taken as directed by the judgment of June 5, 1925, these accounts being extended so far as molasses were concerned, and the appellant was to pay the company's taxed costs of the suit for accounts, but each party was to bear his own costs of the rescission suit. As will appear presently, these consent orders lie at the root of the questions at issue upon this appeal, and it is convenient now to state with reference to them that there is, in their Lordships' view, no room for doubt that an underlying condition of the negotiations for the settlement of the libel action and of the rescission suit, as also of the final arrangement for the settlement of both, was that the action and suit should be settled at the same time. The settlement of one was dependent upon the settlement of the other and the consent orders, although separate, must stand or fall together. The consent order in the rescission suit has, it appears, been acted upon by the Monroe company, and the appellant has obtained advantage under it which, so far as their Lordships have been informed, he has never disaffirmed. The importance of all this in its relation to the ultimate question before the board will presently become apparent. E F G H I

The third respondent Taylor now takes and thereafter retains a prominent place in the narrative. That respondent, as has already been said, was at one time in the employment of the appellant. There had been grave differences between them. Taylor had been prosecuted by the appellant for embezzling his moneys. He was a witness for the Monroe company in the suit for accounts, and it has been an allegation of the appellant that Taylor was paid £1,200 for so giving evidence against him, and that, so far from the appellant having suppressed or concealed his books of account as there alleged, these books were at all material times in the possession or under the control of the respondents Hutchinson and Taylor themselves. Imputations upon Taylor were clearly not accepted by the learned Vice-Chancellor in the suit for accounts, and the adverse decree against the appellant in that suit must have encouraged Taylor to proceed against the appellant in respect of a letter of Oct. 29, 1924, addressed by him to the same Mr. Monroe above referred to, in which he alluded to Taylor as the vagabond who had stolen his cash books to save himself before the courts. Taylor, it seems, had even during the pendency of the suit for accounts instructed the respondents Walcott and Hutchinson to commence on his behalf at some suitable time an action against the appellant for libel in respect of that statement, and the appellant's complaint against all three is—and it is the complaint on which the present action is based—that the respondents Walcott and Hutchinson when negotiating with him for the settlement of the suit for accounts on June 18, 1925, intimated that no such settlement was possible unless the appellant would also agree to pay to the respondents Walcott and Hutchinson on the respondent Taylor's behalf a sum by way of compromise of Taylor's cause of action in respect of the appellant's defamatory letter to Mr. Monroe. That sum the appellant did pay, and the present action, which was commenced on Mar. 31, 1927, has been brought to recover damages from the three respondents in respect of the obtaining from him of that money, the appellant setting up against the three the allegations which he had already made and withdrawn against the respondents Walcott and Hutchinson separately in relation to the settlement of the suit for accounts, namely, that they had all wrongfully conspired to extort that money from him by means of threats to institute against him the criminal proceedings already mentioned.

The pleadings in the action are voluminous. It suffices, however, in the events which have happened, to set forth only the following paragraphs of the statement of claim:

> 3. Some time between June 5 and 19, 1925, the defendants wrongfully and unlawfully conspired together to extort money from the plaintiff.
>
> 4. In pursuance of the said conspiracy the defendants said and did the following acts and things:—(a) The defendants Hutchinson and Walcott threatened to cause the plaintiff to be prosecuted for a criminal offence or offences alleged by them to have been committed by him arising out of the purchase of molasses by the plaintiff as agent for the Monroe Export Co., Ltd., of St. John's, Newfoundland, and the shipments by him of such molasses to the said company unless he the plaintiff paid to them the said Hutchinson and the said Walcott, the legal advisers of the defendant Taylor, the sum of £1,500 sterling in compromise of an alleged cause of action which the defendant Taylor had against the plaintiff for libel in respect of a letter written by the plaintiff to the said Monroe Export Co., Ltd., and/or W. S. Monroe a director of the said company and/or slander.
>
> Particulars
>
> For some time prior to June 18, 1925, the defendants Walcott and Hutchinson had threatened to prosecute the plaintiff for the alleged criminal offence or offences mentioned unless he compromised a then pending suit of the said Monroe Export Co., Ltd., against himself. On the said June 18, 1925, it was definitely agreed between the plaintiff and the defendants Walcott and Hutchinson that the defendants Walcott and Hutchinson would abstain from prosecuting the plaintiff on certain terms then agreed between them, which included the payment by the plaintiff to the defendant Hutchinson of $15,000 on June 19, 1925.

By their defences the respondents denied the allegations of conspiracy and asserted—

and so much is now admitted—that the matters referred to in the above paragraphs of particulars were included among the allegations expressed to be withdrawn in the two consent orders already mentioned. Accordingly the respondents Walcott and Hutchinson pleaded and contended that by reason of these consent orders the appellant is in this action precluded as against them from raising the matters so withdrawn, and all the effective proceedings in the action have so far been concerned with this plea alone.

On July 6, 1927, the cause came on for trial before the Chief Justice of Barbados, and a special jury. The point just mentioned was at once taken by counsel on behalf of the respondents Walcott and Hutchinson, and after full argument was, on July 8, 1927, upheld as a preliminary finding by the learned Chief Justice. Against his order to that effect the appellant appealed to the West Indian Court of Appeal, and on Sept. 8 by consent the appeal was remitted to the Chief Justice to determine whether the appellant was or was not on any grounds estopped or precluded from alleging or proving the allegations withdrawn by him in the consent order in the libel action, the appellant being at liberty to apply to amend his reply so as to raise to the plea of estoppel an answer of fraud and non-disclosure. By the same order the appellant undertook to discontinue his action against all the respondents and not to bring any fresh action against any of them in respect of the matters alleged therein should any appeal by him from the decision on the matter thereby remitted be unsuccessful in the West Indian Court of Appeal and/or before the Judicial Committee of the Privy Council. This undertaking is now invested with a decisive significance. Its effect is that the appellant's whole action now depends upon the result of this appeal although that appeal has direct reference only to a preliminary finding in the cause.

In pursuance of leave reserved by the order of the West Indian Court of Appeal the appellant in an amended reply pleaded that the consent orders were obtained by the respondents Walcott and Hutchinson by their fraudulent concealment from or omission to disclose to him the fixed and unalterable determination of the respondent Hutchinson to prosecute the appellant for perjury committed in his affidavit already mentioned. In a rejoinder these two respondents asserted that neither of them was under a legal obligation to disclose such determination to the appellant and further that the appellant or his agent Mr. Hamel Wells, barrister-at-law, was at all material times aware of it. On these amended pleadings the case as so remitted by the Appeal Court came before the Chief Justice of Barbados on Nov. 28, 1927. He then ordered that the question of estoppel raised by the respondents Walcott and Hutchinson should be tried and determined prior to the evidence being heard on the merits of the case. This is the first order now appealed against. The argument on estoppel then proceeded and in the result the learned Chief Justice held that the respondents Walcott and Hutchinson were under no duty to communicate to the appellant the determination which had been arrived at that he should be prosecuted for perjury, and on the main question whether the appellant was precluded from alleging or proving the allegations withdrawn in the consent order in the libel action, the learned judge adhered to his previous decision of July 8, 1927. By his order of Dec. 2, 1927, he declared accordingly. This is the second order against which the appellant now appeals to His Majesty in Council.

As to the first of these orders appealed from their Lordships entertain no doubt that the learned Chief Justice was well warranted in directing that the question of estoppel raised by the respondents Walcott and Hutchinson should be tried and determined prior to evidence being heard on the merits of the case—should be tried, that is to say, as a preliminary issue. So soon as the terms of the order of the Appeal Court of Sept. 8, 1927, are looked at, no other course, as it seems to the Board, was open to the learned judge. That order was a consent order. The question of estoppel had been brought before the court on an appeal from an order made on a preliminary issue. It is the same preliminary issue albeit on an extended basis that is referred back to the Court of Common Pleas for further consideration. So much clearly appears from the terms of the undertaking embodied in the order and already referred to. It is true that no evidence was heard by the learned Chief Justice on the new allegations of fact made by the respondents Walcott and Hutchinson in their new rejoinder, and directly relevant to

A their plea of estoppel. But it is not to the appellant's disadvantage that in the absence of evidence in support of these allegations, his assertion that he remained in ignorance of the respondent Hutchinson's determination to prosecute him for perjury was by the learned Chief Justice, and must now on this appeal, be accepted as correct. In short, no ground whatever has in their Lordships' judgment been shown for interfering with the order of Nov. 28, 1927.

B The second order appealed from is that of Dec. 2, 1927, against the decision of the Chief Justice that the respondents Walcott and Hutchinson had effectively raised an estoppel against the appellant. Their Lordships heard from his learned counsel an elaborate and able argument which canvassed, in its course, many difficult questions of general interest and importance. Their Lordships, however, do not find it necessary on the present occasion to go into these questions. In the last analysis of the real posi-
C tion the appeal from this second order of the learned Chief Justice can, as they think, be determined by reference to considerations of great simplicity.

First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual
D agreement, and remaining unreduced, is as effective as an order of the court made otherwise than by consent and not discharged on appeal. A party bound by a consent order, as was tersely observed by Byrne, J., in *Wilding* v. *Sanderson* (1), ([1897] 2 Ch. 544), "must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose." In other words, the only difference in this respect between an order made by consent and one not so made is that the first
E stands unless and until it is discharged by mutual agreement or is set aside by another order of the court; the second stands unless and until it is discharged on appeal. And this simple consideration supplies at once the answer to this appeal. The consent order in the libel action has neither been abandoned nor set aside. Accordingly, it stands at this moment as an order effective to prevent the appellant from setting up against the two respondents parties to it the charges against them thereby withdrawn. Nor is it
F any answer for the appellant to say that by his amended reply he has alleged, and he asks to be allowed to prove that the consent order was and is a nullity. It is, first of all, in no sense true that the order is a nullity. At the best, so far as the appellant is concerned, the order embodies an agreement which possibly may still remain voidable at his instance. But that means that the order stands until it has been effectively set aside. And such an order, where the objection taken to it is of the character here set
G up by the appellant, can only be so set aside in an action or proceeding directed to that special end. The decision of Romer, J., in *Ainsworth* v. *Wilding* (2), in that sense seems to their Lordships to be not only in accordance with principle, but alone consistent with convenient practice, and their Lordships note that it has been accepted and followed by this Board in *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.* (3) (and connected appeal), [1926] A.C. at p. 771). But there is a further and special reason
H why in the present case the requirements of that decision should be insisted upon. As has already been pointed out the consent orders in the rescission suit and libel action were intended to stand or fall together. Even if it were possible for the appellant to stand by the order in the suit while repudiating the order in the action it is clear that he cannot take that course except in some proceeding to which the Monroe company is either party or privy, and that company is in no sense at all either party or privy to these
I proceedings.

On this short ground, therefore, their Lordships are of opinion that the order of Dec. 2, 1927, should be upheld. In the view they take of the position it is not open to them in these proceedings, and in any case it is unnecessary for them to decide and they withhold any opinion upon the question whether the respondent Hutchinson during the negotiations for the consent orders was entitled to keep to himself his fixed determination to prosecute the appellant for perjury. And if they refrain from going further into that question their action is in no way attributable to any failure on their part to appreciate its importance. The slightest hint that such a prosecution was in reserve

might well have deterred the appellant, ignorant of the fact, from making even a formal withdrawal of his sworn charges, and that danger cannot well have been absent from Mr. Hutchinson's mind, seeing that the withdrawal made is only consequential on the undertaking not to bring any fresh action in respect of these charges. When to all that is added the fact that this withdrawal must seriously and might fatally embarrass the appellant in his answer to a charge of perjury when brought, this question of concealment, it is seen, involves considerations of wide importance to the legal profession as a whole. It is, however, a question which, owing to the high standard of honour prevailing in the profession, rarely arises in practice. Moreover, in the present case the consequences for the appellant have not been so serious as they might have been. For, when the prosecution was at length launched by Mr. Hutchinson, the grand jury, after hearing the evidence both of himself and Mr. Walcott, threw out the bill. Accordingly, while in no way intimating disagreement with the Chief Justice in the conclusion which he reached on this subject, their Lordships prefer, so far as any observations of theirs might affect it, to leave this question as applied to a case so extreme as the present, entirely open. For the reasons given, they are of opinion that this appeal fails. They will, accordingly, humbly advise His Majesty that it be dismissed and with costs.

Appeal dismissed.

Solicitors: *Markby, Stewart & Wadesons*; *Minet, May & Co.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

Re AUSTEN. COLLINS *v.* MARGETTS

[Chancery Division (Clauson, J.), February 22, 26, 1929]

[Reported [1929] 2 Ch. 155; 98 L.J.Ch. 384; 141 L.T. 325]

Settled Land—Settlement—Will—"Land charged voluntarily with payment of rent-charge"—Land charged with payment of perpetual annuities—"Annual or periodical sums for benefit" of persons named in will.

By the will of a testator land stood charged voluntarily with the payment of perpetual annuities.

Held: although the annuities, being permanent, were not rentcharges "for the life of any person, or any less period," within s. 1 (1) of the Settled Land Act, 1925, they were "annual or periodical sums for the benefit" of the persons named in the will, and, therefore, for the purposes of the Act, the will was a settlement and the land was settled land.

Notes. For definitions of a "settlement" and "settled land," see 29 Halsbury's Laws (2nd Edn.) 668 et seq.; for cases see 40 Digest (Repl.) 790 et seq.; and for the Settled Land Act, 1925, see 23 Halsbury's Statutes (2nd Edn.) 12.

Cases referred to:

(1) *Lord Henry Bruce* v. *Marquis of Ailesbury*, [1892] A.C. 356; 62 L.J.Ch. 95; 67 L.T. 490; 57 J.P. 164; 41 W.R. 318; 8 T.L.R. 787; 36 Sol. Jo. 711; 1 R. 37, H.L.; 40 Digest (Repl.) 816, *2944*.

(2) *Re Bird, Watson* v. *Nunes*, [1927] 1 Ch. 210; 96 L.J.Ch. 127; 136 L.T. 346; 70 Sol. Jo. 1139; 40 Digest (Repl.) 791, *2727*.

(3) *Re Braby and Newman's Contract* (1926), unreported.

Originating Summons

The testatrix, Mrs. Austen at the date of her will, which was made on Jan. 17, 1885, was entitled inter alia, to freehold and leasehold property including freehold property

in Bermondsey, which freehold and leasehold property was subject to a charge under the will of Thomas Carter out of the rents, issues, and profits thereof to pay, inter alia, five annuities to persons mentioned in the said will, and the property was also charged under the will of William Carter, who had become interested in the same with other annuities as therein mentioned. By her will the testatrix devised the property with the exception of the freeholds in Bermondsey to the use of Sir W. C. R. Austen during his life with remainders over and an ultimate remainder to her own right heirs, and she devised the Bermondsey freeholds to trustees in fee simple upon trust out of the rents and profits thereof to discharge, inter alia, the said annuities and then to pay four other annuities, which were life annuities, and to accumulate a fund for the purpose of such annuities and rentcharges as were charged upon her estate. After the cesser of the said four life annuities there were powers given to the trustees to apply the whole or a part of the fund towards the improvement of the property and towards the purchase of other property. In the events which happened the devise of the ultimate remainder became effective. The testatrix died on June 18, 1885. Sir W. C. R. Austen died on Nov. 22, 1902, without ever having had any issue, and subsequently the title to the property devolved on the heir-at-law of the testatrix, and by an order made by YOUNGER, J., on May 10, 1917, the defendant, L. A. Margetts, was appointed to represent the heir-at-law of the testatrix. By the master's certificate dated Dec. 18, 1921, upon inquiry it was certified that the person entitled in remainder under the devise of the testatrix to her own right heirs was Bentham C. Chandler, who died on July 14, 1918, having by his will appointed A. E. R. Austen his sole executor and trustee, and having devised all his real estate upon trust for sale and to divide the proceeds of sale between A. E. R. Austen and the defendant L. A. Margetts in equal shares as tenants in common. A. E. R. Austen died on July 14, 1918, and letters of administration of his estate were granted to the defendants Arthur W. Roberts and Elizabeth A. Roberts, and the residuary estate became divisible between the defendants A. W. Roberts, E. A. Roberts, Hugh A. Roberts and Charles Roberts. On Nov. 23, 1923, letters of administration with the will annexed to B. C. Chandler were granted to the defendant, L. A. Margetts, and on Dec. 18, 1923, the master certified that L. A. Margetts was entitled to the entirety of the real estate as personal representative of B. C. Chandler for the purpose of administration, subject to that administration the defendants, A. W. Roberts and E. A. Roberts, were entitled to the entirety as personal representatives of A. E. R. Austen upon trust for sale; and the persons entitled to the net proceeds of sale were, as to one moiety, the defendant, L. A. Margetts, in her own right, and, as to the other moiety, the defendants, A. W. Roberts and E. A. Roberts, as personal representatives of A. E. Austen. All the annuities and charges arising under the will of the testatrix ceased in 1928. This summons was taken out by the present trustees of the will of the testatrix to determine whether the property was now vested (a) in the plaintiffs under or by virtue of the trusts of the will; and/or upon the statutory trusts under para. 1 (1) of Part IV of Sched. I to the Law of Property Act, 1925; or (b) was vested in the Public Trustee under para. 1 (4) of Part IV of Sched. I to the Act; or (c) in the defendants A. W. Roberts and E. A Roberts, as personal representatives of A. E. R. Austen; or (d) in some other and what person or persons.

C. A. Bennett, K.C., and *J. M. Paterson* for the trustees.

G. D. Johnston for F. A. Margetts.

Swords for A. W. Roberts and E. A. Roberts.

Eardley Wilmot for Hugh A. Roberts.

Spens, K.C., and *H. S. G. Buckmaster* for parties interested.

CLAUSON, J.—Immediately before the coming into force on Jan. 1, 1926, of the Law of Property Act, 1925, and the Settled Land Act, 1925, the position was this. The perpetual annuities were still in existence. Subject to those perpetual annuities, the land in question had become charged with certain life annuities, one of which was at the moment still subsisting under the will of Mrs. Austen, and subject to that remaining life annuity the land belonged to various people. I need not concern myself with the question who they were. If that had been all, it is clear that on Dec. 31, 1925, before

the Acts came into force, it would not have been possible to say that the will of Thomas Carter settled, or was an item in a compound settlement of, the lands in question. So far as Thomas Carter's will was concerned there was in existence a charge upon the lands, but subject to that charge the land belonged to persons who claimed title under persons who took absolute interests under Thomas Carter's will. So far as Thomas Carter's will was concerned no settlement was subsisting.

There was, however, one startling change effected in the law by the Settled Land Act, 1925. It was provided that land in certain circumstances became, as from the moment of the coming into force of the Act, settled land by reason only of the existence of a charge upon the land. That, no doubt, was done in order to carry further in the new legislation the intention of the old Settled Land Act legislation which, as was stated by the EARL OF HALSBURY, L.C., in the House of Lords in *Lord Henry Bruce* v. *Marquis of Ailesbury* (1), was to render land a marketable article. This change was directed in this way. By s. 1 (1) of the Settled Land Act it was provided:

> "Any . . . will . . . whether made . . . before or after . . . the commencement of this Act, under or by virtue of which . . . any land, after the commencement of this Act, stands for the time being . . . (v) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any person with or without any term of years for securing or raising the same; creates or is for the purpose of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires."

A charge that will make the land which it covers settled land must, first of all, be a charge which comes into being voluntarily or in consideration of marriage, or by way of family arrangement. The perpetual annuities charged on the land by Thomas Carter's will unquestionably came into being voluntarily, and so far the section is satisfied. But the section runs: ". . . with the payment of any rentcharge for the life of any person, or any less period. . . ." The rentcharges in question were perpetual rentcharges, and, accordingly, were not for the life of a person or any less period. The section, however, also says:

> ". . . or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same."

The problem is whether it can truly be said that the perpetual annuities created by Thomas Carter's will were annual or periodical sums for the benefit of any person. They were not portions, of course; they were not sums payable for advancement or maintenance. But the section includes the words "or otherwise for the benefit of any persons." Unaided by any authority, and on the mere construction of the section alone, I am of opinion that it is true to say of the land on which these rentcharges were charged, that it was charged voluntarily with the payment of periodical sums for the benefit of certain persons, and, accordingly, that the will which effected that was a settlement, and the land was, for the purposes of the Act, settled land. I have already, in *Re Bird, Watson* v. *Nunes* (2) had to consider the word "benefit" in this section, and there I felt bound to construe the word in an unrestricted sense.

But I ought not to stop there, because I must deal with a certain number of points which have been made on the construction of the Act. Some of those points are in favour of the construction which I have placed upon this section. When one turns to s. 1 (2) (b) of the Law of Property Act, 1925, one finds that a rentcharge in possession which issues out of or is charged on land; and is perpetual, is one of those things which is still, notwithstanding the Law of Property Act, capable of subsisting or being conveyed or created at law. That comes to this—that a rentcharge which was a legal rentcharge before the Act may be and will continue to be a legal rentcharge after the Act. I ought to mention that the rentcharges with which I am dealing here are not

A legal rentcharges, and, of course, that provision has no direct application to this particular case. But turning now to the transitional provisions which are contained in Part II, para. 4, of Sched. I to the Law of Property Act, I find this:

> "Any person who, immediately after the commencement of this Act, is entitled to an equitable interest capable of subsisting as a legal estate which has priority over any legal estate in the same land, shall be deemed to be entitled for the foregoing purposes to require a legal estate to be vested in him for an interest of a like nature not exceeding in extent or duration the equitable interest: Provided that this paragraph shall not—(a) apply where the equitable interest is capable of being overreached by virtue of a subsisting trust for sale or a settlement."

That indicates that the holder of an equitable rentcharge will be, primâ facie, entitled to have a legal rentcharge vested in him, but he is not to be entitled to that if his equitable rentcharge is capable of being overreached by a settlement. I myself do not at the moment see how a settlement within the meaning of the Settled Land Act could so operate as to enable a perpetual rentcharge to be overreached by virtue of powers, statutory or otherwise, subsisting by virtue of that settlement unless it is to be by virtue of s. 1 (1) (v) of the Settled Land Act, 1925. I do not see how that could have effect, unless the true construction of that subsection is as I have stated it to be. That is some indication that the construction I have put upon para. (v) is not incorrect. There is, I agree, one difficulty in the way of my construction. It is odd that the draftsman of para. (v) has been careful to limit rentcharges which operate so as to leave the land settled land to rentcharges for the life of a person or any less period. One would have expected that those words would be omitted, since they contain a smaller class of things than the class of things which, on my construction of the section, is indicated by the words "periodical sum for the benefit of a person," and that, undoubtedly, is a difficulty. But it seems to me to be a difficulty which is outweighed by the difficulty in the way of the alternative view, occasioned by the existence of the provisions among the transitional provisions in Part II of Sched. I to the Law of Property Act, 1925, which contemplate the possible overreaching of a perpetual rentcharge.

It was suggested that a different view of the construction of para. (v) must have been held by TOMLIN, J., when he made an order on June 17, 1926, in an unreported case, *Re Braby and Newman's Contract* (3); see WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES (11th Edn.), vol. 2, pp. 31, 544. It has been suggested that a charge within this paragraph does not include a legal charge such as a perpetual rentcharge created voluntarily for an ecclesiastical or charitable purpose, and that *Re Braby and Newman's Contract* (3) is an authority for that proposition. If *Re Braby and Newman's Contract* (3) is an authority for this proposition, I should feel great difficulty in putting upon the paragraph in question the construction I have put upon it, for I cannot see why there should be any distinction between a legal charge and an equitable charge for the purpose in land. I have, however, been furnished with the order made by TOMLIN, J., in *Re Braby and Newman's Contract* (3), and the evidence on which it is founded; I have also had the advantage of a statement made to me as amicus curiæ by MR. RIVIERE, who was in the case, which has assisted me in understanding what there occurred. That case was this. The vendor owned some land which was subject to an ancient rentcharge payable annually to an ecclesiastical corporation sole. The point taken by the purchaser, on a vendor and purchaser summons, was that this was a rentcharge voluntarily created, and that the effect of its existence was—and here the purchaser placed upon para. (v) the construction which I am placing upon it now—to make land settled land, settled by the document, whatever it was which had originally created the rentcharge. The purchaser, accordingly, took the point that as the land was, in his view of the construction of this section, land subject to a settlement, it was impossible for the owner of the land to convey it subject to the rentcharge. TOMLIN, J., held this contention to be wrong, and decided against the purchaser. As the law stood until June 16, 1926—the day before this judgment of TOMLIN, J.—there was considerable ground for the view that if the land was subject to a settlement by reason of the existence of a charge upon it, it was not possible even for an owner in fee to convey the land subject to the charge.

Whether that difficulty did or did not exist up to June 16, 1926, there does not seem to be any doubt that the difficulty disappeared upon the passing on June 16, 1926, of s. 1 of the Law of Property (Amendment) Act, 1926, which in effect provides that in such a case as TOMLIN, J., had before him, where the settlement arose or was suggested to arise merely from the existence of a charge upon the land, the owner of the land may convey subject to the charge, notwithstanding that the land can be treated as settled land. It was not made clear to me whether the attention of TOMLIN, J., was or was not drawn to the Act passed on the previous day which made it impossible for him to decide otherwise than against the purchaser. However, I gather that TOMLIN, J., was not satisfied that this ancient rentcharge, about the creation of which nothing was known—and, of course, nothing was known of the document, if any, creating it—came within the provisions of s. 1 (1) (v) of the Settled Land Act, which requires that a charge which is to operate to make land settled land is to be charged either voluntarily or in consideration of marriage, or by way of family arrangement. Whether the decision turned on the Amendment Act or on the fact that the charge was not shown to have been created voluntarily, it is in no way inconsistent with the view of the construction of the word "benefit" which I have adopted.

I, therefore, hold that, by reason of certain documents, subsequent in date to Thomas Carter's will, there is a compound settlement composed of that and the subsequent documents, and I shall make an order appointing the plaintiffs trustees for the purposes of the Settled Land Act of the compound settlement.

Solicitors: *Collins & Collins*; *Margetts, Jenkins & Hornby*; *Johnson, Weatherall, Sturt & Hardy*; *Andrew, Wood, Purves & Sutton.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

LOWERY *v.* KINGSTON-UPON-HULL CORPORATION

[KING'S BENCH DIVISION (Lord Hewart, C.J., Swift and Branson, JJ.), November 13, 1929]

[Reported [1930] 1 K.B. 368; 99 L.J.K.B. 127; 142 L.T. 286; 94 J.P. 50; 28 L.G.R. 27; 46 T.L.R. 57; 73 Sol. Jo. 819; 1 B.R.A. 359]

Rates—Rating of owner of property—Liability to pay rate before date specified for payment of statutory allowance—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 11 (1).

Where an owner of small property is rated instead of the occupier subject to an allowance under s. 11 (1) of the Rating and Valuation Act, 1925, the rating authority may enforce payment of the rate (or such part thereof as was from time to time enforceable under the Poor Rate Assessment and Collection Act, 1869 [repealed, but its provisions preserved by s. 2 (3) of the Act of 1925]), notwithstanding that the period within which the allowance is claimable has not expired.

Notes. The limit of £13 rateable value in s. 11 (1) of the Rating and Valuation Act, 1925 (infra), is now £18: see Local Government Act, 1948, s. 55 (1). The amount of the allowance payable to the owner under s. 11 (1) is 10 per cent. of the amount payable or such greater percentage not exceeding 15 per cent. as the rating authority may determine: s. 122 of Act of 1948.

As to rating owners in place of occupiers, see 27 HALSBURY'S LAWS (2nd Edn.) 369 et seq.; and for cases see 38 DIGEST 633. For Rating and Valuation Act, 1925, see 20

A HALSBURY'S STATUTES (2nd Edn.) 103, and for Local Government Act, 1948, see ibid., vol. 14, 653, vol. 20, 220.

Case referred to:

(1) *Walton-on-the-Hill Overseers* v. *Jones*, [1893] 2 Q.B. 175; 62 L.J.M.C. 123; 69 L.T. 319; 57 J.P. 552; 42 W.R. 32; 5 R. 422, D.C.; 18 Digest (Repl.) 394, *1439*.

B **Case Stated** by the stipendiary magistrate of Kingston-upon-Hull.

On May 30, 1929, the respondents, the rating authority of the city and county of Kingston-upon-Hull, by the city treasurer, complained that Mary Elizabeth Lowery, the appellant, of 29, Alliance Avenue, Hull, being a person duly rated and assessed in respect of a general rate made on April 11, 1929, in the sum of £1 10s. 11d., and of water rent or charge in the sum of 2s. 4½d., refused to pay the amounts or any part thereof. C On June 24, 1929, the stipendiary magistrate decided to issue a distress warrant. The appellant applied for a Case to be stated.

By the Poor Relief Act, 1814, s. 12:

"... The goods and chattels of any person or persons neglecting or refusing to pay any sum or sums of money legally assessed on and due from him, her or them in D respect of any rate for the relief of the poor ... for the space of seven days after the same shall have been legally demanded of him, her or them, shall and may be distrained. ..."

By the Poor Rate Assessment and Collection Act, 1869, s. 2 (now repealed):

"No such occupier [i.e., by s. 1, an occupier of any rateable hereditament let to E him for a term not exceeding three months] shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year."

The Rating and Valuation Act, 1925, by s. 2 (1) and (2) substituted for the former poor rate and other rates, which were abolished, a consolidated general rate. By s. 2 (3):

F "Subject to the provisions of this Act, every general rate ... shall be made, levied, and collected, and shall be recoverable, in the same manner in which at the commencement of this Act the poor rate may be made, levied, collected, and recovered, and all the enactments relating to the poor rate which are in force at the commencement of this Act ... shall, so far as not repealed by this Act, apply to the G general rate. ..."

By s. 11 (1) of the Act of 1925, as amended by the Local Government Act, 1929:

"The rating authority may by resolution direct that, in the case of all hereditaments in their area (exclusive of hereditaments consisting of agricultural land) which belong to a class to be defined in the resolution ... the owners thereof shall be rated instead of the occupiers: Provided that the class shall not be so defined as H to include any hereditament the rateable value of which exceeds £13. ... Where a rating authority give any such direction as aforesaid—(a) the owners of any hereditaments in the area of that authority to which the direction applies shall, in the case of any rate made while the resolution is in force, be rated accordingly, and the rating authority shall make to any owner who being so rated pays the amount due by him in respect of the rate before the expiration of one-half of the period in I respect of which the rate is made (or, if the rate is payable by instalments, one-half of the period in respect of which the instalment is payable), or such later date or dates as may be specified in the resolution, an allowance equal to 10 per cent. of the amount payable [which allowance may in certain cases be increased under the 1928 Act to 15 per cent.]. ..."

By s. 11 (4):

"Where in pursuance of this section the owner is rated ... the amount due from him in respect of the rates shall be recoverable ... in the same manner and subject

to the same conditions in and subject to which rates are recoverable from occupiers of rated hereditaments."

At the hearing of the complaint the following facts were proved or admitted. On Dec. 6, 1928, the city council confirmed a resolution of the finance committee, dated Nov. 22, 1928.

"(1) that the compounding allowance under s. 11 of the Rating and Valuation Act, 1925, be fixed at 15 per cent.; (2) that the present limit for compounding—namely, up to a rateable value of £10—be retained."

On Jan. 3, 1929, the council confirmed a resolution of the finance committee of Dec. 27, 1928,

"that the dates by which rates in respect of compounded property shall be paid in order to qualify for the compounding allowance shall be July 31 and Jan. 31 respectively."

On Feb. 7, 1929, the council confirmed a resolution of the finance committee, dated Jan. 31, 1929:

"that, pursuant to s. 11 (1) of the Rating and Valuation Act, 1925, the rating authority hereby direct that in the case of all hereditaments in the city the rent of which is payable or is collected at less than quarterly intervals, and the rateable value of which does not exceed £10, the owner shall be rated instead of the occupiers as and from April 1, 1929."

On May 2, 1929, the city council resolved:

"That the city treasurer be instructed to issue immediately a demand for payment of the compounded rate in all cases where it is brought to his notice by the production of a notice of increase of rent on account of an increase of rates under the Rent and Mortgage Interest Restriction Acts, or otherwise that the landlord or his agent has not allowed the full composition allowance. That the town clerk at the expiration of seven days from the date of service of the demand be instructed to take proceedings for the recovery of the compounded rate if it be not already paid."

Notice of the resolution of Jan. 31, 1929, was given by the respondents in a local newspaper which stated that

"An allowance equal to 15 per cent. of the amount due by them in respect of the rate as follows: (a) as to the first instalment not later than July 31; and (b) as to the second instalment not later than Jan. 31."

The appellant was duly rated and assessed in respect of the rate, which was duly made. On May 15, 1929, the payment of the half-yearly instalment was duly demanded from the appellant in respect of her hereditament, 9, Percy Avenue, South Parade, Hull. The demand note demanded payment of £3 1s. 10d. "now due from you," and bore on the face of it a statement that "if the amount be paid not later than July 31, a compounding allowance of 15 per cent. will be made." It was accompanied by a letter from the city treasurer, dated May 15, 1929, as follows:

"With reference to the demand for rates which has been served upon you in respect of the above property, I have to inform you that should you neglect to pay the amount due for seven days after demand, I am instructed to refer the matter to the town clerk in order that proceedings for recovery thereof may be taken. I would also point out that an allowance of 15 per cent. will be made to you in accordance with s. 11 (1) of the Rating and Valuation Act, 1925, as amended by s. 3 of the Rating and Valuation Act, 1928, if the amount due is paid within the period of seven days above mentioned or payment is obtained by the corporation as a result of proceedings or otherwise by July 31 next."

The rent of the premises was payable weekly and the assessment for rating purposes was not over £10. The water rent was leviable and payable in the same manner as the general rate. There had been a failure or refusal on the part of the appellant to pay the rates for more than seven days and they were in fact still owing.

The appellant contended that the respondents, having decided to rate certain owners instead of occupiers by the resolution of Jan. 31, 1929, were precluded by the resolution of Dec. 27, 1928, from demanding or compelling payment of the first instalment before July 31, 1929; that the demand made was not a demand for immediate payment, and that the terms of the demand precluded the corporation from proceeding for the recovery of the sum demanded before July 31, 1929; and that, notwithstanding s. 11 (4) of the Rating and Valuation Act, 1925, s. 2 (3) of that Act suspended the power of the corporation to levy distress until after July 31st, 1929. The respondents contended that nothing in the Rating and Valuation Act, 1925, repealed or abrogated the power to levy distress, and that the resolution of Dec. 27, 1928, did not extend the time within which the rates should be paid, but merely specified a period within which the owner could claim an allowance. The magistrate issued his distress warrant for £1 10s. 11d., being the one quarter's rate recoverable under s. 2 of the Poor Rate and Assessment Collection Act, 1869.

H. A. Hill for the appellant.

A. M. Trustram Eve for the respondents.

LORD HEWART, C.J.—Two points raised in the present case. First, it is said that at the material date no sum of money was due and payable at all by reason of s. 11 of the Rating and Valuation Act, 1925. It is not necessary to read again the whole of that long section. It is enough to say that by it a rating authority may in certain cases resolve that owners shall be rated instead of occupiers. It goes on to say that those owners shall have the benefit of an allowance if the rate is paid by a certain date, and by an order made under the Act (S.R. & O., 1926, No. 798) it is provided that the form of the demand note must be such as to contain information as to the allowance which may be claimed. [His Lordship referred to the exact terms of sub-ss. (1) and (4) of s. 11.] It is of great importance in the present case to observe that the rent of the premises was payable weekly, and that the assessment was not over £10. The fact that the rent was payable weekly brings the case within the Poor Rate Assessment and Collection Act, 1869. [His Lordship read ss. 1 and 2 of that Act.] In the present case the demand note referred to £3 1s. 10d. That instalment was for one half-year in respect of a general rate made for one year. The note goes on to say: "If the amount be paid not later than July 31, a compounding allowance of 15 per cent. will be made." In form, therefore, there was a demand for the half-year's rate, but, as was held in *Walton-on-the-Hill Overseers* v. *Jones* (1), it matters not that the demand note is in form for a half-year; the amount presently payable under the Act of 1869 is but one quarter's rate, and the sum named in the complaint was accordingly £1 10s. 11d. only. In other words, what the appellant was being asked to pay was not a half-year's rate, but a quarter's rate, in conformity with the Act of 1869.

It has been urged upon the court that she ought not to have been asked to pay that or any sum, inasmuch as the effect of s. 11 of the Act of 1925 is to postpone the right of the rating authority to demand, and the obligation of the ratepayer to pay, the rate, and that, notwithstanding the Poor Relief Act, 1814, there is no right to distrain after a period of seven days, because that Act has now no application to hereditaments of this class where the owner is rated. I will not dwell on the chaotic result which would follow if that argument were permitted to prevail. It omits to consider s. 2 of the Act of 1869. The appellant has been required to pay, not a half-year's rate, but a quarter's rate, and it is still open to her to obtain the allowance in full by paying the second quarter's rate punctually, whereas, if the rating authority were to allow the deduction from the first quarter, non constat that the second quarter would be paid in time for any allowance to become payable at all. I think that it is possible for those statutes to live side by side and that the demand for one quarter's rate does not prejudice the right of

the appellant to obtain the allowance. For these reasons the magistrate, in my opinion, was right, and the appeal should be dismissed.

SWIFT, J.—I agree.

BRANSON, J.—I agree.

Appeal dismissed.

Solicitors: *Steavenson & Couldwell*, for *Gosschalk & Austin*, Hull; *Sharpe, Pritchard & Co.*, for the Town Clerk, Hull.

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

FROST *v.* CASLON
FROST *v.* WILKINS

[COURT OF APPEAL (Scrutton, Greer and Russell, L.JJ.), April 19, 22, 1929]

[Reported [1929] 2 K.B. 138; 98 L.J.K.B. 523; 141 L.T. 281; 45 T.L.R. 417; 93 J.P. 192; 73 Sol. Jo. 333; 27 L.G.R. 480]

Elections—Non-resident qualification—Ownership or tenancy of "land or premises" —Tenancy of single room—Tenancy by person employed by landlord—Representation of the People Act, 1918 (7 & 8 *Geo.* 5, *c.* 64), *s.* 1 (1), (3) *as substituted by Representation of the People (Equal Franchise) Act*, 1928 (18 & 19 *Geo.* 5, *c.* 12), *s.* 1—*Objection to registration—Need for evidence in support—Insufficiency of statements by advocate—Duty of registration officer.*

By s. 1 (1) of the Representation of the People Act, 1918, as substituted by s. 1 of the Representation of the People (Equal Franchise) Act, 1928: "A person shall be entitled to be registered as a Parliamentary elector . . . if he . . . (b) has the requisite business premises qualification." By sub-s. (3): "The expression 'business premises' in this section means land or other premises of the yearly value of not less than £10 occupied for the purpose of the business, profession, or trade of the person to be registered."

A director of a limited company occupied under a tenancy agreement with his company a room on the premises of the company at a rental of not less than £10 and therein did his work of directing the business of the company.

Held (SCRUTTON, L.J., dissenting): one room in a building could constitute "premises" within s. 1 (3); the fact that the profit from the work done by the director was received by the company and not directly by himself did not prevent the work he did being his work done in the conduct of his business or trade; and, therefore, he occupied "premises for the purpose of his business or trade" within s. 1 (3) and was entitled to be registered as a voter in respect of his occupation of the room.

Per SCRUTTON, L.J.: Where an objection is made to the inclusion of a person's name in the register of electors the objector must tender evidence in support of the objection, and if he fails to do so, the objection must be disallowed. The registration officer must not accept statements regarding the facts made by a professional advocate representing the objector. He must investigate the facts regarding which evidence is given, including, e.g., the genuineness of a tenancy agreement or other document put in evidence, and, in the event of an appeal, must forward to the registrar of the county court a statement of the material facts which, in his opinion, have been established and of his decision thereon.

Notes. The Representation of the People Acts, 1918 and 1928, were repealed (so far as is material) by the Representation of the People Act, 1948. The qualification of

a Parliamentary voter has been altered and is now to be found in s. 1 of the Representation of the People Act, 1949, but by s. 5 (1) the non-resident qualification for local government electors is ownership or tenancy of "land or premises . . . of the yearly value of not less than £10": cf. wording of s. 1 (3) of the Act of 1918 as substituted.

As to objections to registration, see s. 9 (1) (c) of the Act of 1949. For procedure see Representation of the People Regulations, 1950.

As to non-resident qualification, see 14 HALSBURY'S LAWS (3rd Edn.) 15–17; and as to claims and objections, see ibid. 28–32. For cases see 20 DIGEST 16–20, 27–40. For Representation of the People Acts, see 8 HALSBURY'S STATUTES (2nd Edn.) 485 et seq.

Cases referred to:

(1) *Smith* v. *Anderson* (1880), 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 29 W.R. 21, C.A.; 9 Digest (Repl.) 70, *270*.

(2) *Rolls* v. *Miller* (1884), 27 Ch.D. 71; 53 L.J.Ch. 682; 50 L.T. 597; 32 W.R. 806, C.A.; 43 Digest 6, *10*.

Appeals from two orders of the county courts at Shoreditch and Clerkenwell respectively affirming decisions of the registration officer.

These two appeals, which raised the same question, were consolidated and heard together. The question raised was whether a director of a limited company by virtue of the fact that he was in occupation of a room on the company's premises under a tenancy agreement made between himself and the company, was entitled to be put on the Parliamentary register of voters in respect of that room. The claimant in the first case was one Albert Harding Caslon, who was a director of H. W. Caslon & Co., Ltd., and was in occupation of a room under a tenancy agreement with the company upon the premises of the company at an annual rental of £20, payable quarterly. He occupied that room for the purpose of his business as a director of the company and also to enable him to carry on his private correspondence there. The claimant in the second case was John Wilkins, who, besides being a director of his company, was also a member of the Finsbury Borough Council and the President of the Finsbury Ratepayers' Association. In his case the room which he occupied as a tenant on the company's premises, for which he paid an annual rental of £25, was used by him, not merely for his work as a director of the company, but also for the purpose of the public duties which he had to perform and for his work in connection with certain properties as an estate agent. An objection having been taken to the votes in each of these two cases the registration officer disallowed the objection, and allowed the claims of the claimants to votes, and those decisions were affirmed in the Shoreditch and Clerkenwell County Court respectively. The objector now appealed to the Court of Appeal.

Sir Henry Slesser, K.C., and *Arthur Henderson* for the objector.

Cyril Atkinson, K.C., and *F. S. Laskey* for the claimants to votes.

By s. 1 of the Representation of the People Act, 1918 (as substituted by s. 1 of the Representation of the People (Equal Franchise) Act, 1928):

> "(1): A person shall be entitled to be registered as a parliamentary elector for a constituency (other than a university constituency) if he or she is of full age and not subject to any legal incapacity; and (a) has the requisite residence qualification, or (b) has the requisite business premises qualification; or (c) is the husband or wife of a person entitled to be so registered in respect of a business premises qualification. . . . (2) . . . (b) must during the whole of the qualifying period have resided in premises, or occupied business premises, as the case may be, in the constituency. (3): The expression 'business premises' in this section means land or other premises of the yearly value of not less than £10, occupied for the purpose of the business, profession, or trade of the person to be registered."

SCRUTTON, L.J.—These appeals raise a question of some difficulty. They come from two county court judges of experience, and on the only point of difficulty in the cases they have apparently differed. There is also, I am afraid, a difference of opinion in this court, and I should say that what I am saying now is only the expression of my own personal views.

The procedure in these cases is a hearing by a registration officer, from whom there is an appeal to the county court judge, from whom, on matters of law only, there is an appeal to this court. I want to make some comments on what has happened in the proceedings below. A certain gentleman, Mr. Caslon, was on the preliminary list submitted by the registration officer. A Mr. Frost objected to his being on it, and the objection was that he did not occupy the premises for the purposes of his business, trade, or profession. Mr. Riley, appearing for the objector, repeated the substance of the objection and alleged, among other things, that Mr. Caslon had no personal occupation of any part of the premises. He produced no evidence in support of this contention. In my view, there should then have been an end of the case. If an objector alleges facts and produces no evidence, the case should be at once dismissed, and I suggest to registration officers, that if an objector in a case which involves facts tenders no evidence in support of his objection, there is an end of the objection. That was always the old practice, and I do not know why it should be altered. Next, no evidence having been offered by the objector, the registration officer asked for evidence, and a Mr. Deeks, a solicitor, stated that he appeared for Mr. Caslon. He made certain statements in reply to questions by the registration officer, and the registration officer accepted them as sufficient. That, in my view, was quite a wrong procedure. I do not think statements made by an advocate, whose knowledge of the facts is only derived from statements by his client, should be accepted as evidence of facts. However, Mr. Deeks, in reply to questions by the registration officer, stated certain facts. The registration officer thereupon disallowed the objection, having no evidence other than the statements of the professional advocate. It then became the duty of the registration officer, first of all under Sched. I to the Representation of the People Act, 1918, and secondly under the County Court Rules, to state the material facts which in his opinion had been established in the case. The County Court Rules provide that he "shall forward a statement of the material facts which in his opinion have been established in the case" [see now Representation of the People Regulations, 1950, reg. 62 (2); County Court Rules, Ord. 43, r. 2]. The registration officer has not done that; he has not stated what material facts he found. He has stated that after the answers of Mr. Deeks, he disallowed the objection, and that does not tell the court what facts he found at all. It is the duty of the registration officer to find facts; he has not done it in this case, and it is only because the date of the general election is so near that we have not sent the matter back to him in order that he may state what facts he has found.

I come to the substantial question in dispute in the first case, *Caslon's Case*. The business of H. W. Caslon & Co., Ltd., type founders, is carried on at 82, Chiswell Street, and I have no doubt that they pay to the revenue large sums of income tax. Parliament in its wisdom has not thought it necessary to give people who are heavily taxed a vote. So far as companies are concerned, Parliament does not think that representation should follow taxation. However, there appeared in the opinion of the directors of H. W. Caslon & Co., Ltd., to be a means of correcting this injustice of Parliament, and, accordingly, there appear on the register for No. 82, Chiswell Street, seven persons, four directors and three wives. My brother GREER has endeavoured to find the principle which underlies this Act of Parliament. I should be delighted if anyone would explain to me the principle on which the wife of a business man, who never comes near the business office and takes no part whatever in conducting the business, has a vote, and why a company, which pays heavy sums in taxation, has not a vote. He attempted to find the principle underlying those two propositions—I am afraid it is quite beyond my powers—and I do not wonder at my brother asking what the principle in the Act was. As I say, there appear on the register four directors of the company, three of them appear to be married, and three wives appear on the register, so that H. W. Caslon & Co., Ltd., does correct the injustice which it suffers of not having a vote by producing four directors and three wives who may vote. On inquiry as to how the four directors became entitled to vote, the inquiry being concentrated on the question of Mr. Albert Harding Caslon, it appears that Mr. Albert Harding Caslon has entered into an agreement with this company by which he pays them £20 for an annual tenancy of room No. 1,

situate on the first floor of 82, Chiswell Street, and very careful provisions are made as between the company and Mr. Albert Harding Caslon, to ensure that that tenancy shall have no unfortunate consequences to the company. Mr. Albert Harding Caslon appears to be a rather disorderly person, and so the company ensure that he shall replace all broken glass in his room. There is also the provision that, if notice is given to determine the tenancy, the landlord shall be at liberty to affix on the premises of No. 1 a notice advertising the same to be let. I should think that would not be an extremely valuable notice—a notice on a room in a passage advertising the fact the room was to be let. In my opinion, there would be ample materials for holding that this is not a genuine agreement, but the case proceeded before the registration officer and the county court judge on the footing that it was a genuine agreement—that is to say, the objectors did not suggest it was not—and in the absence of evidence the county court judge and the registration officer naturally treated it as being what the parties agreed that it was. If a genuine agreement means an agreement which is intended to have legal consequences, I have no doubt it was a genuine agreement; it was an agreement intended to have the legal consequences of giving Mr. Albert Harding Caslon a vote. If it was intended that these clauses were clauses which nobody ever thought of enforcing or that they had any legal meaning, I would desire to say it was not a genuine agreement, and again I desire to say to registration officers that they are not bound by bits of paper. The courts have always said that they can go behind the bit of paper to the facts, and the fact that parties have put on a piece of paper an alleged agreement does not mean that the courts are bound to enforce it if they are satisfied that as to the greater part of it, it was intended for some other purpose. However, I deal with this document as the parties below dealt with it, on the footing that it is an agreement constituting a tenancy, an exclusive tenancy under which Mr. Albert Harding Caslon can keep out anybody who desires to come into that room, including his other directors and including all the servants of the company, because he has an exclusive occupation of that room.

The question then is whether under the provisions of the Act that agreement entitled Mr. Albert Harding Caslon, and incidentally his wife, to a vote in respect of those premises. The effect of part of the provisions of the Representation of the People (Equal Franchise) Act, 1928, and of the Representation of the People Act, 1918, the two Acts being read together, is to sweep away a large number of the old technicalities which gave the courts such trouble in deciding what electors were entitled to a vote. The first qualification under the two Acts—in s. 1 (1) (a) of the Act of 1918 as substituted by s. 1 of the Act of 1928—is a residence qualification. The old ideas about occupying the premises and the nature of the occupation of the premises, and whether the person was a lodger or occupier of part of a tenancy or holding only under a service franchise, seem now to have gone. The only question is: Did the person, man or woman of full age, reside in premises in the constituency for a certain time? The meaning of "residence" is about as wide as it can be; but there is another qualification in s. 1 of the Act of 1928—a business premises qualification. By s. 1 (2) (b) a voter

> "must during the whole of the qualifying period have . . . occupied business premises . . . in the constituency or in another constituency within the same Parliamentary borough."

We might have been left to interpret "business premises" for ourselves, but Parliament has given a definition, which is:

> "(3) The expression 'business premises' in this section means land or other premises of the yearly value of not less than £10 occupied for the purpose of the business, profession, or trade of the person to be registered."

What is said, on the one hand, is that Mr. A. H. Caslon, the managing director of H. W. Caslon & Co., Ltd., occupies that room for the purpose of the business of which he is managing director in respect of which business everything that is done in that room of a business nature is done. On the other hand, it is said: That may be so, but in addition to the business of H. W. Caslon & Co., Ltd., the same operations have another side;

they are all done by Albert Harding Caslon in the exercise of his business, profession or trade of a director; he is carrying out the business of H. W. Caslon & Co., Ltd., because he is for profit carrying on the business of a director. So the business done in that room has two aspects; it is done by the managing director of H. W. Caslon & Co., Ltd., for the company of which he is a director, but it is also business done as a director by Albert Harding Caslon in order to earn his living as a director of a company. Cases are put on the one side or the other. On one side it is said: What about the charwoman? Supposing H. W. Caslon & Co., Ltd., let one of their rooms to their charwoman at £20 a year. She is carrying on the trade of a charwoman, and she occupies that room for the sole purpose of keeping the implements of her trade there. On the other hand, it is said as to "profession" that both a dentist who is carrying on his profession in the employment of a dental company, or a managing clerk of a solicitor, whose employer lets him a room on the same premises and he carries on in that room only the business of his employer, are occupying the rooms for the purpose of their profession. I confess that looking at it as a problem of construction without reference to human nature at all, I think it is a difficult question, but I have been told sometimes, probably truly, that I have a common jury mind, and looking at it from the point of view of a common juryman, knowing something about human nature, I do not think Parliament were thinking about the trade or occupation of the man who was carrying on the business of another. I think they were thinking about the substantial business carried on in that room, namely, the business of the employer and were not thinking about, and did not use words to cover, the possible aspect of the business of the employer, which was that his employee was, as is always the case, working for reward and so may be said to be carrying on his trade. I think that they were thinking about the trade of the person for whom the trade was carried on and who was making the profits out of the trade. As I say, it is a difficult question, and I have hesitated for some time whether the common jury mind should get the better of the technical methods of construction; but I have come to the conclusion that the view which I gather would have been taken by Judge ROWLANDS at Clerkenwell is the correct view, and the view which was taken by Judge CLUER in the other county court is inaccurate, and, therefore, in the case of Mr. Caslon I myself should allow the appeal and say that Mr. Caslon was not entitled to be on the register.

In the other case the question is not the same. Mr. Wilkins, who is managing director and chairman of a company carrying on a metal worker's business, is a man with many other interests. Among other things he owns a quantity of property with regard to which he appears to carry on the business of estate agent, and besides the business of his own company which Mr. Wilkins carried on in the room let to him, he carries on peculiarly private businesses or trades, particularly that of an estate agent, of his own, and the county court judge, finding that as a fact, has held that he occupies the room for the purposes, among others, of a business or trade which is not the business or trade as managing director of his employer, part of whose business is also carried on in the room. In that state of facts (and indeed it was not argued otherwise in the appeal), I think that Mr. Wilkins is entitled to his vote, provided he satisfies the other conditions, as to which two points were argued before us.

It follows that, so far as the first point is concerned, I should allow the appeal in the case of Mr. Caslon on the ground that everything done in the room in the nature of business operations is the business or part of the business operations of the employer and landlord, and the fact that in doing that business the servant and tenant is also earning money for himself is not sufficient to make those business operations also the business of the servant or tenant within the meaning of the Act. In *Caslon's Case* the two other points I have referred to were not taken. In *Wilkins' Case* they were, and the first, as I understand it, is that one room is not "premises" because it is part of premises, and that the Act contemplates the whole of the premises structurally and not part. The other point was that there is no sufficient occupation of this one room in the premises. Whatever may have been the case in the early days of the Parliamentary franchise, when there were great fights as to whether a room in a house could be "premises" or

A "tenement," or whatever the phrase used was, sufficient to give a Parliamentary occupation, in my view the course of legislation has got a long way beyond that. We have become so used in cases under the Rent Restrictions Acts to knowing that a dwelling-house may include six smaller dwelling-houses, and that one of the smaller dwelling-houses may include another dwelling-house, that the idea of expressing that premises within premises may still be premises has, I think, entirely departed from the legislation. The simple way in which I deal with the "premises" point is to say that I see no reason why a room separately occupied should cease to be "premises" because it is contained within the structure of a larger building which is also "premises." My view is the same as that expressed by the late FRASER, J., in his work on REPRESENTATION OF THE PEOPLE ACTS, 1918–21, at p. 50:

> "The words 'any land or premises' are very wide, and will include any piece of land or any kind of structure or building of whatsoever kind, or any part thereof, provided it is capable of being 'occupied' within the meaning of s. 3."

The other point was that this room could not be occupied, which I take to be really an allegation that it is not so structurally severed from the rest of the premises as to be capable of separate occupation. On that point one would have been glad if the registration officer had found the facts, but as far as I could understand the facts from the allegations made in the various papers there was evidence on which the registration officer and the county court judge could find that this room was so structurally severed as to be capable of separate occupation, and that, therefore, disposes of the appeal because the appeal is only on questions of law. For these reasons I personally am of opinion that the appeal in *Caslon's Case* should be allowed, and that the appeal in *Wilkins' Case* should be dismissed.

GREER, L.J.—I regret to find myself in disagreement with my lord upon a question upon which there can be no appeal from the decision of this court, but, although the question involved in *Caslon's Case* is not free from difficulty, I have formed a definite opinion as to what construction should be given to the words of s. 1 of the Representation of the People (Equal Franchise) Act, 1928, which repeals s. 1 of the Representation of the People Act, 1918, and is substituted for it.

That section provides, in my judgment, that there shall be preserved in one instance an occupying franchise, that is the franchise of a person who is in business or exercises a profession or trade and occupies premises for that purpose. I think the intention was, as expressed by the words, that if any individual could say: "I am a man of business," or "I am exercising a profession or trade, and I am occupying premises in another constituency for the purpose of enabling me to do the acts which it is necessary for me to do in carrying on my business or exercising my profession or carrying on my trade," he should be entitled to a vote. As to what was the intention of individual members of Parliament who voted upon this statute, it is impossible to speculate; some may have thought it meant one thing and others may have thought it meant another thing. What we have to do is to interpret the words of the section as it appears after the necessary assent has been given to convert it from a Bill into an Act of Parliament. I cannot read the words of s. 1 (2) (b) and s. 1 (3) as meaning anything but this, that if a man can properly describe himself as having a business, and he is in genuine occupation of that which is in law premises, then he is entitled to a vote in respect of those premises, in addition to any residential vote that he may have in another constituency. I ask myself what would Mr. Caslon reply to this question if he were asked before he went down to his daily work: "What is your business?" I think he would answer, without misusing the English language: "My business is that of being a managing director of a type-foundry business, and I am going down to an office which I have rented from my company at £20 a year to occupy that room and there do that which is the business of my adult life." I test the question in reference to the words with which the term "business" is in collocation in sub-s. (3), "business, profession, or trade." I think one is entitled to suppose that Parliament intended to put a business man, a man exercising a business calling, on the same footing as a man exercising a profession, and if there arose the

case of a dental surgeon who was in a room for which he paid rent, and of which he held the key, filling teeth or extracting teeth, and doing it as the managing director of a dental company, he would be none the less exercising his profession when he was doing that professional work, because the direct remuneration from the client went to his company and not to himself, and he only got remuneration by means of a salary, or it might be commission on the total receipts of the dental company. He would be none the less exercising his profession in that room, and occupying that room for the purpose of his profession, notwithstanding the fact that the money did not come direct into his pocket but went into the treasury of his company. For these reasons I think that the registration officer was right in disallowing the objection in *Caslon's Case*. If he had looked at dictionaries, he would probably have come to the same conclusion, because if he had referred to the IMPERIAL DICTIONARY which was mentioned by SIR GEORGE JESSEL, M.R., in *Smith* v. *Anderson* (1) (15 Ch.D. at p. 258), he would have found these words as a definition of "business":

> "Business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement,"

and if he had gone to *Rolls* v. *Miller* (2) he would have found another reference extracted from a dictionary in the judgment of LINDLEY, L.J., where he says (27 Ch.D. at p. 88):

> "When we look into the dictionaries as to the meaning of the word 'business,' I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business—I do not think we can get much aid from the dictionary."

Such aid as we can get from the dictionary supports the view of this section, which I have indicated as being my view.

I agree with my lord that there may be many cases in which it would be right for the tribunal of fact to say: "Well, on the whole we do not think this is a real agreement." By that I do not mean that the tribunal of fact could dispose of the agreement by saying that the motive for entering into the agreement was to enable the director to get a vote. That is a perfectly valid motive, and it would have legal effect, provided it is carried out by a document which is intended and meant by both parties to regulate their rights towards one another. If the tribunal of fact were satisfied that the document was a mere piece of paper to be handed in to the registration officer to deceive him as to the position of the director, the registration officer would be entitled to say: "This is all nonsense; this is not a real agreement: the real occupation is by the company, and it is a mere pretence to say that the managing director is a tenant." There might be many grounds which would be regarded as sufficient to enable the registration officer to come to that conclusion. But he has not come to that conclusion in the present case, and indeed when the matter was argued before the county court judge, from whom this appeal is brought, he said: "It was conceded that the tenancy granted to the director was a genuine tenancy," and of course we have to decide the case upon that basis. Personally, I am not at all afraid of the invading army of charwomen and office boys who, it is suggested, will, by means of this decision, be put upon the register for the purpose of enabling a company to have a large number of votes. I doubt very much whether there is any company which would run the risk of the ridicule that would come upon it if it pretended that it was giving exclusive occupation of any portion of its premises to office boys and charwomen. On the other hand, I feel, although I may be wrong about it, that some useful purpose may be brought about by the right which I think was given by this Act of Parliament to companies to secure, at any rate, some form of representation by granting occupation to those persons who can reasonably speak for the interests of the company and exercise votes in the interests of the company. However, these questions of policy really have nothing to do with it. What we have to do is to interpret the Act of Parliament, and, I think, for my own part that the learned county court judge was right in his view of the meaning of this section which he had to consider, and that this appeal should be dismissed.

With regard to the other case, I agree with what my Lord has said, with the result that in that case also the appeal should be dismissed. Also for the reasons given by my Lord. I do not desire to add anything except to call attention to what I find on p. 24 of the late FRASER, J.'s book, where he uses these words:

> "The words land or other premises include any piece of land and any kind of structure, erection or building of whatever nature or any part thereof provided they are occupied for the purpose of the business, profession or trade of the person to be registered."

I think Parliament when it used the word "premises" intentionally used a word which covers the office occupied by Mr. Caslon in the first case and the office occupied by Mr. Wilkins in the second case. For these reasons I think that both these appeals should be dismissed.

RUSSELL, L.J.—These appeals raise three questions under s. 1 of the Representation of the People Act, 1918, as substituted by s. 1 of the Representation of the People (Equal Franchise) Act, 1928. We have to deal with this question upon the footing that the tenancy agreement in the *Caslon Case* and the tenancy agreement in the *Wilkins Case* are to be treated as genuine bona fide documents representing genuine bona fide transactions, that is to say (referring only to the *Caslon Case* in this regard) we must treat it that Mr. Caslon is paying a rent of £20 per annum as a tenant of a room, and that as such tenant he is entitled under his tenancy agreement as tenant to the exclusive occupation of that room. That is the footing upon which we have to deal with the case. The question which has to be answered (again referring to the *Caslon Case*) is this. Having regard to the language of s. 1 (1), (2) and reading into those subsections the definition of "business premises" which is contained in sub-s. (3), the question will run thus: Has Caslon during the whole of the qualifying period occupied premises occupied for the purpose of Caslon's business? Three answers, or three reasons, were suggested by counsel for the objector for answering that question in the negative, and the three reasons were these. First, it was said that there was no occupation of the premises by Caslon within the meaning of s. 1; secondly, it was said that the room which was occupied did not constitute "premises" within the meaning of the section, and, thirdly, it was said, and this is the point which has given the greatest difficulty and around which a great bulk of the argument centred, that the room was not occupied by Caslon for the purpose of his business, but was occupied by Caslon for the purposes of the company. The first two reasons apply to both appeals, the third reason applies only in *Caslon's Case.*

As regards the first reason, that there was no occupation within the meaning of the section by Caslon, I desire to add nothing to what has been said on that point except that it appears to me impossible for us so to hold once we are asked to treat the case upon the footing that the tenancy agreement is a genuine document. As regards the second point, namely, that a single room does not constitute "premises" within the meaning of the statute, I am in agreement with the other members of the court. I only desire to add that it appears to me that within the four corners of this statute it is clear that it uses the word "premises" in a general signification, and intends thereby to include the case of a single room, for I turn to s. 2 (c) which deals with local government franchise, and I find that that subsection provides for the acquisition of the local government franchise in the case of a man who is on the last day of the qualifying period occupying as tenant any premises, and to that it adds three provisos, the second of which is this:

> "Provided that for the purposes of this section the word tenant shall include a person who occupies a room or rooms as a lodger only where the room or rooms is or are let to that person in an unfurnished state."

That proviso seems to me to do two things—first, it shows that the earlier words in the section, "occupying as tenant any premises," include a person who occupies a room as a lodger, and, secondly, that those words shall only include a lodger whose room or rooms is or are let to him unfurnished. So that within the four corners of this Act

I find clear evidence that the word "premises" is used so as to include the case of a room or rooms. A

I now come to the third point, which is the point that has occasioned great difficulty, and which has occasioned, to my regret, a difference of opinion among the members of the court in this case, which is not subject to appeal, but, having formed a view in agreement with the view expressed by GREER, L.J., I feel bound to express it. Section 1 appears to me to provide two qualifications as a parliamentary elector, first, a qualification provided by reference to where a person lives, and, secondly, a qualification provided by reference to where he works, and those two qualifications are called residence qualification and business premises qualification. When I come to consider the words of s. 1 (3) relevant to the definition of a business premises qualification, I find that the premises are to be occupied for the purpose of the business, profession, or trade of the person to be registered, and I can find nothing in the section which prevents me from giving to the word "business" one of its ordinary and natural meanings, namely, work or occupation. Turning to the particular case of Mr. Caslon, the question seems to me to resolve itself into this: Was this room in question occupied by Caslon for the purpose of the business of Caslon, or of the work of Caslon? In my opinion, it was the latter. Mr. Caslon secured the exclusive occupation of this room for the purpose of enabling him to fulfil his work. What was his work? His work was the work of assisting in the direction and management of the affairs of this company, and that work did not cease to be his work, nor did that business cease to be his business, because it involved, and necessarily involved, assisting in the management of the business of the company. I possess a mind to which I desire to apply no epithet beyond human, and, being human, I am only able to ascertain the intention of the legislature by looking at and reading the words and language which the legislature has used. Looking at the words in s. 1 (3) I am unable to find therein any reason for departing from the ordinary meaning of the words there used, or any reason for supposing that the legislature had or had not in its mind the particular case which we have been considering here. Giving the words in the subsection their natural and ordinary meaning and treating these tenancy agreements, not as bogus agreements, but as genuine agreements, I feel bound to come to the conclusion to which I have come, namely, that Mr. Caslon's case falls within the provisions of sub-s. (3), and that he is a person, who, during the qualifying period, was within the meaning of this section occupying premises of the necessary yearly value for the purpose of his business. For these reasons I agree with GREER, L.J., that the appeal should be dismissed, not only in the *Wilkins Case*, but also in the *Caslon Case*.

B C D E F

Appeals dismissed. G

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